ALDI FOODS PTY LIMITED AS GENERAL PARTNER OF ALDI STORES (A LIMITED PARTNERSHIP) v. SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATION AND ANOR (M33/2017)

Court appealed from: Full Court of the Federal Court of Australia
[2016] FCAFC 161

Date of judgment: 29 November 2016

Special leave granted: 8 March 2017

This appeal concerns the jurisdiction of the Fair Work Commission in approving enterprise agreements under the *Fair Work Act* 2009 (Cth) ('the FWA").

In 2015 the Appellant ("ALDI") was in the course of setting up a new region in South Australia, to be called "Regency Park". In so doing it canvassed its existing staff, employed in other regions, for expressions of interest in working in the new region. From those who expressed an interest ALDI selected a number to whom offers of employment in the region were made, and those offers were accepted. In all 17 contracts were issued to 17 proposed employees. ALDI proceeded to make an enterprise agreement with these employees under Pt 2-4 of the FWA ("the Agreement") and requested the employees to vote for the agreement under the FWA. Their votes were cast and then ALDI applied to the Fair Work Commission for the approval of the agreement. The Agreement was duly approved by the Deputy President of the FWC.

The First Respondent was not involved in this process but later sought, and was granted, leave to appeal against the approval decision of the Deputy President, but its appeal from that decision was dismissed by the Full Bench of the FWC. The First Respondent then applied for judicial review to the Federal Court, challenging several jurisdictional aspects of the decision of the Full Bench.

The majority of the Federal Court held that the 17 employees were not "covered by the Agreement" as required by the FWA. In so doing, the majority accepted the First Respondent's submission that this was a 'genuine new enterprise' i.e. a 'greenfield' agreement as it was setting up a new business and therefore the SDA, as the relevant employee organisation representing the employees that *would be covered* by the agreement, was entitled to represent the industrial interests of those employees. ALDI had taken the view that the Regency Park agreement was not a 'greenfields' agreement and had not followed the necessary procedures under the FWA for the making of such agreements. The Deputy President of the Fair Work Commission also dealt with the Agreement as if it was *not* a greenfields agreement and the Full Bench held that the employees who accepted on-going employment in the Regency Park region were employed by ALDI at the time the Agreement was made and were covered by the Agreement in the requisite sense.

The majority also held that the Full Bench erred in deciding that the Agreement satisfied 'the better off overall test" ("the BOOT"), i.e. that each award-covered employee, and each prospective award-covered employee would be better off overall if the Agreement applied rather than the applicable award.

ALDI appealed to the High Court.

The grounds of appeal are:

- That the majority of the Full Court erred in finding there was jurisdictional error by the Fair Work Commission in exercising its functions under s 186 of the FWA to approve the enterprise agreement in this case.

- That the majority erred in determining there was jurisdictional error made by the Fair Work Commission in determining that the Agreement satisfied the BOOT as set out in s 193 of the FWA.

In this appeal the First Respondent has filed a Notice of Contention contending that the decision of the Full Court should be affirmed on the grounds that the Full Bench:

- Committed an error of law on the face of the record in concluding that the employees by whom the Agreement was made were employees who will be covered by the Agreement within the meaning of s 172(g) of the FWA.

- Committed an error of law on the face of the record in concluding that the Agreement passed the BOOT under s 186(2) of the FWA.