Federal Court of Australia

Coles Supply Chain Pty Ltd v Milford [2020] FCAFC 152

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| Review of: | Application for Judicial Review: |
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| File number: |  |
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| Judgment of: | **RARES, COLLIER AND CHARLESWORTH JJ** |
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| Date of judgment: | 11 September 2020 |
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| Catchwords: | **INDUSTRIAL LAW** – application for judicial review of decision of the Fair Work Commission constituted by a Full Bench – Full Bench allowing an appeal from a decision refusing an extension of time to commence an application under s 365 of the *Fair Work Act 2009* (Cth) – Full Bench concluding that the Fair Work Commission had no power to determine whether an applicant under s 365 of the Act had been dismissed in fact – Full Bench concluding that the date of dismissal must be assumed to be the date dismissal was alleged to have occurred by the applicant – whether Full Bench misconstrued provisions of the Fair Work Act defining the jurisdiction of the Fair Work Commission in relation to a general protections application involving dismissal |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 15AA  *Fair Work Act 2009* (Cth) ss 12, 40A, 340, 342, 365, 366, 368, 369, 370, 371, 374, 386, 390, 394, 396, 399, 405, 539, 562, 585, 587, 590, 592, 593, 604, 609, 613, 725  *Federal Court of Australia Act 1976* (Cth) ss 20, 21  *Judiciary Act 1903* (Cth) s 39B  *Migration Act 1958* (Cth) s 477 |
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| Cases cited: | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27  *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321  *Ayub v NSW Trains* [2016] FWCFB 5500  *Belan v National Union of Workers (NSW Branch)* (2018) 267 FCR 6  *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541  *Cameron Milford v Coles Supply Chain Pty Ltd* [2019] FWCFB 2277  *Cameron Milford v Coles Supply Chain Pty Ltd* [2019] FWCFB 7658  *Cameron Milford v Coles Supply Chain Pty Ltd T/A Coles Heathwood Distribution Centre* [2019] FWC 844  *Cameron Milford v Coles Supply Chain Pty Ltd T/A Coles Heathwood Distribution Centre* [2019] FWC 4892  *Chang v Laidley Shire Council* (2007) 234 CLR 1  *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297  *Craig v South Australia* (1995) 184 CLR 163  *Forbes v Petbarn Pty Ltd* [2018] FCA 256  *Hewitt v Topero Nominees Pty Ltd* [2013] FWCFB 6321; 238 IR 42  *Jackamarra v Krakouer* (1998) 195 CLR 516  *Jess v Scott* (1986) 12 FCR 187  *Mihajlovic v Lifeline Macarthur* [2013] FWC 9804  *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355  *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254  *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 |
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| Division: |  |
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| National Practice Area: |  |
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| Date of hearing: | 24 August 2020 |
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| Counsel for the Applicant: | Mr B Rauf |
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| Solicitor for the Applicant: | Herbert Smith Freehills |
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| Counsel for the First Respondent: | Mr A Crowe QC with Mr M Walker |
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| Solicitor for the First Respondent: | LawRight |
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| Counsel for the Second Respondent: | The Second Respondent filed a Submitting Notice |

ORDERS

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|  | | QUD 793 of 2019 |
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| BETWEEN: | COLES SUPPLY CHAIN PTY LTD  Applicant | |
| AND: | CAMERON MILFORD  First Respondent  FAIR WORK COMMISSION  Second Respondent | |

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| order made by: | RARES, COLLIER AND CHARLESWORTH JJ |
| DATE OF ORDER: | 11 SEPTEMBER 2020 |

THE COURT ORDERS THAT:

1. A writ of certiorari issue, quashing the decision of the second respondent (constituted by a Full Bench) made on 26 November 2019 in C2019/4735.
2. A writ of mandamus issue requiring the second respondent (constituted by a Full Bench) to hear and determine the respondent’s application for permission to appeal (and, if permission be granted, the appeal) under s 604(1) of the *Fair Work Act 2009* (Cth) in accordance with law.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT

1. The applicant, Mr Cameron Milford, was formerly employed as a casual store worker by **Coles** Supply Chain Pty Ltd. Mr Milford alleges that he was dismissed from his employment in contravention of Pt 3-1 of the *Fair Work Act 2009* (Cth) (FW Act). On 5 August 2018, he purported to file a general protections court application in the Fair Work Commission (FWC) under s 365 of the FW Act relating to his dismissal.
2. A general protections court application under s 365 of the FW Act must be made within 21 days from the date the dismissal takes effect, or within such further time as the FWC may allow under s 366(1). In the documents lodged with the FWC, Mr Milford alleged that he had been dismissed in contravention of s 340 of the FW Act and that his dismissal took effect on 20 July 2018, that is, less than 21 days before he lodged the application.
3. If a person has made an application under s 365 of the FW Act, the FWC must deal with the dispute in accordance with s 368. Relevantly, if the dispute cannot be resolved by conciliation, the FWC must issue a certificate to that effect:  s 368(3). The issue of a certificate under s 368 is an essential precondition to the commencement of a general protections court application or (if the parties consent) to an arbitration conducted by the FWC:  FW Act, s 370 and s 399 respectively.
4. Coles raised a jurisdictional objection to Mr Milford’s application. It alleged that Mr Milford’s dismissal took effect from the completion of his last casual shift on 1 October 2014. Coles later raised an alternate and primary argument to the effect that Mr Milford had not been dismissed at all because his casual employment had come to an end by the operation of an enterprise agreement. In either case, Coles submitted, the FWC did not have the power to deal with any dispute under s 368 of the FW Act.
5. The FWC (constituted by a Deputy President) determined that Mr Milford’s employment had come to an end on 1 October 2014, that Coles had made him aware of that circumstance in June or July of 2016 and that the application was out of time:  *Cameron Milford v Coles Supply Chain Pty Ltd T/A Coles Heathwood Distribution Centre* [2019] FWC 844 (the first decision).
6. Mr Milford sought permission to appeal from the first decision to the **Full Bench** of the FWC. Permission was refused on the basis that Mr Milford could apply for an extension of time and, accordingly, the appeal was premature:  *Cameron Milford v Coles Supply Chain Pty Ltd* [2019] FWCFB 2277.
7. The Deputy President later dismissed an application by Mr Milford for an extension of the time in which to make a general protections court application:  *Cameron Milford v Coles Supply Chain Pty Ltd T/A Coles Heathwood Distribution Centre* [2019] FWC 4892 (the second decision).
8. Mr Milford again sought permission to appeal to the Full Bench. The Full Bench granted permission to appeal and proceeded to review both the first decision and the second decision, treating the first as an interlocutory decision affecting the outcome of the second.
9. The Full Bench determined that the date of dismissal was to be ascertained by reference to the date of dismissal that had been alleged by Mr Milford on his application, namely 20 July 2018 irrespective of whether the allegation was correct in fact: *Cameron Milford v Coles Supply Chain Pty Ltd* [2019] FWCFB 7658 (the Full Bench decision). The Full Bench concluded that the Deputy President had erred by effectively determining the substantive dispute between the parties on the merits, which the FWC was not empowered to do. The Full Bench set aside the first decision and the second decision and then referred the dispute to a different Commissioner to be dealt with under s 368 of the FW Act.
10. This is an application for judicial review under s 39B of the *Judiciary Act 1903* (Cth) for orders in the nature of constitutional writs quashing the decision of the Full Bench, prohibiting the FWC from acting upon it and requiring the Full Bench to determine Mr Milford’s appeal in accordance with the law. Coles seeks declarations as to the proper construction of the FW Act and a further declaration to the effect that Mr Milford’s dismissal took effect from either 13 June 2016 or 1 July 2016.
11. The Chief Justice made a direction pursuant to s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) that the Court’s jurisdiction to hear the application be exercised by a Full Court.

