



Précis Paper

Applications to the Fair Work Commission and Coles Supply Chain Pty Ltd v Milford [2020] FCAFC 152

Abstract – The case *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152, which went before the Full Bench of the Fair Work Commission, and the Full Court of the Federal Court, demonstrates the functions, powers, and limitations of the Fair Work Commission.

Discussion Includes

- Key aspects of the matter
- Summary of the facts
- Competing arguments
- Three requirements under s 365-366 Fair Work Act 2009 (Cth)
- The appeal process
- Orders Sought
- Special leave application
- What is the significance of this decision?

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Applications to the Fair Work Commission and Coles Supply Chain Pty Ltd v Milford [2020] FCAFC 152

1. In this edition of BenchTV, Bilal Rauf (barrister), and Emily Strachan (solicitor), discuss the contemporary issues surrounding employee dismissals, the Fair Work Commission's powers, functions, jurisdiction, and limitations with regard to the current case *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152.

Key aspects of the matter

2. Starting in Brisbane before Booth DP of the Fair Work Commission ('FWC') with two hearings, the matter went to the full bench of the Fair Work Commission on two occasions, to the Federal Court, the High Court, and now it has been remitted back to the Full Bench of the FWC so that the appeal can be heard in accordance with the law.
3. It is an important matter for two reasons. First, it demonstrates the FWC functions and powers with regard to general protection applications that have been filed, and it guarantees specific jurisdiction, specifically what the FWC can and cannot do. Second, it has overturned eight years of FWC jurisprudence, as the Federal Court has stipulated that specific provisions are to be applied in a certain way.¹

Summary of the facts

4. Mr Milford, the applicant, was previously an employee of Coles Supply Chain Pty Ltd as a casual store worker. Mr Milford alleges that he was dismissed from employment in contravention of Pt 3-1 of the *Fair Work Act 2009* (Cth) ('FW Act'). On 5 August 2018, under s 365 of the FW Act, Mr Milford filed a general court application with the FWC regarding his dismissal.
5. Under s 365 of the FW Act, a general protections court application must be filed within twenty-one days of the dismissal taking effect, or within an extension period allowed by the FWC under s 366(1) of the FW Act.
6. Pursuant to s 340 of the FW Act, and within documentation lodged with the FWC, Mr Milford alleged that his dismissal took effect on 20 July 2018, less than twenty-one days before he lodged the application. However, Coles raised a jurisdictional objection to the above statement, alleging that the dismissal in question occurred on the completion of Mr Milford's last shift, 1 October 2014. In the alternative, Coles raised a primary argument that there was no dismissal as it was an enterprise agreement that had come to an end.

¹ *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152.

7. The case has since been remitted back to the Full Bench of the FWC so that the appeal can be heard in accordance with the law.

Competing arguments

8. The main issue boiled down to the one critical fact about the dismissal.
9. Mr Milford made an application under s 365 of the FW Act, which carries the requirement to apply within twenty-one days of dismissal. Therefore, leading to the question of, was there a dismissal, and if so, when did it take effect.
10. Ultimately, the FWC assessed the dismissal and whether it had to assess a time extension in a different stage.
11. However, though there were numerous earlier communications, Mr Milford alleges that the dismissal did not occur until receiving a formal letter on 20 July 2018.
12. Nevertheless, Coles alleges that the dismissal in question occurred on the completion of Mr Milford's last shift, 1 October 2014.

Three requirements under s 365-366 *Fair Work Act 2009* (Cth)

13. First, the applicant must be a person who has in fact been dismissed.
14. Second, the applicant must allege that the dismissal was in contravention of Pt 3-1 of the FW Act.
15. Third, within twenty-one days of the dismissal taking effect, the application must be filed or within such further time as the FWC may allow on an application under s 366(2) of the FW Act.

