DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Cameron Milford

v

Coles Supply Chain Pty Ltd
(C2019/4735)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT MASSON

SYDNEY, 26 NOVEMBER 2019

Appeal against decision [2019] FWC 4892 of Deputy President Booth at Sydney on 15 July 2019 in matter number C2018/4297.

Introduction and background

[1] Cameron Milford has lodged an appeal, for which permission to appeal is required, against decisions issued by Deputy President Booth on 19 February 2019[1] (first decision) and 15 July 2019[2] (second decision). In the first decision, the Deputy President determined that an application lodged by Mr Milford on 5 August 2018 pursuant to s 365 of the *Fair Work Act 2009* (FW Act) was not lodged within the 21-day time period prescribed by s 366(1)(a). Mr Milford lodged an earlier appeal against the first decision, but in a decision issued on 5 April 2019[3] (appeal decision) the Full Bench refused him permission to appeal. In the second decision, the Deputy President refused to grant Mr Milford an extension of time pursuant to s 366(2) to lodge his application. In his current appeal Mr Milford contends that both the first decision and the second decision were in error because his application was filed within the time limit prescribed by s 366(1). Coles Supply Chain Pty Ltd (Coles) contends that the first decision was correct in determining that Mr Milford's application was filed outside of the time limit prescribed by s 366(1), and the refusal of an extension of time under s 366(1) in the second decision was not attended by appealable error.

[2] The factual background to the matter was précised in the first appeal decision as follows:

> "[2] …Mr Milford was engaged by Coles as a casual store worker from early 2012. On 24 May 2014 he injured his shoulder and lodged a workers' compensation application, in which he also claimed to have sustained a psychological injury. The application was processed by Wesfarmers Limited, the group self-insurer. In July 2014 Mr

[1] [2019] FWC 844

[2] [2019] FWC 4892

[3] [2019] FWCFB 2277

> Milford received a WorkCover medical certificate stating that he was fit for light duties. He returned to work on 24 September 2014 but his shoulder condition worsened, and after working a casual shift on 1 October 2014, he did not work for Coles again.
>
> [3] On 12 October 2014 Mr Milford sent Coles a medical certificate stating that he was again fit for light duties. Coles replied that before he could return to work, Mr Milford needed a clearance for full duties. From November 2014 to June 2016, Mr Milford sent to both Coles and Wesfarmers various medical certificates indicating fitness for light duties. Coles either ignored this correspondence or replied by reiterating the need for full medical clearance.
>
> [4] On 13 June 2016, Wesfarmers advised Mr Milford that it had been informed by Coles that his employment had terminated. On 21 June 2016, Mr Milford wrote to Wesfarmers and Coles stating that he had not received any correspondence concerning his employment status, and disputing that his employment with Coles had ended. Coles did not reply to this message, but on 1 July 2016 Wesfarmers did so, stating that if Mr Milford wished to discuss his employment status, he should contact Coles directly. Wesfarmers also explained that Mr Milford was receiving his weekly compensation payments from Coles because Wesfarmers, as the insurer, was not able to pay him directly, and that this was so even in cases where a person is no longer employed but continues to be entitled to weekly compensation payments.
>
> [5] For the next two years Mr Milford continued to send medicate certificates to Coles, seeking a return to work on light duties. Throughout this period he received workers' compensation payments. On 20 June 2018, Mr Milford wrote to Coles seeking a return to work for rehabilitation arising from his workers' compensation claim. In response, Coles advised Mr Milford on 20 July 2018 that his employment had ceased in 2014. It is not apparent why Coles did not tell Mr Milford at an earlier time that it considered his employment to have ended.
>
> [6] Mr Milford's general protections dismissal application contends that his employment was terminated by Coles on 20 July 2018, and that the reason for his dismissal was his request of 20 June 2018 for a return to work for rehabilitation, which he characterises as the exercise of a workplace right. He alleges that Coles contravened sections 340 and 343 of the FW Act by occasioning adverse action for a proscribed reason. Coles maintains that Mr Milford's casual employment ended with his last casual shift in October 2014 and that the alleged contraventions of the FW Act by Coles in 2018 could not have occurred because he was not an employee of Coles at that time.
>
> [7] In its Form 8A response to Mr Milford's general protections application, Coles objected to the application because it was not lodged within 21 days of the dismissal."