# SUMMARY OF RESULT

1. For the reasons that follow, the Full Bench misconstrued the provisions of the FW Act defining the boundaries of the FWC’s authority to deal with the dispute and so committed jurisdictional error. There should be orders having the effect of quashing the decision of the Full Bench and remitting Mr Milford’s appeal to be determined in accordance with the law. Declaratory relief ought to be granted. However, declarations in the terms sought by Coles should not be made.

# the FW ACT

1. It is necessary to begin with a broad survey of the relevant provisions of the FW Act, and the context in which they are placed in the statute as a whole.
2. Part 3-1 of the FW Act is titled “General Protections”*.* Section 340(1) relevantly provides that a person must not take “adverse action” against another person because the other person has exercised (or proposes to exercise) a “workplace right”. Adverse action is taken by an employer against an employee if the employer (relevantly) dismisses the employee and that action is not authorised by law: s 342(1), item 1; s 342(3). There are other defined adverse actions that do not involve dismissal.
3. Section 12 defines the word“dismissed” by reference to s 386. It relevantly provides:

**386 Meaning of *dismissed***

(1) A person has been ***dismissed*** if:

(a) the person’s employment with his or her employer has been terminated on the employer’s initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

…

1. Division 8 of Pt 3-1 is titled “Compliance”. It establishes two regimes for dealing with disputes in which allegations of contravention of general protection provisions are made: a regime for dismissal disputes (Subdiv A) and a regime for non-dismissal disputes (Subdiv B).
2. Section 365 and s 366 of the FW Act are contained in Subdiv A. They provide:

**365 Application for the FWC to deal with a dismissal dispute**

If:

(a) a person has been dismissed; and

(b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.

**366 Time for application**

(1) An application under section 365 must be made:

(a) within 21 days after the dismissal took effect; or

(b) within such further period as the FWC allows under subsection (2).

(2) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:

(a) the reason for the delay; and

(b) any action taken by the person to dispute the dismissal; and

(c) prejudice to the employer (including prejudice caused by the delay); and

(d) the merits of the application; and

(e) fairness as between the person and other persons in a like position.

1. Section 368 of the FW Act confers authority on the FWC to deal with a dismissal dispute in the event that an application is made under s 365. It provides:

**Dealing with a dismissal dispute (other than by arbitration)**

(1) If an application is made under section 365, the FWC must deal with the dispute (other than by arbitration).

Note: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)). One of the recommendations that the FWC might make is that an application be made under Part 3-2 (which deals with unfair dismissal) in relation to the dispute.

(2) Any conference conducted for the purposes of dealing with the dispute (other than by arbitration) must be conducted in private, despite subsection 592(3).

Note: For conferences, see section 592.

(3) If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:

(a) the FWC must issue a certificate to that effect; and

(b) if the FWC considers, taking into account all the materials before it, that arbitration under section 369, or a general protections court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.

(4) A ***general protections court application*** is an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of this Part.

1. If a certificate is issued under s 368(3), the parties may agree to the FWC arbitrating the dispute:  s 369. In that event, the FWC may deal with the dispute by arbitration and may make orders affecting the substantive rights of the parities, including orders for reinstatement, and for the payment of compensation: s 369(2). Section 369(3) prohibits a person from contravening an order made under s 369(2).
2. Section 370 of the FW Act provides that “A person who is entitled to apply under s 365 for the FWC to deal with a dispute” must not make a general protections court application (as defined in s 368(4)) in relation to the dispute unless:

(a) both of the following apply:

(i) the FWC has issued a certificate under paragraph 368(3)(a) in relation to the dispute;

(ii) the general protections court application is made within 14 days after the day the certificate is issued, or within such period as the court allows on an application made during or after those 14 days; or

(b) the general protections court application includes an application for an interim injunction.

1. Part 3-2 of the FW Act is titled “Unfair Dismissal”. Section 394(1) provides that “a person who has been dismissed” may apply to the FWC for an order under Div 4 granting a remedy. Section 394(2) and (3) are in the same terms as s 366(2) of the FW Act (providing for a 21 day time limit for the making of an application and conferring a discretion on the FWC to allow more time). Division 4 of Pt 3-2 confers powers on the FWC to grant remedies for unfair dismissal, if it is satisfied that the person has been unfairly dismissed and that the person was protected from unfair dismissal at the time of being dismissed:  s 390(1). The FWC may grant a remedy for unfair dismissal only if an application has been made under s 394: s 390(2).  A person to whom an order under Pt 3-2 applies must not contravene a term of the order: s 405. Section 396 provides that the FWC must not determine the merits of an unfair dismissal application unless it is satisfied of a number of “initial matters”, each of which presupposes the fact of a dismissal.
2. Section 539(1) of the FW Act defines ss 340(1), 369(3) and 405 as civil remedy provisions:  s 539, items 11 and 13. A person affected by a contravention of any one of those civil remedy provisions may apply to this Court or the Federal Circuit Court of Australia for orders imposing a civil penalty:  s 539(2).
3. Division 3 of Ch 5 applies to all matters before the FWC.  It contains provisions:
4. requiring that applications to the FWC be made in accordance with procedural rules made under s 609 (see s 585);
5. conferring powers on the FWC to inform itself in relation to any matter before it in such a manner as it considers appropriate (see s 590);
6. requiring and conditioning the conduct of a hearing in certain circumstances (see s 593);
7. authorising the FWC to compel a person to attend a conference, for the purpose of performing a function or exercising power conferred upon it, at which the FWC may mediate or conciliate or make a recommendation or express an opinion (see s 592); and
8. authorising the FWC to direct that a conference under s 368 be conducted in public (see s 592(3)), a power that does not exist in relation to non-dismissal disputes (see s 374(2)).
9. Section 587provides:

**587 Dismissing applications**

(1) Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if:

(a) the application is not made in accordance with this Act; or

(b) the application is frivolous or vexatious; or

(c) the application has no reasonable prospects of success.

Note: For another power of the FWC to dismiss an application for a remedy for unfair dismissal made under Division 5 of Part 3-2, see section 399A.

(2) Despite paragraphs (1)(b) and (c), the FWC must not dismiss an application under section 365 or 773 on the ground that the application:

(a) is frivolous or vexatious; or

(b) has no reasonable prospects of success.

(3) The FWC may dismiss an application:

(a) on its own initiative; or

(b) on application.

1. A person who is aggrieved by a decision of the FWC (other than a decision of the Full Bench) may appeal the decision, with the permission of the FWC:  FW Act, s 604(1).  Except in cases of unfair dismissal, the FWC must grant permission if it is satisfied that it is in the public interest to do so:  FW Act, s 604(2).  If permission is granted, the appeal is to be heard by the Full Bench of the FWC:  FW Act, s 613(1)(b).

# THE PARTIES’ CASES IN THE FWC

1. The allegations made by Mr Milford in the documents lodged in the FWC are conveniently summarised at [18] of the Full Bench decision as follows:

(1) Mr Milford was employed by Coles as a casual storeworker from 2010, working regular shifts.

(2) He was injured at work in 2014, and after he returned to work his condition worsened, resulting in him being unable to work a full shift after 1 October 2014.

(3) There was subsequently a dispute concerning whether he could return to work on light duties. Mr Milford supplied medical certificates stating his fitness to return to work on light duties, but Coles did not permit him to return to work on this basis.

(4) Mr Milford continued to receive weekly workers’ compensation payments throughout.

(5) On 20 June 2018, Mr Milford wrote to Coles seeking a return to work for rehabilitation. This constituted him exercising, or proposing to exercise, workplace rights arising under the *Industrial Relations Act 2016* (Qld) and the *Workers’ Compensation and Rehabilitation Act 2003* (Qld). He followed this up with further correspondence dated 25 June 2018, 29 June 2018, and 12 July 2018 to similar effect. He also lodged two ‘*safety concerns*’ on 2 July 2018, and his application might be read as suggesting this constituted a complaint or inquiry concerning his employment.

(6) On 20 July 2018 Coles sent him correspondence in reply stating that it could not accede to his requests as he was no longer an employee of Coles and had not been since 31 December 2014. Coles had never previously informed him that his employment had terminated. This letter constituted a dismissal effective from that date, i.e. 20 July 2018.

(7) The dismissal occurred by reason of the matters identified in (5) above. This constituted a contravention of s 340(1).

1. In its written response, Coles alleged that Mr Milford was dismissed effective from the end of his final shift on 1 October 2014. It denied that Mr Milford’s dismissal was effective from 20 July 2018 as alleged in the initiating documents. Coles later modified its position to advance its alternative case to the effect that Mr Milford had not been “dismissed” at all. That argument was founded on the fact that Mr Milford was a casual employee, the fact that he had not been offered any further shifts, and the application of an enterprise agreement to those facts. In submissions on this application, that alternative case was described as Coles’ principal submission. Whether Coles maintains its principal submission is unclear. As will be seen, the declaratory relief sought on this application is difficult to reconcile with it.
2. Before the Deputy President and the Full Bench (and before this Full Court) the parties made submissions as to the significance of an earlier decision of the Full Bench in ***Hewitt*** *v Topero Nominees Pty Ltd* [2013] FWCFB 6321; 238 IR 42.  Crudely summarised, the effect of the decision in *Hewitt* was that the FWC was not authorised to make any finding as to whether or not an applicant had been dismissed from his or her employment as to do so would determine the substantive dispute on its merits, which the FWC had no authority to do under s 368 of the FW Act as then in force. The authority of the FWC to deal with a dispute under s 368 did not depend upon there having been a dismissal in fact, rather it depended on the applicant having alleged that he or she was dismissed, so the Full Bench held. The reasons given by the Deputy President for the first and second decisions are to be interpreted in the context of *Hewitt,* by which she considered herself bound as a single Commissioner.

# Decisions of the Deputy PresIDENT

## The first decision

1. After citing the decision in *Hewitt*, the Deputy President said (at [57]):

… it is not necessary to make a finding concerning whether Mr Milford was dismissed. However it is necessary to determine the date that the 21–day time period commenced (the relevant date) the purposes of s 366(1) of the Act. …

1. The Deputy President referred to a line of cases in the FWC to the effect that the employment relationship ended when the employee became aware of the employer’s decision to end it at [72], citing *Mihajlovic v Lifeline Macarthur* [2013] FWC 9804. See also *Ayub v NSW Trains* [2016] FWCFB 5500. The Deputy President said that it was clear that Mr Milford had become aware of the end of the employment relationship “on 13 June 2016 or, at the latest, 1 July 2016”. And that “At its highest ... Mr Milford’s case results in the conclusion that the employment relationship ended on either of those dates”. The reason that the Deputy President referred to the dates in 2016 was that Coles’ workers compensation insurer (being a related entity of Coles) had written to Mr Milford on 13 June 2016 informing him that his employment with Coles had been terminated (at [2]). The Deputy President concluded that Mr Milford was “out of time by 1404 days” (at [10]).
2. As has been mentioned, following the first decision, Mr Milford made an application for permission to appeal the first decision to the Full Bench. The Full Bench refused to grant permission because, it said, it remained open to Mr Milford to make an application under s 366(1) to extend the time limit. At that time, the Full Bench failed to appreciate the effect of the first decision on Mr Milford’s case, namely to place the date of the end of his employment before the date that he purportedly exercised his workplace right. As explained below, the refusal of permission to appeal from the first decision on the basis that Mr Milford could and should make an application for an extension of time gave, rise to conceptual difficulties before the Deputy President when the application under s 366(1) was made.

