DECISION

Fair Work Act 2009
s.365—General protections

Elizabeth Maree Kelly
v
Atanaskovic Hartnell Corporate Services Pty Limited T/A Atanaskovic Hartnell; Atanaskovic Hartnell
(C2016/7105)

COMMISSIONER RYAN MELBOURNE, 30 DECEMBER 2016

General protections application - extension of time.

[1] The Applicant filed an application to deal with a general protections contravention involving dismissal pursuant to s.365 of the *Fair Work Act 2009* (the Act). The Applicant alleges she was forced to resign due to the actions taken by the Respondent and on 4 August 2016 she gave 3 months' notice of her intention to resign. The Applicant's last day of employment was 4 November 2016.

[2] The application filed on 1 December 2016 was identified by the Fair Work Commission as being made outside the 21 day time limit specified by s.366(1)(a) of the Act.

[3] As such, the application was listed for hearing in relation to an extension of time application. The parties were directed to file and serve their respective material in relation to the extension of time application. The hearing of the extension of time matter was listed for 21 December 2016. At the hearing evidence was given on behalf of the Applicant by both the Applicant and by her sister Ms Annette Bedford. Each witness was subject to cross examination by the Respondent.

[4] The Act places a time limit on the making of a general protections application involving dismissal. Section 366 provides as follows:

> "(1) An application under section 365 must be made:
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> (a) within 21 days after the dismissal took effect; or
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> (b) within such further period as the FWC allows under subsection (2).
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> (3) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:
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> (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."

[5] The application in the present matter was not filed within the 21 day time limit specified by s.366(1)(a). Therefore the application will only be within time if the Commission allows a further period for the making of the application.

[6] As s.366(2) makes clear an extension of time can only be granted if the Commission is satisfied that there are exceptional circumstances present.

[7] What constitutes "exceptional circumstances" was considered by a Full Bench in *Nulty v Blue Star Group P/L*:[i]

"10. It is convenient to deal first with the meaning of the expression "exceptional circumstances" in s 366(2). In *Cheval Properties Pty Ltd (t/as Penrith Hotel Motel) 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*,4 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.

> 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.
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> 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 everyday 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.
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> 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."
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> [14] Mere ignorance of the statutory time limit in s.366(1)(a) is not an exceptional circumstance. Indeed, unfortunately, it would seem to be all too common for dismissed employees to be unaware of the time limits imposed in relation to making an application for an unfair dismissal remedy or a general protections FWA application. The parliament has chosen to condition the discretion to extend time for making such applications on the existence of "exceptional circumstances". In doing so the parliament must be presumed to have proceeded on the basis that an employee who is aggrieved at being dismissed ordinarily ought be expected to seek out information on any remedy they may have in a timely fashion such that delay on account of ignorance of the statutory time limit is not, of itself, an exceptional circumstance.
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> [15] A finding that there are "exceptional circumstances", taking into account the matters specified in paragraphs 366(2)(a) to (e), is necessary before the discretion to extend time is enlivened. That is, even when "exceptional circumstances" are established, there remains a discretion to grant or refuse an extension of time. That discretion should be exercised having regard to all the circumstances including, in particular, the matters specified in paragraphs 366(2)(a) to (e) and will come down to a consideration of whether, given the exceptional circumstances found, it is fair and equitable that time should be extended." [references removed]

[8] The discussion in *Nulty*, with its reliance on Rares J's decision in *Ho*, contains a nuanced outcome which is possible to miss. In *Ho* Rares J was considering legislation in which the term "exceptional circumstances" was not qualified. The specific provision under consideration in *Ho* was s.106KA(2) of the *Health Insurance Act 1973* which provided as follows:

> *"(2) If the person under review satisfies the Committee that, on a particular day or particular days during the relevant period, exceptional circumstances existed that affected the rendering or initiating of services by the person, the person's conduct in connection with rendering or initiating services on that day or those days is not taken by subsection (1) to have constituted engaging in inappropriate practice."*

The conclusion in *Nulty* at [13] as to the proper meaning of the phrase "exceptional circumstances" is undoubtedly correct. However the nuance in the decision in *Nulty* is the recognition that when "exceptional circumstances" is used in s.366(2) all of the circumstances that have to be taken into account are those enumerated in s.366(2). The opening sentence of para [13] in *Nulty* is misleading if the reader does not have regard to the opening sentence of para [15] of *Nulty*.

[9] In any consideration as to whether or not there are "exceptional circumstances" the Commission must only consider the matters enumerated in s.366(2)(a) to (e) and no other matters. Unlike a number of other provisions of the Act such as s.387 (Criteria for considering harshness, etc.) or s.392 (Remedy – compensation), s.366(2) does not permit or require the Commission when considering an extension of time application to take into account "all the circumstances of the case" or "any other matters that the Commission considers relevant".

This point was made very clear in the Explanatory Memorandum to the Act which said of s.366(2):

> 1480. Subclause 366(2) provides an exhaustive list of the factors FWA must take into account when determining if there are exceptional circumstances. (emphasis added)

[10] Para [13] of *Nulty* must always be applied on the basis of only taking into account the matters enumerated in s.366(2) and it is not open to the Commission to take into account all of the circumstances of the case when considering the existence of "exceptional circumstances". However as the decision in *Nulty* makes very clear at [15] if "exceptional circumstances" within the confines of s.366(2) exist then the Commission can take into account all of the circumstances of the case when considering whether or not to exercise the discretion to grant an extension of time.