Statutory framework

[3] Part 3-1, *General Protections*, of the FW Act comprises a scheme of provisions establishing a series of enforceable statutory employment protections. Section 340(1) provides, relevantly, that a person may not take "*adverse action*" against another person because the other person has or has proposed to exercise a "*workplace right*". Circumstances

which constitute "*adverse action*" are set out in s 342(1), and include where an employer dismisses an employee. Section 341(1) provides that a person has a "*workplace right*" if, relevantly, the person is entitled to the benefit of a "*workplace law*", or is able to make a complaint or inquiry to a person or having the capacity under a "*workplace law*" to seek compliance with that law or in relation to his or her employment. "*Workplace law*" is defined in s 12 to include any law of the Commonwealth, a State or Territory that regulates the relationship between employers and employees (including by dealing with occupational health and safety matters).

[4] Division 8 of Pt 3-1 concerns compliance with and enforcement of the protections established by the Part. At a high level of generalisation, enforcement of the protections requires a person alleging a contravention of Pt 3-1 to make a "*general protections court application*" to the Federal Court or the Federal Circuit Court. Where the alleged contravention involves a dismissal, Subdiv A of Div 8 establishes a discrete scheme whereby the "*dismissal dispute*" must be subject to a dispute resolution process conducted by the Commission before a general protections court application may be made. In this connection, s 365 provides:

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

[5] Section 366 establishes a time limitation for the making of applications pursuant to s 365 as well as conferring upon the Commission the capacity to extend time:

> **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.

[6] Section 368(1) provides that if an application is made under s 365, the Commission must deal with the dispute other than by arbitration. The statutory note under s 368(1) states that the Commission "*may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion*". Section 368(2) provides that any conference conducted to deal with the dispute must be in private. Section 368(3)(a) provides that if the Commission is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then the Commission must issue a certificate to that effect, and must also, if it forms the view that arbitration under s 369 or a general protections court application does not have a reasonable prospect of success, advise the parties accordingly. Section 369 provides that, once the s 368(3) certificate has been issued, the Commission may arbitrate the dispute if the parties agree that it should do so. Under s 370, a general protections court application must not be made unless the certificate has been issued and the application is made within 14 days of the certificate being issued (except where the application includes an application for an interim injunction).

[7] Finally, section 587 provides:

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.

The decisions

[8] In the first decision, the Deputy President proceeded on the basis that while the Full Bench decision in *Hewitt v Topero Nominees Pty Ltd*[4] (*Hewitt*) prevent her making a finding concerning whether Mr Milford had in fact been dismissed by Coles (noting that Coles denied that it had dismissed Mr Milford at any time), it remained necessary to determine the date by reference to which the 21-day period in s 366(1)(a) operated. The Deputy President's conclusion in this respect wa s that Mr Milford's casual employment with Coles ended after he worked his last shift on 1 October 2014, the date upon which the 21-day period prescribed by s 366(1)(a) commenced was 2 October 2014, and therefore Mr Milford had filed his s 365 application 1404 days out of time. The Deputy President stated that Coles did not make Mr Milford aware of the end of the employment relationship at that time, and did not do so until 2016. The Deputy President did not determine in the first decision whether an extension of time should be granted as Mr Milford had not yet made an application for such an extension.