## The second decision

1. The Deputy President found that Mr Milford had not taken any action to dispute his dismissal between mid-2016 and 5 August 2018 when his initiating documents were lodged. The Deputy President concluded that Mr Milford had “put his head in the sand” in June and July 2016, that he had allowed two years to pass before making his application (at [27]) and that he had “wilfully resisted the reality of the situation” (at [27]). The Deputy President concluded that Coles would be prejudiced if the extension of time was to be granted and that this weighed against granting Mr Milford an extension of time (at [28]).
2. In considering the merits of the application under s 366(2)(d), the Deputy President said that the first decision involved an acceptance of Coles’ submission that “… the Applicant was engaged on a casual basis and his employment came to an end when he was not reengaged for further shifts” (at [34]). She continued:

Neither the hearing of 17 June 2019 nor the hearing that gave rise to the [first decision] debated the question of the reason or reasons for this. In short, the merits of Mr Milford’s substantive application pursuant to s 365 of the Act have not been the subject of submissions and evidence before me. I am not in a position to interrogate the merits of his substantive application and it would not be appropriate for me to make any determination concerning his application save for the decision as to whether to grant an extension of time.

(footnote omitted)

1. The Deputy President cited *Hewitt* in support of the latter conclusion.
2. The Deputy President noted that Mr Milford had submitted that if his application for an extension of time was to be dismissed “that would effectively determine my legal right to address the dismissal dispute that arose on 20 July 2018”.
3. In response to that submission, the Deputy President said (at [40]):

This is [a] direct consequence of the time limitation in the Act for an application to be lodged. The Act gives the Commission the power to determine whether to extend this time limit. This is a discretionary decision. If the discretion is exercised against the application it follows that the application continues to be outside the time limit. It follows that the application cannot proceed.

1. The Deputy President concluded that in the period between 2 October 2014 and May 2016, exceptional circumstances existed so as to enliven the discretion to grant an extension of time. However, she concluded, Mr Milford’s behaviour during the balance of the period of the delay weighed against the exercise of the discretion in his favour and so refused to allow an extension of time under s 366(1) (at [41]).

# THE DECISION OF THE FULL BENCH

1. The Full Bench said that the first decision “necessarily involved the complete rejection of Mr Milford’s pleaded case concerning his dismissal”. That was because the claimed contravention of s 340(1) of the FW Act was founded on a series of events that had occurred on 20 July 2018, being the date upon which Mr Milford alleged he had exercised a workplace right and had been dismissed for having done so. The Full Bench noted (correctly) that if Mr Milford’s employment had ended on the date or dates identified by the Deputy President, the foundation for the alleged contravention (being the causal connection between the exercise of the workplace right and the dismissal) could not exist. The Full Bench continued (at [22]):

…  The ‘question of the reason or reasons’ for any termination arising in 2014, as adverted to in paragraph [34] of the second decision, was an entirely irrelevant consideration because Mr Milford did not allege that there had been any dismissal before 2018 in breach of s 340(1) or at all.

1. The Full Bench noted that neither party before it had submitted that *Hewitt* was incorrectly decided. The Full Bench went on to say that consistent with the reasoning in *Hewitt*, “the time limitation in s 366(1) must be read as operating by reference to the dismissal that is pleaded in the application that is lodged with the Commission” (at [28]). The remaining critical portions of the Full Bench’s decision will be discussed in the course of determining the grounds for judicial review.

# THE APPLICATION FOR JUDICIAL REVIEW

1. To succeed on this application it is necessary for Coles to show that the Full Bench committed jurisdictional error.
2. The grounds for review are set out in a Statement of Contentions filed on 24 December 2019. They are to the effect that the Full Bench erred in construing the provisions of the FW Act defining the limits of the FWC’s authority to deal with a dispute under s 368.
3. In ***Craig*** *v South Australia* (1995) 184 CLR 163 at 179, the High Court said that if an administrative tribunal makes an error of law which causes it to identify a wrong issue or to ask itself the wrong question, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers and so commits jurisdictional error. The FWC (howsoever constituted) is an administrative tribunal for the purposes of these principles. It is not a court:  *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254;  *Belan v National Union of Workers (NSW Branch)* (2018) 267 FCR 6 at [18].
4. The FWC was entitled to determine the limits of its authority to deal with a dispute under s 368 of the FW Act, although it had no authority to conclusively determine those limits. Error in the construction of the FW Act leading the FWC to assume authority that it does not have (or to decline to exercise jurisdiction that it does have) may readily be characterised as jurisdictional in the sense explained in *Craig*,with the consequence that the affected decision would be liable to be quashed. It is common ground that the decision of the Full Bench was amenable to review and Mr Milford has not submitted that error of the kind alleged by Coles ought not to be characterised as jurisdictional.

