



## End of the road for Coles driver sacked for drug test failure

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A full bench has overturned an extension of time, originally granted on the basis of his union's representative error, for a truck driver summarily sacked by Coles Supermarkets after testing positive for methamphetamine and cannabinoids.

Vice President Adam Hatcher, Deputy President Bryce Cross and Commissioner Tim Lee found "no evidence", even in "the broadest sense" to support the representative error finding.

The bench noted that the driver did not allege such an error, and also found no evidence that the SDA acted as his representative at any time after his dismissal, or that the driver sought any advice from it about making a claim.

Further, it found no evidence to support the member's findings that the driver took immediate action with the union after his dismissal or that he filed the claim on the advice of the union after it failed to advise him of the 21-day time limit.

The bench also ruled the commissioner erroneously found the driver took immediate action with WorkSafe Tasmania after his separation and filed his claim on its advice after it failed to advise him of the time limit.

The "most that can be safely said" is that WorkSafe suggested he lodge a claim with the FWC to challenge the basis of the dismissal and "thus support his claim for long service leave entitlements".

It continued that there is no evidence "and nor is it the case, that WorkSafe Tasmania is a source of advice concerning unfair dismissal claims under the FW Act".

The bench also took issue with Commissioner Leyla Yilmaz's finding that the driver challenged his summary dismissal and that he filed the application after Coles' advice that it would not reconsider the dismissal (or pay his long service leave).

"This is not supported by the evidence.

"There was no evidence that [the driver] ever asked Coles to reconsider his dismissal.

"Nor was there evidence that, after the dismissal occurred, [the driver] 'challenged' it (beyond threatening Coles that if it did not pay his long service leave, he would lodge an unfair dismissal application)."

The bench redetermined the claim and denied the driver an extension of time.

### Driver dismissed after drug tests

Coles dismissed the driver after a December 1 oral swap produced an unconfirmed methamphetamine reading.

A second test provided a positive test for cannabinoids but not for methamphetamine.

The driver told Commissioner Yilmaz that he believed he had good grounds to challenge the drug test findings because they conflicted, but claimed he received different advice from the SDA and WorkSafe Tasmania.

He said "the first one came up for methamphetamine and then when they've done. . . re-tested me 30 seconds later and sent that back and there's no meth and then all of a sudden it's, yes, THC".

But when he spoke to the SDA "they were just like no, [Coles is] not going to budge.

"But then yes, WorkSafe were like 'no, no, you should fight this, you should fight this'."

#### Claim brought to secure pro rata LSL payout

The driver told the Commission that he mainly made the dismissal claim to contest the employer's denial of his pro rata long service leave entitlement, after more than seven years of service.

Coles told the driver the LSL had been denied because of his alleged serious and wilful misconduct.

He told Commissioner Yilmaz that the state LSL law "states that if you've been employed with a company for over seven years, unless you are dismissed for severe and wilful, and they're very key on this and wilful side of things, that you're eligible for the seven year pro rata".

"Coles every step of the way has absolutely refused to even consider the variation in severe and wilful.

"According to the people I've spoken to the Coles policy is severe or wilful.

"I attempted to get people to actually, you know, check the legislation because that's not what it is and they were not interested in doing so."

The bench noted that "it remains apparent that [the driver's] main objective is to obtain payment of his accrued long service leave".

It underlined that its ruling "in no way precludes him from seeking recourse in that respect", saying the State long service leave legislation provides for referral of such disputes to the secretary of the Tasmanian Department of Justice, to the Tasmanian Industrial Commission, "or to be resolved upon direct application to the Commission".

It cited recent cases where that mechanism "has been used by employees to successfully obtain payment of long service leave entitlements denied by their employer", while claims can also be made to a magistrate.

[Coles Supermarkets Australia Pty Ltd v Alexander Tapier \[2021\] FWCFB 2559 \(6 May 2021\)](#)

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