[9] In the appeal decision, the Full Bench determined to refuse permission to appeal for the following reasons:

> "[16] We have decided not to grant permission to appeal, as we consider Mr Milford's appeal to be premature. The Deputy President has dealt only with the question of whether an extension of time under s 366(2) is required. She has not considered any application to allow a further period. If Mr Milford seeks and is granted an extension of time, his matter will proceed to conference, and, in the event the matter does not settle, the Commission will issue a certificate at the appropriate time. That will then conclude the Commission's involvement with Mr Milford's application. Thereafter he would need to decide whether to take his claim to a court. If on the other hand Mr Milford seeks an extension of time and the Deputy President decides not to grant it, he could then file an appeal from that decision. Subject to being granted permission to appeal, the substantive arguments that Mr Milford seeks to advance before us now could be made then, together with any challenge to the decision not to extend time.
>
> [17] It is not desirable or in the interests of the efficient administration of justice for appeals to be brought from interlocutory or interim decisions, or from substantive decisions that form part of a broader controversy, the totality of which might rationally be the subject of a single appeal.
>
> [18] Further, there is no substantive or procedural prejudice to Mr Milford that arises from our refusing permission to appeal. Mr Milford can make an application for an extension of time without prejudice to what he maintains to be his pleaded case, namely that he was dismissed in July 2018. We also note that any decision by the Deputy President not to grant an extension of time would necessarily be founded upon her conclusion in the Decision that an extension of time was needed. The 21 day period prescribed by the Commission's rules for instituting an appeal would run from the date of any decision not to extend time. The significance of this is that Mr Milford would not need to seek an extension of time to appeal the Decision, because it would in substance form part of the reasons for any future decision not to grant an extension of time.

[4] [2013] FWCFB 6321, 238 IR 42

> [19] In these circumstances, we do not consider that the present appeal enlivens the public interest, or that permission to appeal should otherwise be granted under s 604(2). In light of this conclusion, it is not necessary for us to record our opinion on the grounds of appeal. Nevertheless, we make two brief observations.
>
> [20] First, several of the appeal grounds contended that the Deputy President erred in dismissing the application on the basis that it was made out of time. This contention is misconceived. As we have said, the Deputy President did not dismiss Mr Milford's application. She dealt only with the question of when Mr Milford was dismissed and whether the application was out of time. Mr Milford's application under s 365 remains before the Deputy President. He may now seek an extension of time, and if he does so, the Deputy President has indicated that she will make relevant directions.
>
> [21] Secondly, we consider that the present matter raises a question as to whether the determination of the date of dismissal correlatively involved an adverse determination of the pleaded case under s 365, contrary to the principles in *Hewitt*. Of course, the Deputy President has no power to make any determination of the substantive application under s 365, and her conclusion as to the date of dismissal does not bind any court that might subsequently consider Mr Milford's general protections claim.

[10] In the second decision, the Deputy President considered each of the matters identified in s 366(2)(a)-(e). It is not necessary for us to traverse the Deputy President's consideration of each of these matters except in relation to s 366(2)(d). In her consideration of the merits of Mr Milford's application pursuant to this provision, the Deputy President firstly noted the submissions of Mr Milford and Coles as follows (footnotes omitted):

> "[31] Mr Milford said:
>
> > 'I haven't made an application to deal with the dispute that occurred in October 2015 [sic], if there was one – there was no dismissal dispute – or an application to deal with the dispute that occurred in June 2016. It is the application to deal with the dispute that occurred on 20 July 2018.'
>
> [32] He went on to say:
>
> > 'Now my concern is that in this instance if the application is dismissed, that would effectively determine my legal right to address the dismissal dispute that arose on 20 July 2018.'
>
> [33] Coles disputes these grounds and submitted:
>
> > 'There are no merits to this claim. The Respondent submits that the Applicant was engaged on a casual basis and his employment came to an end when he was not reengaged for further shifts, not for unlawful reasons as alleged, or at all.'

[11] The Deputy President's conclusion in relation to s 366(2)(d) was as follows (footnotes deleted):

> "[34] My earlier decision is consistent with the 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.' Neither the hearing of 17 June 2019 nor the hearing that gave rise to the decision of 19 February 2019 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."
>
> [35] I consider this factor as neutral in the consideration of Mr Milford's application for an extension of time."