# SUBMISSIONS

1. Counsel for Coles submitted that the FWC’s authority to deal with a dispute under s 368 of the FW Act (including its authority to issue a certificate under s 368(3)) depended upon the existence of three circumstances. First, the applicant must be a person who has been dismissed in fact. Second, the applicant must allege that the dismissal was in contravention of Pt 3-1 of the FW Act. Third, the application must be filed within 21 days of the dismissal taking effect or within such further time as the FWC may allow on an application under s 366(2). It was submitted that the construction of s 365 favoured by the Full Bench in this case and in *Hewitt* was one that rendered the task conferred by s 366 of the FW Act otiose and that otherwise frustrated the purpose of its enactment. It was submitted that the decision of the Full Bench had the consequence that the FWC would be compelled to act on the basis that a dismissal had occurred on any date alleged by an applicant, including one that was concocted so as to bring the application within time, when in fact it was not.
2. Counsel for Mr Milford submitted that to determine that there was no dismissal was to substantively determine the dispute between the parties, a task which the FWC was not authorised to do on a general protections court application involving dismissal, save for cases where the parties agreed to submit to an arbitration under s 369 of the FW Act.
3. It was submitted that on the proper construction of s 365 of the FW Act, the dismissal must be presumed to have occurred and to have taken effect on the date that the applicant alleged. In the present case, it was submitted, the Deputy President was bound to conclude that the dismissal had taken effect on 20 July 2018, that being the date alleged on the face of the application. There was no power to determine whether there was a dismissal in fact, nor was there any express provision in the FW Act providing for the manner in which any such fact finding task should be performed.
4. Counsel submitted that it was a matter for the Court hearing a general protections court application to determine (under s 370(1) of the FW Act) whether the applicant was “a person who is entitled to apply under s 365” of the FW Act. The FW Act conferred a conciliation function on the FWC, and deferred to the Court the question of the person’s entitlement to make an application to the FWC. The disincentive against parties nominating a false date so as to artificially bring an application within time was that the person would lose the opportunity to apply to the FWC for an extension of time under s 366(1), which only the FWC was empowered to grant. The policy considerations behind the enactment of the time limit were therefore protected because breach of the time limit could be assessed by a court at the time that the Court “deals with the balance of the general protections court application”.
5. Counsel submitted that where the legislature had intended the FWC to perform the function of determining a dispute between the parties, it had made express provision for that to occur, as was apparent from the provisions of Pt 3-2 in respect of unfair dismissal applications. In addition, by s 587 of the FW Act, the legislature had confined the FWC’s power to dismiss a general protections application, such that the application could not be dismissed on the ground that it was frivolous or vexatious, and nor could it be dismissed on the ground that it had no reasonable prospects of success. Counsel submitted that proof of the circumstance that the applicant had not been dismissed would have the necessary consequence that the application could have no reasonable prospects of success, and yet the Parliament had expressly excluded the dismissal of the application on that ground by the express carve out in s 587(2). That, Counsel submitted, was a strong indicator that the substantive question of whether an applicant had been dismissed was to be answered (and only answered) by the Court on a general protections court application and not by the FWC in the exercise of its powers under s 366 or s 368 of the FW Act, at least in cases where the parties had not agreed to an arbitration under s 369. Subject to one qualification (discussed below) Counsel otherwise submitted that *Hewitt* was correctly decided and that the Full Bench in this case was correct to follow it.

# CONSIDERATION

1. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, Hayne, Heydon, Crennan, Kiefel JJ said (at [46]):

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself.  …  The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

And see *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] (McHugh, Gummow, Kirby, Hayne JJ), *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297 at 321).

1. In *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 at [34] – [35] the Court observed that, ordinarily, the words of a statutory provision are to be given their literal or grammatical meaning unless the context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction required otherwise. Where a party contends for a meaning other than the literal or grammatical one, “such a contention may lack force unless accompanied by some plausible formulation of an alternative legal meaning” (at [35]). In construing ss 365, 366 and 368 of the FW Act, the starting point is the text:  *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Chang v Laidley Shire Council* (2007) 234 CLR 1 at [59] – [60]. Three preliminary observations may be made of the literal and grammatical meaning of those provisions.
2. The first observation is that s 365 and s 366 are concerned with different subject matters. Section 365 defines the persons who are entitled to make a general protections application to the FWC involving dismissal. Section 366 conditions the manner in which such a person’s application must be made. The condition is that the application be commenced within 21 days or a longer a period that may be allowed by the FWC in the exercise of the discretionary power conferred under s 366(1), having regard to the factors in s 366(2). For an application to be “made under” s 365, it must be made by a person described in s 365 *and* it must be made within the time prescribed or allowed under s 366(1). The opening phrase in s 368, “if an application has been made under s 365*”*, incorporates both concepts. The words erect an essential precondition to the FWC’s authority to perform both its conciliation function and its associated power to issue a certificate under s 368(3).
3. The power to allow further time under s 366(1) is cast in familiar terms, both within the landscape of the FW Act and in other more litigious contexts: see, for example s 477(2)(b) of the *Migration Act 1958* (Cth). The purpose of limitation periods conditioning the time for commencing litigation was discussed by McHugh J in ***Brisbane South*** *Regional Health Authority v Taylor* (1996) 186 CLR 541 at 552:

The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation period. First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even ‘cruel’, to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period.

(footnotes omitted)