The appeal process

16. The first appeal was concerning the dismissal and when it took place. The FWC Full Bench, in this instance, did not grant permission to appeal because it was incomplete. The reason being that Mr Milford had not yet made an application for an extension of time.² The FWC made directions to seek an application for more time, and pending the results of that decision, the applicant could return.
17. However, Booth DP refused an application for more time.³
18. The second appeal dealt with the correctness of both previous decisions. The Full Bench of the FWC found that Booth DP was exercising judicial power rather than administrative power in essentially deciding the case, and remitted the case back to Booth DP of the FWC.⁴

² *Cameron Milford v Coles Supply Chain Pty Ltd* [2019] FWC 2277.

³ *Cameron Milford v Coles Supply Chain Pty Ltd T/A Coles Heathwood Distribution Centre* [2019] FWC 4892.

⁴ *Cameron Milford v Coles Supply Chain Pty Ltd* [2019] FWC 7658.

19. However, the case did not make it back to the FWC as Coles appealed to the Full Court of the Australian Federal Court.⁵

Orders Sought

20. In the current case at hand *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152, Coles sought a Constitutional writ of Mandamus and Certiorari, as well as two other declarations. The first was pursuant to the function of the FWC under s 365 FW Act, that it must determine the dismissal. Secondly, regarding Mr Milford's dismissal, that it took place on 13 June 2016, or at the very latest 1 July 2016.

Special leave application

21. Following the Full Court of the Federal Court, a special leave application was made to the High Court of Australia. There was a process of written submission and arguments made to the High Court to decide whether the matter would be heard.
22. The High Court determined that the Full Court of the Federal Court's decision was the correct decision by implication, thereby dismissing the application for special leave.⁶

What is the significance of this decision?

23. The decision in the matter *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152 is of particular significance, as applicants in the future cannot just claim that their dismissal took effect on a day that suits them and suggest that the claim falls within the twenty-one day requirement in s 365 of the FW Act.
24. Now the FWC must determine when a dismissal took effect as a matter of fact. The decision is beneficial for Coles and employers generally as there is an abundance of claims that can now be concluded at this threshold questions, as there has been no dismissal, or the dismissal has been outside of the twenty-one day limit.

⁵ *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152.

⁶ *Milford v Coles Supply Chain Pty Ltd & Anor* [2021] HCASL 37.

BIOGRAPHY

Bilal Rauf

Barrister, State Chambers, Sydney

Bilal was called to the bar in 2014 and specialises in employment and industrial relations Law, and workplace health and safety law. He appears led and unled in all Federal and State courts and tribunals in which such matters are litigated, both at first instance and on appeal. Bilal has appeared for many of Australia's largest corporations, employer associations and government entities. His expertise has been recognised in the Doyle's Guide from 2017 to 2021 where he has been included in the list of leading employment and workplace safety junior counsel each year.

Emily Strachan

Solicitor, Herbert Smith Freehills, Sydney

Emily's practice focuses on general employment and industrial relations. Her recent experience has included assisting clients with underpayment issues (including those being investigated by the Fair Work Ombudsman), unfair dismissal, breach of General Protections and enterprise agreement related claims, preparation and bargaining for an enterprise agreement, award compliance, performance improvement, disciplinary and termination processes.

BIBLIOGRAPHY

Focus Case

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

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_15-09-2020_insurance_banking_construction_government.pdf

Judgment Link

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2020/152.html>

Cases

Cameron Milford v Coles Supply Chain Pty Ltd [2019] FWCFB 2277

Cameron Milford v Coles Supply Chain Pty Ltd T/A Coles Heathwood Distribution Centre [2019] FWC 4892

Cameron Milford v Coles Supply Chain Pty Ltd [2019] FWCFB 7658

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

Hewitt v Topero Nominees Pty Ltd T/A Michaels Camera Video Digital [2013] FWCFB 6321

Milford v Coles Supply Chain Pty Ltd & Anor [2021] HCASL 37

Legislation

Fair Work Act 2009 (Cth) ss 12, 365, 366(1), 386, 394, 725