[12] The Deputy President's overall conclusion was:

> "[41] I have found that in respect to the period 2 October 2014 to either 13 June 2016 or 1 July 2016 exceptional circumstances existed that enliven the Commission's jurisdiction to grant an extension of time. I have decided that Mr Milford's behaviour in the balance of the period of delay weighs against the exercise of that discretion in his favour. Taking this, and all other factors into account as outlined above, I decline Mr Milford's application for an extension of time."

Appeal submissions

[13] Mr Milford submitted that:

- his application was made within the time limit set by s 366(1)(a) because it was made within 21 days of the alleged dismissal dispute identified in his application, and the Deputy President erred in finding otherwise;

- the Commission was not required or authorised to determine whether he had an entitlement to make his application in respect of the alleged dismissal, and it was confined to dealing with the dismissal dispute through mediation or conciliation, or by making a recommendation or expressing an opinion;

- for the reasons stated in the Full Bench decision in *Hewitt*, the time limit under s 366(1)(a) is 21 days from the date the alleged dismissal in contravention of Pt 3-1 took effect, and in this case the Deputy President did not have jurisdiction to determine whether he was dismissed within the meaning of s 342 on 20 July 2018;

- the Deputy President had erred in conducting a full determinative hearing to effectively arbitrate the jurisdictional issue of whether he had been dismissed on 20 July 2018;

- the Deputy President had no power to dismiss his application on the basis that it had no reasonable prospects of success, which is what effectively occurred; and

- in the alternative, the Deputy President erred in concluding that his employment terminated on 1 October 2014 because his employment subsisted while he was on workers' compensation and Coles never communicated to him that he was dismissed prior to 20 July 2018.

[14] Mr Milford submitted that permission to appeal should be granted because the decisions under appeal were contrary to the principles established in *Hewitt* and the appeal raised issues of importance and general application and was meritorious.

[15] Coles submitted that:

- s 366 required the Commission to determine the date on which the dismissal took effect as a step in considering whether a s 365 application has been filed within time and, if not, whether there are exceptional circumstances in reliance on which it may exercise its discretion to extend the time limit;

- in the first decision the Deputy President properly understood the Commission's function under s 366(1) as described, and in the second decision the Deputy President made a discretionary decision under s 366(2) and found against Mr Milford;

- the reasoning of the Deputy President was consistent with *Hewitt*, in which the Full Bench accepted that s 366 involved a determinative power;

- it was a jurisdictional precondition to the discharge of functions under s 368 that an application has been made under s 365, and such an application could only be made in accordance with s 366;

- the Commission was therefore required to consider compliance with s 366 before undertaking any function under s 368, and this requires a finding of fact as to when the dismissal took effect;

- it was not the case that a s 365 applicant could nominate any date the applicant liked as to when the dismissal took effect, and the Commission would then be required to issue a certificate under s 368(3)(a) based on a fiction;

- a construction of s 366 which required an out-of-time application to be treated as if it were made under s 365 by the mere stating of an in-time date would defeat the policy purpose of the time limit;

- the Deputy President was cognisant of *Hewitt*, expressly refrained from determining whether there had been a dismissal, and did not dismiss Mr Milford's application because of any conclusion that it did not have a reasonable prospect of success; and

- the Deputy President's finding of fact concerning the termination date of 1 October 2014 should not be interfered with on appeal, since it was based on the evidence, documents and submissions.

[16] Coles submitted that permission to appeal should not be granted because the appeal lacked merit for the reasons stated above; alternatively, the appeal should be dismissed.

Consideration

[17] The second decision may be characterised as finally disposing of Mr Milford's s 365 application, with the first decision constituting an interlocutory decision. It is clear that the second decision, in which an extension of time pursuant to s 366(2) was refused, proceeded on the premise determined in the first decision that it was necessary to determine the date by reference to which the 21-day time limitation operated, and that date was 1 October 2014 with the result that Mr Milford had lodged his application out of time. It is well-established that, in an appeal from a final decision or order, the Full Bench can correct any interlocutory decision or order which affected the final result.[5] Accordingly, and consistent with the basis upon which Mr Milford advances his appeal, our decision will involve a review of the first decision as well as the second decision notwithstanding the earlier refusal of permission to appeal the first decision.