1. The same principles inform the intent behind the enactment of s 366 of the FW Act as it applies to an administrative tribunal. The provision is to be construed so as to give it meaningful work to do, and in a manner that best promotes its purpose:  *Acts Interpretation Act 1901* (Cth), s 15AA (as in force on 25 June 2009:  see s 40A of the FW Act). The mandatory considerations in s 366(2) are to be understood as giving effect to that purpose by precluding all delayed applications except in cases where the FWC is satisfied that there are exceptional circumstances.
2. The second observation that may be made is that s 365 contains two criteria conditioning a person’s entitlement to make an application. The first criterion is expressed in objective terms: *the person has been dismissed*. The second criterion is also expressed in objective terms, albeit by reference to the fact that an *allegation* has been made that “the dismissal” was in contravention of a provision of Pt 3-1. The word “alleges” is found in the criterion in s 365(1)(b), but not in the criterion in s 365(1)(a). In its ordinary meaning, the criterion in s 365(1)(a) will be fulfilled if there has been a dismissal *in fact*. It will not be fulfilled merely because an applicant asserts that he or she has been dismissed. The words “the dismissal” to which subs (b) refers is clearly a reference back to subs (a) and so refers to “the dismissal” that has occurred *in fact*.
3. That construction accords with the nature of the prohibitions with which Subdiv A of Div 8 of Pt 3-1 is concerned: it is not a contravention of the FW Act to dismiss a person from his or her employment. Rather, it is a contravention to (relevantly) dismiss a person *for a prohibited reason*.
4. Mr Milford’s claim is that adverse action was taken against him because he had exercised a workplace right. The right was said to have been exercised on 20 July 2018 and so preceded a dismissal he alleged had occurred later that same day. The Full Bench was correct to say that a finding that there was no dismissal necessarily entailed a rejection of his pleaded case because he had not exercised a workplace right. So too would a finding that there had been a dismissal at a time predating the exercise or purported exercise of the right.
5. The word “alleges” is also absent in s 366(1)(a). In accordance with its ordinary meaning, the time to lodge the application runs from the date the dismissal takes effect *in fact*. The Parliament might have easily prescribed the time for commencing the application by reference to the date upon which an applicant alleged (whether honestly or not) the dismissal to have taken effect, but it has not done so.
6. The third observation is that the power to allow more time to make an application presupposes that there has been a dismissal in fact and that the application was not lodged within 21 days of its occurrence. The following features make that plain:
7. First, the requirement that the FWC take into account the reason for the delay necessarily comprehends that the length of the delay may be objectively ascertained.
8. Second, the requirement that the FWC take into account any action taken by the person to dispute the dismissal focuses attention on the steps taken (or not taken) after the dismissal has occurred. By its nature, that task requires the FWC to identify the time from which steps ought to have been taken.
9. Third, the requirement that the FWC have regard to any prejudice to the employer “including prejudice caused by the delay” also requires a finding to be made as to the length of the delay, being the delay between the dismissal taking effect and the expiration of the usual 21 day limitation period. To calculate the length of the delay from the date upon which a dismissal is alleged would be to deny the actual length of the delay and hence disregard the consequent prejudice to the respondent.
10. Fourth, the FWC must also consider the fairness of granting or refusing an extension of time as between the person and others in a like position. That, too, is an objective enquiry. A person is not “in a like position” just because he or she alleges that to be the case.
11. As discussed later in these reasons, there may be cases where the FWC may avoid drawing a conclusion as to whether or not an employment relationship has ended in circumstances that amount to a dismissal, and proceed to determine an application for an extension of time on the assumption that it has so ended. But on an application for an extension of time, ascertainment of the length of the delay between the date that the relationship ended and the expiration of the statutory time limit must be identified.
12. The requirement that the FWC take account of “the merits of the application” under s 366(2)(d) requires some assessment to be made of the parties’ respective positions in the *particular* dispute that is to be the subject matter of the FWC’s conciliation powers under s 368 of the FW Act, should an extension of time be granted. We will return to that question in due course.
13. Construed in accordance with their ordinary meaning, s 365 and s 366 of the FW Act together promote the purpose of ameliorating the adverse effects of delay on the quality of justice as identified by McHugh J in *Brisbane South*. To construe the provisions in a way that would deny or ignore the existence of *actual* delay would be to frustrate that purpose.
14. Counsel for Mr Milford properly acknowledged that the Parliament had not expressed s 365 in terms that conditioned a person’s entitlement to apply on the circumstance that the person had *alleged* that he or she had been dismissed in contravention of Pt 3-1 of the FW Act. The thrust of the submissions was that the ordinary text of the provision should give way to a different meaning, to be discerned from the FW Act as a whole.
15. Subject to what follows, Mr Milford is correct in his submissions that the power of the FWC to “deal with the dispute” under s 368 of the FW Act is limited to conciliating “the dispute”, to expressing an opinion in accordance with s 592 of the FW Act and (if the matter cannot be resolved by conciliation) to issuing a certificate to that effect under s 368(3). However, those non-determinative functions are only enlivened in the event that an “application is made under s 365”, and they only apply to “the dispute”. What, then is the dispute to be dealt with under s 368?
16. The answer is found in s 365 and in the opening words to s 368 itself. As observed earlier, when s 368 refers to an “application” made under s 365, it refers to an application validly made by a person entitled to make it. The text and structure of s 365 is such that there has been a dismissal *in fact* and that there is an allegation that the dismissal was for a prohibited reason. Construed in the context of s 365, when s 368 refers to “the dispute” it must be taken to refer to the dispute agitated by the allegation: that is, the allegation concerning the reason for the dismissal, and not an allegation of dismissal *per se*. It does not assist Mr Milford to show that the power under s 368 is non-determinative. We are presently concerned with an antecedent question as to whether the non-determinative powers are enlivened at all. The “merits of the application” to which s 366(2)(d) refers is the merits of the allegation referred to in s 365(1)(a), that is, the allegation that the applicant was dismissed in contravention of (in this case) s 340(1). That is a criterion that is usually considered in applications to extend time: cf  *Jackamarra v Krakouer* (1998) 195 CLR 516 Brennan CJ and McHugh J at [3] – [4], Kirby J at [66(d)]; *Jess v Scott* (1986) 12 FCR 187. The timing of the dismissal may be relevant to the merits, indeed in some cases it may be determinative. The Parliament could not have intended that in discharging the obligation under s 366(2)(d) the FWC must ignore a circumstance that would render the application without any, or perhaps any reasonable, prospects of success. The circumstance that the dismissal predated the alleged exercise of the workplace right may be one such circumstance.
17. It is not difficult to conceive of cases where the parties may be in “dispute” as to whether or not a person has been dismissed. Most often that will occur in cases where the applicant alleges (and the respondent contests) that he or she has been constructively dismissed. But that dispute is not to be confused with the dispute forming the subject matter of the FWC’s conciliation powers as just described. A dispute about whether a person has been dismissed raises an antecedent issue going to the existence of the FWC’s authority to compel an employer to participate in its conciliation processes.
18. The question of whether or not a person has been dismissed is an objective condition appearing elsewhere in the FW Act in the same objective terms. By way of example, s 725 of the FW Act provides that “a person who has been dismissed” is precluded from making applications or complaints of certain kinds. Whether or not a person has been dismissed also determines whether the person may apply under Subdiv A or Subdiv B of Pt 3-1. In the latter case, the employer may be compelled to participate in a conference but the person conducting the conference has no power to direct that it be conducted in public:  s 374(2). If the construction advanced by Mr Milford were to be accepted, the authority of the FWC to proceed under Subdiv A or B (and hence its powers to direct that the conference be conducted in public) would depend upon whether the applicant *alleged* (falsely or otherwise) that a dismissal had occurred. I am unable to comprehend how such a construction would advance the objects of the FW Act.
19. To summarise, when an application is purportedly lodged under s 365 it is open to a respondent to assert that there has been no dismissal, so giving rise to a dispute on that question. Such a dispute falls to be determined not under s 368 but under s 365 itself. It is an antecedent dispute going to the entitlement of the applicant to apply. It is also open to a respondent to admit that a dismissal has occurred but dispute that the dismissal took effect within 21 days of the date that the application was filed. Such a dispute may give rise to an issue under s 366(1), involving as it does a question as to whether it is necessary for the FWC to determine whether more time should be “allowed” for the application to be made under s 365. That too is an antecedent dispute, going to the question of whether an application has been made. It is a dispute that must be resolved before the powers conferred by s 368 can be exercised at all.
20. Contrary to Mr Milford’s submissions, it is not correct to say that the FW Act contains no express powers for the resolution of antecedent issues of the kind mentioned above, nor is it correct to search for an express conferral of power of that kind in any event. Part 6-1 of the FW Act (which concerns multiplicity of actions) contains numerous references to applications before the FWC (including an application under s 365) failing for “want of jurisdiction”, so recognising that an administrative tribunal such as the FWC may determine the limits of its powers (albeit not finally). No express power is necessary. As to procedure, s 590 expressly empowers the FWC to inform itself in relation to “any matter before it in such manner as it considers appropriate”. In the present case the “matter” before the Deputy President was whether she had authority to deal with the dispute under s 368. To the extent that practices and procedures have not developed in the FWC to deal with challenges to its own jurisdiction, there is a power under s 609 to make procedural rules by legislative instrument to address the deficiency.
21. Whether or not it was open to the Deputy President to dismiss the application under s 587(1)(a) of the FW Act on the basis that it had not been made “in accordance with” the FW Act, may be left to a case in which the outcome might turn on it. The better view is that it is not necessary to identify an express power in the FWC to decline to act upon an application on the basis that it fails for want of jurisdiction. It may be that an application purportedly made by a person having no entitlement to make it is not an “application” for the purposes of s 587(1)(a) at all. Section 587(1)(a) has work to do in cases where an otherwise valid application has not been made in accordance with procedural rules made under the FW Act. The statutory note suggests that is its purpose (although the note does not form a part of the Act):  see s 40A of the FW Act.
22. Returning to the Full Bench decision, as the Full Bench correctly identified, “There will be some cases where there is a genuine dispute concerning the date upon which the pleaded dismissal took effect which may have consequences for compliance with the time limitation in s 366(1)”. The Full Bench said that a dispute of that nature might arise in the “theoretical scenario” posited by Coles whereby an applicant adopted a fictitious date in order to avoid the time limitation in s 366(1) applying. The Full Bench continued (at [28]):