[11] After the Applicant had completed her last day at work the Applicant was living at a rural location in NSW in which the Applicant did not have access to the internet. The Applicant had a telephone with a fax facility. Towards the end of the 21 day time period after the dismissal took effect the Applicant sought assistance from her sister to file a general protections application. Ms Bedford downloaded a copy of Form F8 and faxed it to the Applicant who filled it in and faxed it back to Ms Bedford. The intention of the Applicant in seeking assistance from her sister was that her sister would email to the FWC a completed Form F8. The Applicant in previous contact with the FWC had been advised to email her general protections application to the FWC. After receiving the completed faxed Form F8 from the Applicant, Ms Bradford identified that it was possible to make an online application. She advised the Applicant of this possibility and sought permission from the Applicant to do so. The Applicant agreed that Ms Bradford could go ahead and make an online application. Ms Bradford completed an online application with one critical exception – no credit card details were entered into the online application for payment of the lodgement fee. The online application was made about lunchtime on 25 November 2016 (the 21st day after the dismissal took effect). At 12.26pm on 25 November 2016 Ms Bradford received a lodgement response from the FWC providing her with a lodgement reference number for the general protections application she had lodged online. The evidence of Ms Bradford was that she understood that the FWC would contact the Applicant within 3 days of the application having been made to enable the Applicant to pay the lodgement fee. When the FWC did not contact the Applicant in relation to the payment of the lodgement fee the Applicant contacted the FWC on 1 December 2016 to provide the FWC with her credit card details. At that time the Applicant was advised by the FWC that the FWC had no record of the application having been lodged on 25 November 2016. The Applicant then contacted Ms Bradford who on the same day at 12.05pm emailed to the FWC a Form F8.

[12] The Applicant contends that the reason for the delay in filing the application on 1 December 2016 is sufficient to constitute an exceptional circumstance.

[13] The Commission accepts that a lodgement notice was sent to Ms Bradford on 25 November 2016. Such a lodgement notice should not have been sent as the online form was incomplete. The Commission, as currently constituted, cannot explain why a lodgement notice was sent in circumstances where such a lodgement notice should not have been able to be generated through an incomplete online application.

[14] The Commission accepts that Ms Bradford genuinely believed that in making an online application on 25 November 2016 that the FWC would contact the Applicant within 3 days to obtain payment by way of credit card. The online lodgement process requires that the Form F8 be downloaded and filled in and then uploaded to the FWC website. The Form F8 contains a statement that if paying by credit card then the FWC will contact the applicant for the credit card details. However, the online lodgement process requires that payment be made at the time of uploading the Form F8 to the website. The information on the Form F8 is not the same as the information on the online lodgement service, yet the Form F8 is used to complete an online lodgement.

[15] In the present matter the evidence of both Ms Bradford and Ms Kelly was given openly and honestly and the evidence of each was not shaken by cross examination. The Commission accepts the evidence of both Ms Bradford and Ms Kelly. Both gave evidence to the best of their recollection of events and the minor inconsistencies between the two are understandable. The evidence of Ms Bradford and Ms Kelly provides a wholly satisfactory reason for the delay in filing an application on 1 December 2016 if the 21 day time limit ended on 25 November 2016.

[16] The Respondent has contended that the dismissal took effect on 5 August 2016, the date that the Applicant gave written notice of her resignation to the Respondent. The Respondent contends that even though the last day of work by the Applicant was 4 November 2016 the Applicant's dismissal took effect on 5 August 2016. The very notion of 'dismissal' is that the employment relationship has ended. In the circumstances where an employee gives notice of termination to their employer and where the employer permits the employee to work out the period of notice it is nonsensical to suggest that the employment relationship has ended with the giving of the notice. The practical relationship which exists as between an employee who has given notice of termination to their employer and the employer who has accepted that the employee will work out their period of notice is nothing other than an employment relationship. In the circumstances of the present matter the dismissal took effect on 4 November 2016 being the last day of work of the Applicant.

[17] As previously discussed the Applicant has provided a reason for the delay in filing an application some 6 days after the 21 day time limit set by s.366(1)(a).

[18] The criteria in s.366(2)(b) was addressed by both parties in their written material. The Respondent contends that the Applicant took no action to dispute the dismissal. The Applicant contends that during the notice period that complaints were made by the Applicant to Mr Hartnell. In the circumstances of the present matter this criteria does not weigh in favour of a finding as to the existence of exceptional circumstances.

[19] The criteria in s.366(2)(c) was addressed by both parties in their written material. The Respondent contends that it has suffered significant prejudice because it did not have the opportunity to address the dismissal any time between 5 August 2016 and November 2016 The Respondent's contentions in relation to this criteria are misconceived as they are based upon the erroneous assertion that the dismissal took effect on 5 August 2016. In any event the Respondent has not led any evidence to support any assertion that it has suffered prejudice in relation to an application which is 6 days out of time. In the present matter this criteria does not weigh against a finding that there are exceptional circumstances nor does it assist the Applicant in establishing that exceptional circumstances exist.

[20] The merits of the application have not been the subject of any detailed submissions or evidence before the Commission. The most that can be said in relation to the merits of the application in the present matter is that this criteria has neutral value in considering whether exceptional circumstances exist.

[21] Both parties agree that the criteria in s.366(2)(e) is not relevant to the present matter. The Commission agrees.

[22] In taking into account each of the relevant criteria in s.366(2) the Commission is positively satisfied that exceptional circumstances exist which warrant the Commission exercising its discretion to grant an extension of time to the Applicant to file her general protections application before close of business on 1 December 2016. As the application is within the further period as allowed by the Commission under s.366(2) the application will be referred for further action under s.368 of the Act.

COMMISSIONER

Appearances:

M. Harmer for the Applicant.

M. Sophocles for the Respondent.

Hearing details:

2016
December 21
Via video link with Member sitting in Melbourne and parties

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[i] [2011] FWAFB 975 at para 13.