[18] Mr Milford is not a lawyer and has at all relevant times been self-represented. Taking these matters into account, it can reasonably be discerned from Mr Milford's s 365 application that he was, in substance, pleading the following case concerning an alleged contravention of the general protections provisions in Pt 3-1 arising from his alleged dismissal:

(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.

[5] *United Firefighters' Union of Australia v Country Fire Authority* [2013] FWCFB 8165 at [19], citing *Gerlach v Clifton Bricks Pty Limited* [2002] HCA 22, 209 CLR 478

(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).

[19] We note that Mr Milford's application also made reference to a contravention of s 343, which relates to coercion. It is not clear how this provision arises in connection with the pleaded dismissal, and we will not regard it as relevant.

[20] As earlier stated, Mr Milford filed his s 365 application on 5 August 2018. This was within 21 days of the date of the pleaded dismissal.

[21] Coles' initial Form F8A response to Mr Milford's application contended that it had terminated his employment on 31 December 2014, that his application was out of time, and that any contravention of Pt 3-1 of the FW Act was denied. However in its submissions before the Deputy President, Coles modified its position. It contended that it had *never* dismissed Mr Milford; rather, his employment as a casual employee had terminated when he completed his last shift on 1 October 2014. It was on the basis of this modified position that the Deputy President proceeded in the decisions under appeal.

[22] Having regard to the respective positions of the parties, it is apparent that the Deputy President's determination in the first decision that, for the purpose of s 366(1)(a), she would proceed upon the basis that Mr Milford's employment with Coles terminated on 1 October 2014 necessarily involved the complete rejection of Mr Milford's pleaded case concerning his dismissal. As earlier set out, his contention that Coles contravened s 340(1) by dismissing him was founded upon a series of events which occurred in 2018. If his employment ended in 2014, there could be no foundation for the alleged contravention. The Deputy President's statement in the second decision that the merits of Mr Milford's substantive application had not been the subject of submissions and evidence before her and could not be interrogated by her cannot, with respect, be accepted. Coles explicitly submitted that Mr Milford's application had no merit because his employment terminated in 2014 rather than there being a dismissal in 2018, and the Deputy President effectively accepted that position in the first decision. 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. That was made clear by Mr Milford in the submissions he made to the Deputy President which are recorded at paragraphs [31] and [32] of the second decision, which we have earlier set out.

[23] Although the Deputy President disavowed any intention of determining whether Mr Milford had been dismissed, the position arrived at in the first decision necessarily implied a conclusion that Mr Milford had not been dismissed. The parties' respective positions allowed for only two possibilities: first, that Mr Milford was dismissed on 20 July 2018 and his application was therefore filed within the 21 days prescribed by s 366(1)(a) or, second, that his employment terminated at the end of his last shift on 1 October 2014 and there was no dismissal at all. There was not on any view a third alternative of a dismissal occurring on 1

October 2014. That being the case, s 366(1) could have no sensible application to the 1 October 2014 date preferred by the Deputy President.

[24] The question considered and determined by the Full Bench in *Hewitt* was as follows:

> "[14] The question on appeal is whether the Commission must make a determination that the applicant in a s.365 proceeding has been 'dismissed' from their employment (within the meaning of s.365), before the Commission can conduct a conference in relation to the dispute. For the reasons which follow we have concluded that the answer to this question is no. Further, the Commission does not have the requisite jurisdiction to effectively dismiss a s.365 application on the basis of a finding that the applicant was not 'dismissed' from their employment."