In this type of case it will be necessary for the Commission to identify the correct date of the pleaded dismissal in order to determine whether the application was filed within the prescribed 21 days and consequently whether it is necessary to consider the grant of an extension of time under s 366(2).

1. By that passage the Full Bench appears to accept that the FWC may (indeed in some cases must) perform a task involving the determination of facts. It is difficult to comprehend why the FW Act would permit (as it does) the FWC making a finding about *when* a dismissal occurred in a case of suspected dishonesty, but preclude it from making a finding about *whether* a disputed dismissal had occurred.
2. The Full Bench said that Mr Milford’s case was different because the relevant dispute was not in truth about the precise date upon which the pleaded dismissal took effect, but whether there was a dismissal at all. The Full Bench erred in reducing the issues Coles had raised in that way. As has been said, Coles by its written response, alleged that Mr Milford had been dismissed as at 1 October 2014. It did not abandon that position. It then advanced an additional and alternative contention to the effect that Mr Milford had not been “dismissed” as defined. Hamstrung as she was by the decision in *Hewitt*, the Deputy President proceeded on the basis that it was not permissible to make a finding about whether there had been a dismissal.
3. In the present case, the finding that Mr Milford’s employment ended effective from 1 July 2016 at the latest was fatal to his claim that the *reason* for his alleged dismissal was the exercise of a workplace right on 20 July 2018, some two years later. But none of that means that the Deputy President exceeded her powers under s 366 or s 368, properly construed. On any interpretation of the first and second decisions, the Deputy President declined to deal with the particular dispute to which s 368 is directed, because she was not satisfied that she had the authority to do so.
4. The submission that the power to determine a person’s entitlement to make an application to the FWC under s 365 of the FW Act is “deferred” exclusively to this Court or the Federal Circuit Court under s 370 of the FW Act cannot be accepted. Section 370 is to be interpreted against the background that the FWC may determine the question of a person’s entitlement to make an application to it, although not conclusively. Whilst Mr Milford is correct to state that this Court has the power to determine whether a person is entitled to make an application to the FWC under s 365 of the FW Act, it does not follow that the FWC is precluded from making decisions about the limits of its own powers in cases (such as the present) where there is a genuine challenge to those limits.
5. As has been mentioned, the FW Act establishes multiple alternate pathways for an applicant and prospective litigant, the appropriate pathway depending upon whether or not the person is entitled to make an application to the FWC under s 365 of the FW Act. The opening words to s 368 of the FW Act would be rendered useless if the FWC were bound to deal with an application that the applicant had no entitlement to make, or that did not accord with the express requirement in s 366(1). It is true that a court may decline to recognise an “application” or resulting certificate as valid when determining an objection to competency of a legal proceeding under s 370 of the FW Act: see by comparison *Forbes v Petbarn Pty Ltd* [2018] FCA 256 at [65] to [66]. However, there is nothing in the text, context or purpose of the FW Act evincing an intention that the first opportunity for a respondent to challenge the authority of the FWC to deal with a dispute should be by way of collateral attack on the validity of a certificate after it has been compelled to participate in the FWC’s processes and after court proceedings have commenced.

## The decision in *Hewitt*

1. Before concluding, something must be said of the reasoning in *Hewitt* and the critical steps in the reasoning of the Full Bench in that case. The reasoning is disapproved to the extent that it is inconsistent with the conclusions of this Court.
2. In its concluding paragraphs, the Full Bench in *Hewitt* identified an anomaly it perceived would arise should arguments of the kind advanced by Coles in this case be accepted. It should be emphasised that Counsel for Mr Milford did not rely on the anomaly perceived by the Full Bench, nor did Counsel seek to explain its meaning. It is nonetheless appropriate to comment on the anomaly to underscore the errors of the Full Bench in this matter. The reasoning in relation to the perceived anomaly commences (at [46]) as follows:

Let us assume that the Commission must make a determination that the applicant has been ‘dismissed’ from their employment (within the meaning of s 365) before the Commission can conduct a conference.

1. The Full Bench continued:

If we further assume that in a particular case the Commission determines that the applicant was *not* dismissed and accordingly does not conduct a conference or issue a certificate (as happened in this matter at first instance), what happens next?

