DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Mr Pawel Jan Slowinski
v
OS MCAP Pty Ltd
(C2023/8162)

COMMISSIONER PLATT ADELAIDE, 20 FEBRUARY 2024

Application to deal with contraventions involving dismissal – extension of time – granted

[1] On 22 December 2023, Mr Pawel Jan Slowinski (the Applicant) lodged a s.365 general protections application seeking a remedy in relation to the termination of his employment with OS MCAP Pty Ltd (the Respondent) which occurred on 13 November 2023.

[2] The *Fair Work Act 2009* (the Act) allows 21 days to lodge this application. The application appears to have been made outside of that time frame. This means that an extension of time must be granted by the Fair Work Commission to allow the general protections application to proceed.

[3] The application identified that it was made beyond the 21 days from the date of dismissal and provided the following explanation:

> *"We submitted a Form F2 application for unfair dismissal within the 21 day time frame in commission matter number U2023/11844, believing this was the only form available. However, at the conciliation conference the Commissioner in attendance discussed matters which led us to realise that a more appropriate Form was available, namely Form 8, and that we had submitted the incorrect Form.*
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> *The contents and substance of the matters pleaded in this Form 8 is identical to that pleaded in the submitted Form 2 Application."*

[4] On 19 January 2024, the Commission corresponded with the parties and advised that the extension of time issue was listed for Hearing at 2:00pm on 14 February 2024. Directions were issued for the filing of material and provided information about the matters that would be considered by the Commission.

[5] Both parties filed submissions. In addition, the Applicant filed a statement and two statutory declarations from his legal representative, Ms Mychi Duong.
[6] The material received was collated into a Digital Court Book (DCB) and distributed to parties prior to the Hearing. The DCB was received into evidence (with appropriate weight being afforded based on its relevance, hearsay and the like).

[7] The Applicant was represented by Ms Sagorika Platel of Counsel, who was granted permission pursuant to s.596(2)(a) and (b) which was unopposed by the Respondent. The Respondent was represented by Mr Lucas Ryals.

EVIDENCE

[8] The Applicant gave evidence and was cross examined. Ms Mychi Duong gave evidence and answered questions from the Commissioner but was not cross examined by the Respondent.

[9] The relevant evidence is summarised below:

- The Applicant engaged RSA Law during the disciplinary process undertaken by the Respondent. Mr Roger Sallis (Barrister and Solicitor) corresponded with the Respondent on the Applicant's behalf.

- On 13 November 2023, the Respondent dismissed the Applicant.

- The Applicant contended that he was dismissed as a result of making complaints concerning safety to the Respondent and denied the alleged driving infringement (that he had disobeyed a stop sign).

- On 14 November 2024, the Applicant had a discussion with Mr Sallis. The option of lodging and Unfair Dismissal and a General Protections Claim were discussed. This is supported by the oral evidence of the Applicant and Mr Sallis' notes.[i]

- On 17 November 2023, the Applicant telephoned RSA Law. Mr Sallis was not available and the Applicant spoke to Ms Duong. The Applicant contends (and I accept) that he instructed Ms Duong to file a General Protection Claim.

- Ms Duong gave evidence that she is unfamiliar with industrial relations matters. I note that Ms Duong was admitted some time ago and holds an unrestricted practicing certificate. For some reason Ms Duong thought it was appropriate to rely upon Google as her research tool having discovered a Form F2 (which is an unfair dismissal application). The Unfair Dismissal application was lodged on 1 December 2023 which was within 21 days of the dismissal. It appears Mr Sallis did not review the application filed. Ms Duong confirmed that the Applicant would not be required to pay the costs of the extension of time hearing due to her error.

- The Applicant advised that he had not made an Unfair Dismissal or a General Protections Claim before and did not know what the appropriate form looked like. He relied upon the claimed expertise of his representative. He did not understand the significance of the From F3 Employer Response Form which refers to Unfair Dismissal as opposed to General Protections.

- The Commission conducted a staff conciliation on 21 December 2023, Mr Sallis represented the Applicant. The Applicant discovered that the wrong application had been filed. The Unfair Dismissal was withdrawn and the General Protections Claim

(now out of time) was filed on 22 December 2023, 18 days beyond the time permitted.

[10] The Respondent did not present any evidence.

[11] The Applicant submits that the delay was due to representative error and that he did not contribute to the delay.

[12] The Respondent contends that the Applicant contributed to the delay by not noticing the application form lodged and the fact the Form F3 response referred to Unfair Dismissal and not General Protections. The Respondent did not challenge the evidence of Ms Duong and indicated that it did not contest the existence of representative error.

Applicable Law

[13] Section 366 of the Act relevantly states:

"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."

[14] I have considered the provisions of s.366(2) of the Act in the context of the Full Bench decision in *Nulty v Blue Star Group Pty Ltd*[ii] which stated:

"[10] It is convenient to deal first with the meaning of the expression "exceptional circumstances" in s.366(2). In *Cheval Properties Pty Ltd v Smithers* a Full Bench of FWA considered the meaning of the expression "exceptional circumstances" in s.394(3) and held:

"[5] The word "exceptional" is relevantly defined in The Macquarie Dictionary as "forming an exception or unusual instance; unusual; extraordinary." We can

> apprehend no reason for giving the word a meaning other than its ordinary meaning for the purposes of s.394(3) of the FW Act."