[25] The Full Bench stated three reasons for reaching the conclusion that it did. The first was that s 368(1) required the Commission to conduct a conference to deal with the dismissal dispute identified in the s 365 application, and nothing in the provision was suggestive of the possibility of an intermediate hearing concerning jurisdictional issues.[6] The second was that the requirement to advise the parties if the Commission considered that the application had no reasonable prospect of success, the requirement to issue the certificate allowing the matter to proceed before a court notwithstanding the provision of such advice, and the prohibition in s 587(2)(b) against dismissing a s 365 application on the basis that it had no reasonable prospect of success, all told against the proposition that the Commission had any determinative function in relation to the application.[7] The third was that there was nothing in Subdiv A of Div 8 of Pt 3-1 which contemplated the receipt of evidence by the Commission or the making of a determination requiring findings of fact.[8]

[26] In relation to s 366, the Full Bench said (emphasis added):

> "[38] As we have noted, s.366 provides an exception to the general proposition that the Subdivision does not confer any determinative power upon the Commission. But the express power in s.366(2), to extend the time within which an application must be made, serves to reinforce the point that where the legislature intended to confer a determinative power it did so expressly. Absent an express provision there is no legislative intent to confer a determinative power. This point is supported by an analysis of the provisions of the Act which deal with unfair dismissal applications. We deal with those provisions shortly.
>
> [39] The second point to note about s.366 is that **it does not involve any determination of the merits of a s.365 application**. The section simply prescribes the time within which the entitlement to make a s.365 application must be exercised - it does not deal with the entitlement to make the application per se."

[27] Neither party before us submitted that *Hewitt* was not correctly decided.

[28] Consistent with the reasoning in *Hewitt*, we consider that the time limitation in s 366(1) must be read as operating by reference to the dismissal that is pleaded in the

---

[6] [2013] FWCFB 6321, 238 IR 42 at [24]-[32]

[7] Ibid at [33]-[35]

[8] Ibid at [35]-[37]

application that is lodged in the Commission. 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 theoretical scenario posited by Coles whereby an applicant adopts a fictitious date for the pleaded dismissal in order to avoid the operation of the time limitation would no doubt give rise to a dispute of this nature (although we have no experience of this ever having actually happened). 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).

[29] However the matter the subject of this appeal is not such a case. The relevant dispute here is not in truth about the precise date upon which the pleaded dismissal took effect, but whether there has been a dismissal at all. The Deputy President's acceptance of Coles' position concerning the date of the termination of Mr Milford's employment, for the reasons already stated, necessarily involved a denial that the 2018 dismissal pleaded in Mr Milford's application ever occurred. Although the Deputy President disavowed doing so, the first decision involved in substance the Deputy President doing what the Full Bench in *Hewitt* said the Commission had no power to do - that is, dealing with the merits of Mr Milford's application and determining that he was not in fact dismissed in the circumstances claimed in his application. Further, there was no basis in the second decision for s 366(2) to be applied to a termination date of 1 October 2014, since on any view no dismissal occurred on that date by reference to which s 366(1) could validly operate.

[30] For these reasons we conclude that the first and second decisions were both attended by appealable error. Because the errors are jurisdictional in nature and have the result of unjustly denying Mr Milford the capacity to bring his general protections claim before a court, we consider that it is appropriate to grant permission to appeal and uphold the appeal. In substitution for the first and second decisions, we find that Mr Milford's application was lodged within the 21-day time period prescribed by s 366(1)(a). It should be obvious, based on our reasoning, that this conclusion does not involve the expression of any view concerning the date of the termination of Mr Milford's employment or the merits of his application generally.

Orders

[31] We order as follows:

(1) Permission to appeal is granted.

(2) The appeal is upheld.

(3) The first decision ([2019] FWC 844) and the second decision ([2019] FWC 4892) are quashed.

(4) Mr Milford's s 365 application (C2018/4297) is referred to Deputy President Lake to be dealt with under s 368 of the FW Act.

VICE PRESIDENT

Appearances:

C Milford on his own behalf.
B Avallone of Counsel and *W Fauvel* on behalf of Coles Supply Chain Pty Ltd.

Hearing details:
2019.
Melbourne with video link to Brisbane:
3 September.

Printed by authority of the Commonwealth Government Printer

<PR714072>