1. The correct answer is as follows. The applicant may proceed with a non-dismissal application depending on the circumstances of the case and on whether he or she is prepared to accept the FWC’s determination on the question of whether there was a dismissal. However, the determination that there has been no dismissal (even if upheld on appeal to the Full Bench) is not authoritative in the sense of being final. If the FWC errs in determining a question upon which its authority depends, it will commit jurisdictional error by wrongfully denying that it has no authority to “deal with the dispute” under s 368 of the FW Act. An affected applicant in such a case may apply to this Court for relief, just as Coles has done in respect of an alleged wrongful assumption of jurisdiction.
2. The Full Bench continued:

On the face of it there would be no bar to Ms Hewitt making a general protections application to the Federal Court or the Federal Circuit Court seeking remedial orders under Pt 4-1 of the Act. Such an application could be made because the prohibition in s 371(1)(a) against making a court application without a s 369 certificate only applies to ‘a person who is entitled to apply under s 365’. This prohibition would not apply to Ms Hewitt because she was not entitled to apply under s 365 as she had not been ‘dismissed’ from her employment. But what might happen next?

1. Since *Hewitt* was decided the prohibition contained in s 371(1)(a) and the power to issue a certificate under s 369 are now contained (in relevantly the same terms) in s 370 and s 368(3) respectively (see [20] and [18] above). The phrase “general protections court application” was defined then (as now) as an application to a court under Div 2 of Pt 4-1 for orders in relation to a contravention of Pt 3-1. The proposition that a person who was determined by the FWC not to be a person entitled to apply under s 365 could as a matter of practical reality succeed on an application for relief under Pt 4-1 of the FW Act in relation to a contravention of Pt 3-1 involving dismissal is a peculiar one. What is the person to plead? To avoid a successful objection to the competency of such an application, it would be necessary for the litigant to show that the prohibition in s 370 does not apply. Such a contention would involve a denial by the applicantthat he or she is a person who is entitled to apply to the FWC under s 365 and so deny the objective circumstance of his or her dismissal in s 365(1)(a). Taking that position would be fatal to the substantive allegation that he or she had been dismissed for a prohibited reason. The scenario posited by the Full Bench could not sensibly arise. It certainly does not arise as a consequence of the construction of the FW Act articulated in these reasons.

# RELIEF

1. Coles seeks relief in the following terms:

1. A writ in the nature of certiorari directed to the Fair Work Commission that the decision made by the Full Bench of the Fair Work Commission on 26 November 2019 in *Cameron Milford v Coles Supply Chain Pty Ltd* [2019] FWCFB 7658 (in Matter No. C2019/4735) be quashed;

2. A writ in the nature of prohibition to the Fair Work Commission preventing it from hearing and deciding the applications in Matter No. C2018/4297 and Matter No. to [sic] C2019/7695 in reliance on the Full Bench’s decision in *Cameron Milford v Coles Supply Chain Pty Ltd* [2019] FWCFB 7658;

3. An order in the nature of mandamus requiring the Fair Work Commission to hear and determine the proceedings according to law;

4. A Declaration that, on a proper construction of section 366(1) of the *Fair Work Act 2009* (Cth):

a. the Fair Work Commission is required to determine the date on which a dismissal took effect; and

b. the determination by the Fair Work Commission as to the date on which a dismissal took effect is not limited to the date of dismissal as pleaded in a relevant application made to it.

5. A Declaration that, on a proper application of section 366(1) of the *Fair Work Act 2009* (Cth), Mr Cameron Milford’s dismissal from his employment with Coles Supply Chain Pty Ltd took effect on either 13 June 2016 or 1 July 2016.

1. It is appropriate to grant relief in terms of orders in the nature of writs of certiorari and mandamus. There will be orders in the nature of the constitutional writs in respect of the Full Bench decision as follows:
2. an order in the nature of certiorari directed to the FWC quashing the decision of the Full Bench made on 26 November 2019 in the purported disposition of the Mr Milford’s appeal;
3. an order in the nature of mandamus requiring the FWC (constituted of a Full Bench) to hear and determine Mr Milford’s application for permission to appeal under s 604(1) of the FW Act in accordance with the law.
4. The Court has the power to make a declaration of right under to s 21 of the Federal Court of Australia Act in relation to matters in respect of which it has original jurisdiction. In addition to the jurisdiction conferred on the Court under s 39B of the Judiciary Act, s 562 of the FW Act confers jurisdiction on the Court “in relation to any matter (whether civil or criminal) arising under this Act”. The power to make a declaration of right is discretionary.
5. It is neither necessary nor appropriate to make a declaration in the terms that Coles seeks for three reasons. First, the declaration is not cast in terms that declare the rights as between the parties to this proceeding. Second, the proposition that the FWC must in all cases “determine” the date on which a dismissal took effect is not entirely correct. There may be cases when the date of dismissal alleged by the applicant is undisputedly outside the statutory timeframe in any event. The question of whether the dismissal may have taken effect on a date earlier still may be immaterial, depending on the facts of the particular case. A declaration by this Court should not preclude the possibility of such a case arising.
6. In an appropriate case, it may also be permissible for the FWC to determine that the employment came to an end on a particular date without deciding whether or not the applicant was “dismissed” with the meaning of s 386 of the FW Act. In such a case it may be permissible to refuse to grant an extension of time even assuming, for the employee’s benefit, that there was indeed a dismissal.
7. Third, the proposition in [4(b)] is cast in terms that are not readily comprehensible, except to a person who has had the benefit of reading these reasons for judgment. The proper construction of the FW Act should be apparent in these reasons. An order in the nature of mandamus will be sufficient to ensure that the rights of the parties will be determined by the FWC in accordance with that construction.
8. A declaration in the terms sought in [5] should not be made. The grounds of review advanced on this application have not presented any occasion for this Court to determine that Mr Milford was in fact dismissed from his employment, nor as to the date upon which any such dismissal took effect. They are questions s 365 and s 366 of the FW Act require the FWC to decide. Once the Full Bench’s decision is quashed, then unless the Full Bench grants Mr Milford permission to appeal, the Deputy President’s decision will bind the parties unless it is affected by jurisdictional error. The parties’ cases in respect of those questions may be advanced on the remitted application for permission to appeal and then (should permission be granted) determined on their factual and legal merits, depending on the grounds and contentions that are pressed by the parties. To the extent that it is unclear whether the Deputy President made any finding in relation to whether there was or was not a dismissal, it is for the parties to determine the relief that can or should be sought in relation to that uncertainty.
9. There will be no order as to costs, neither party asserting that there is a proper basis to make an award under s 570 of the FW Act.

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| I certify that the preceding eighty-nine (89) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Rares, Collier and Charlesworth. |

Associate:

Dated: 11 September 2020