[11] Given that s.366(2) is in relevantly identical terms to s.394(3), this statement of principle is equally applicable to s.366(2).

[12] The ordinary meaning of the expression "exceptional circumstances" was considered by Rares J in Ho v Professional Services Review Committee No 295, a case involving in s.106KA of the Health Insurance Act 1973 (Cth). His Honour observed:

> "23. I am of opinion that the expression 'exceptional circumstances' requires consideration of all the circumstances. In *Griffiths v The Queen* (1989) 167 CLR 372 at 379 Brennan and Dawson JJ considered a statutory provision which entitled either a parole board or a court to specify a shorter non-parole period than that required under another section only if it determined that the circumstances justified that course. They said of the appellant's circumstances:
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> > 'Although no one of these factors was exceptional, in combination they may reasonably be regarded as amounting to exceptional circumstances.'
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> 24. Brennan and Dawson JJ held that the failure in that case to evaluate the relevant circumstances in combination was a failure to consider matters which were relevant to the exercise of the discretion under the section (167 CLR at 379). Deane J, (with whom Gaudron and McHugh JJ expressed their concurrence on this point, albeit that they were dissenting) explained that the power under consideration allowed departure from the norm only in the exceptional or special case where the circumstances justified it (167 CLR at 383, 397).
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> 25. And, in *Baker v The Queen* (2004) 223 CLR 513 at 573 [173] Callinan J referred with approval to what Lord Bingham of Cornhill CJ had said in *R v Kelly (Edward)* [2000] QB 198 at 208, namely:
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> > 'We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.'
>
> 26. Exceptional circumstances within the meaning of s 106KA(2) can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional. Thus, the sun and moon appear in the sky every day and there is nothing exceptional about seeing them both simultaneously during day time. But an eclipse, whether lunar or solar, is exceptional, even though it can be predicted, because it is outside the usual course of events.

> 27. It is not correct to construe 'exceptional circumstances' as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural 'circumstances' as if it were only a singular occurrence, even though it can be a one off situation. The ordinary and natural meaning of 'exceptional circumstances' in s 106KA(2) includes a combination of factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon. And, the section is directed to the circumstances of the actual practitioner, not a hypothetical being, when he or she initiates or renders the services."

> [13] In summary, the expression "exceptional circumstances" has its ordinary meaning and requires consideration of all the circumstances. To be exceptional, circumstances must be out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare. Circumstances will not be exceptional if they are regularly, or routinely, or normally encountered. Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional. It is not correct to construe "exceptional circumstances" as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural "circumstances" as if it were only a singular occurrence, even though it can be a one off situation. The ordinary and natural meaning of "exceptional circumstances" includes a combination of factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon."

Consideration

[15] This general protections application was made 18 days outside of the 21 day time limit and therefore, can only be pursued if this time limit is extended.

[16] Section 366 of the Act requires the Commission to take into account the matters set out in s.366(2)(a)-(e). It is convenient to discuss these under the various matters raised by the provision, however, insofar as they are relevant, each matter has been treated as a matter of significance in the decision making process.

The reason for the delay

[17] Based on the uncontested evidence of Ms Duong , I am satisfied that the reason for the delay was Representative Error and I also find that the Applicant did not contribute to the delay. This weighs in favour of granting the extension of time.

Any action taken by the person to dispute the dismissal

[18] The Applicant's prior unfair dismissal application filed on 1 December 2023 represents action taken to dispute the dismissal. This weighs in favour of granting the extension of time.

Prejudice to the employer (including prejudice caused by the delay)

[19] There is no submission that the granting of an extension of time represents prejudice to the Respondent and accordingly I have regarded the merits as a neutral factor.

The merits of the application

[20] In terms of the merits of the application, there is insufficient evidence before me to make an assessment and accordingly I have regarded the merits as a neutral factor.

Fairness as between the person and other persons in a similar position

Despite the Respondent's submission to the contrary, I find that consideration of fairness relative to other persons in similar positions is a neutral factor. The decisions in *Pringle v BHP Iron Ore*[iii] and *Parker v BHP Billiton Iron Ore*[iv] that I was referred to by the Respondent do not appear to be in anyway analogous to this matter.

Conclusion

[21] I have considered all the material before me and I am satisfied that the Applicant's circumstances can be regarded as exceptional so as to support an extension of time. The request for an extension of time is granted. An Order[v] reflecting this decision has been issued.

[22] At the conclusion of the hearing the parties were advised of my decision to extend the time. A conciliation was conducted but the matter did not resolve and a Certificate was issued.

COMMISSIONER

Appearances:

Ms S Platel of Counsel on behalf of the Applicant.

Mr L Ryals on behalf of the Respondent.

Hearing details:

2024
Adelaide
14 February

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[i] Page 73 of the DCB.

[ii] [2011] FWAFB 975.

[iii] [2022] FWC 554.

[iv] [2022] FWC 545.

[v] PR771477.