



DECISION

Fair Work Act 2009
s.365—General protections

Michael Hall

v

Marel Food Systems Pty Ltd T/A Marel
(C2017/3684)

COMMISSIONER SIMPSON

BRISBANE, 5 SEPTEMBER 2017

Application to extend time – Alleged contraventions involving dismissal – Extension granted

[1] The Act provides that a person who has been dismissed and applies to the Commission for it to deal with a general protections application pursuant to s.365 of the Act, must make the application within 21 days after the dismissal took effect. However, the Commission may allow a further period for the application to be made if the delay in lodgement was due to exceptional circumstances.

[2] Section 366 of the Act provides:

“Section 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.”

[3] Mr Michael Hall alleges his employment was terminated by Marel Food Systems Pty Ltd T/A Marel (Marel) in contravention of the general protections provisions of the Act. Marel denies the allegations, and contends that Mr Hall was not dismissed for exercising a workplace right, but was dismissed because of conclusions drawn from allegations about Mr Hall's inappropriate conduct towards employees in his team.

[4] Mr Hall submitted exceptional circumstances existed that were sufficient to render it just and equitable to grant relief by extending the time under section 366 (2) of the Act exist.

[5] Mr Hall states in his application that he commenced employment with Marel on 24 January 2017 until his dismissal on 13 June 2017. Mr Hall's general protections application was lodged on 5 July 2017, and was one day outside the 21 day period prescribed by the Act. The Application cannot proceed unless an extension of time is granted by the Fair Work Commission (the Commission). Marel did not consent to the application proceeding to a conference and on that basis the matter was initially listed for a hearing of the extension of time argument on 11 August 2017 before Commissioner Spencer, but was subsequently relisted for hearing on 4 September 2017 before me.

[6] Mr Hall was represented by Mr M Brown of Reichman Lawyers and Marel was represented by Mr M Proctor or ClarkeKann Lawyers. Mr Hall filed a witness statement¹ as did Mr Jonathan Rankin² for Marel's case. Both statements were admitted into evidence without the requirement for cross examination.

The Reason for the Delay – s 366(2)(a)

[7] Mr Hall's statement sets out his attempts made to file the general protections application within the statutory time limited period.³ Mr Hall submitted that he made several attempts to upload his F8 application at approximately 9:17pm on 4 July 2017. Mr Hall submitted there appeared to be an error with the FWC website as the documents failed to load.

[8] Mr Hall submitted that the factual circumstances in this case are analogous to those found in *Christopher Johnson v Joy Manufacturing Co Pty Ltd t/as Joy Mining Machinery* [2010] FWA 1394, *Garson v Urban Land Authority* [2013] FWC 6589 and *Wolfgang v Boeing Defense Australia* [2016] FWC 3807.

[9] Mr Hall submitted that in those cases it was determined that failed attempts to lodge an application electronically within the statutory time limited period constituted an exceptional reason for the delay.

[10] Mr Hall submitted evidence from the FWC's Information and Communications Technology team will verify his attempts to file the Application on the evening of 4 July 2017.

[11] Mr Hall submitted that the failure of the Commission's website portal to process and accept the application on the evening of 4 July 2017, despite his attempts, was something beyond his control.

[12] Mr Hall said that four times he attempted to submit the final page and on the final submit it appeared the application had been processed and accepted. He said he tried to

contact the FWC by phone to confirm this but the call went to voice mail. He said he left a voice message about the application.⁴

[13] Mr Hall attached to his statement a copy of a print screen image from his computer showing his history in engaging with the FWC portal.⁵ This document supports a conclusion that Mr Hall was attempting to engage with the FWC portal between 9.18pm and 9.59pm. Mr Hall said that when he left the FWC website he was asked to complete an online survey which he said he did, and as part of his feedback expressed concern about the difficulties he had in lodging his application.⁶

[14] Mr Hall said that on Wednesday 5 July, he was contacted by the FWC and advised that his survey response had been received but no general protections application had been received on 4 July 2017. He said he was advised to resubmit the application which he did.

[15] Marel submitted that Mr Hall was aware that the dismissal took effect on the day that it took effect.⁷ Marel submitted that consequently Mr Marel had the full 21 days to lodge an application, though lodged it one day late.

[16] Marel referred to the case of *Cem Ozsoy v Monstamac Industries Pty Ltd*,⁸ where the FWC dismissed an application for a time extension in an unfair dismissal claim where the applicant:

- (a) was unaware of the time limit that attached to unfair dismissal remedy applications;⁹
- (b) was led to believing that the Fair Work Ombudsman had power to deal with his unfair dismissal complaint;¹⁰ and
- (c) lodged the application only one day late.¹¹

[17] Marel submitted that the facts of this case are not dissimilar to *Ozsoy*.

[18] Marel submitted that on Mr Hall's own evidence, as at 29 June 2017, he sought legal advice and was told that he may have a general protections claim.¹² Marel submitted that from this time, he would have been aware (or ought to have known) there was a 21 day time limit from the date of dismissal on lodging any application.

[19] Marel submitted that Mr Hall commenced his application process for this application on the last day for filing. It submitted Mr Hall had not provided a reasonable excuse for the delay at all, or at least from 29 June 2017 to 4 July 2017.

[20] Marel submitted that despite Mr Hall's evidence that he was not aware of his right to make an application with the Fair Work Commission until 29 June 2017, it is accepted that *mere ignorance of the statutory time limit is not an exceptional circumstance*.¹³

[21] Marel placed emphasis on the requirement for the FWC to have regard to the circumstances from the time of the dismissal until the lodgement, and that an applicant needs to provide a credible reason for the whole of the period that the application was delayed. Marel pointed to *Ozsoy* being a Full Bench authority for refusing an application that is one day out of time. I am satisfied however that the factual circumstances in *Ozsoy v Monstamac*

are distinguishable from what happened in Mr Hall's case. In *Ozsoy*, the applicant waited until the last day to access the FWC website, completed his application on that day, however waited until 5pm on the next day to lodge his application without explanation. Mr Hall does have a clear explanation that he believed the application was filed which is supported by the evidence. It is clear the online survey form was received by the FWC on 4 July, when the application itself did not transmit.

[22] Marel also relied on a Full Bench decision in *Mitchell Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank*¹⁴, also for the purpose of emphasising the requirement to consider the circumstances from the time of dismissal.¹⁵ The facts in *Shaw v ANZ* is also distinguishable as in *Shaw* an extension was not granted because an explanation of impairment leading to a miscalculation of the time frame could not be relied upon for the entire period leading to the late lodgement, and stress, shock and confusion was not accepted as an explanation for the delay.

[23] In this case I am satisfied on the evidence that Mr Hall made a bona fide attempt to file his application electronically within time, and further believed that he had in fact filed his application just prior to 10pm on Tuesday evening 4 July 2017, and for reasons which are not clear from the evidence the electronic application was not received through the FWC portal.¹⁶ On being advised of this by a telephone call the next day from the FWC he filed the application.

[24] The delay to be considered by the FWC is the delay beyond the 21 day period, however the reasons for the delay must be considered by reference to the circumstances from the date the dismissal took effect. I have weighed the evidence concerning the delay and the circumstances from the date of dismissal. I am satisfied Mr Hall has provided an acceptable explanation for the delay, and has a credible reason for the whole of the period that the application was delayed. The particulars concerning his actions from the date of dismissal to filing are set out in more detail below. The details below also support my conclusion that Mr Hall had a credible reason for the whole of the period.

Action taken to dispute the Dismissal – s 366(2)(b)

[25] Mr Hall had until Tuesday 4 July 2017 to make his application.

[26] Mr Hall submitted that by filing the general protections application, he has provided evidence to the FWC that he disputes the dismissal.

[27] Mr Hall submitted that his statement clearly establishes that he immediately disputed the dismissal and the surrounding circumstances giving rise to it¹⁷ and continued to do so.¹⁸

[28] Mr Hall submitted that he refrained from immediately taking legal action in anticipation that he would receive feedback from the relevant compliance officer regarding the concerns he had expressed via the Respondent's procedures under its Code of Conduct and the termination of his employment.¹⁹

[29] Mr Hall submitted that when it became apparent that no feedback would be forthcoming, he commenced pressing the matter through other channels and ultimately filing the general protections application.²⁰

[30] On 15 June 2017, two days after his termination, Mr Hall sent email correspondence to Mr Bernard van den Beld,²¹ Corporate Legal Counsel for Marel, stating that he believed his termination was partly due to his raising allegations of potential fraud and was retaliation.

[31] On 16 June he received an email response from Mr van den Beld advising he had contacted the compliance officer who would look into the issue and would reply to him (Mr Hall). A number of other persons were copied into the email by Mr van den Beld that Mr Hall not unreasonably took to include the compliance officer referred to by Mr van den Beld.

[32] Mr Hall said he was comforted by this email and waited for a response as he believed he would receive advice about his concerns. When no response was received by Mr Hall by 27 June he sent a further email to Mr van den Beld requesting that someone please contact him as he had lost his position, referring to the whistle blowing policy, and that Marel would not accept any retaliation against employees. He states he feels he has been unfairly dismissed.²² On the same day he received an email reply from Mr van den Beld stating he was sorry Mr Hall had not been contacted and he would call the compliance officer and forward the email.²³ Mr Hall received a further email that day from Arni Sigurjonsson apologising for not having been in touch earlier, and stating the matters raised were being investigated.²⁴

[33] On 28 June, Mr Hall emailed Arni Sigurjonsson advising the matter was urgent from Mr Hall's perspective because his former role was being advertised and there existed time frames for legal action to be instigated.²⁵

[34] On 29 June, Mr Hall attended the Robina Community Legal Centre and sought legal advice. He said he was advised that he had a potential general protections claim and should get in contact with the Fair Work Commission.

[35] Mr Hall said as he had no response from Beld, Sigurjonsson, or Bjorgvinsdottir, he contacted the FWC on Friday 30 June and spoke with a FWC officer. Mr Hall claimed he made a general enquiry about being dismissed for being a whistle blower and was told to contact the Commonwealth Ombudsman to seek assistance about whistleblowing. Mr Hall said he contacted the Commonwealth Ombudsman and was informed that it did not have jurisdiction as it was not a matter involving the Commonwealth Government.

[36] Mr Hall said that on Monday 3 July 2017, he again contacted the FWC. He said he was aware of a 21 day period for bringing an application and he sought advice about getting an extension of time but was advised he could file an application until midnight on 4 July 2017.²⁶ Mr Hall said he was advised to obtain legal advice about the matter.

[37] Mr Hall said he attempted to contact the Job Watch Community Legal Information Centre to obtain legal advice but received a recorded message advising that legal advice over the phone would not be available until Wednesday (5 July).

[38] Mr Hall said that on Tuesday 4 July 2017, he attempted to submit the application, the details of which are set out above under the reasons for delay.

[39] I accept that Mr Hall did take action to dispute his dismissal within the time limit set by s.366(1)(a) and was active throughout the time inside the time limit set in attempting to pursue the matter. This is a consideration in his favour.

Prejudice to the Employer – s 366(2)(c)

[40] Mr Hall submitted that a delay of one day in filing the general protections application is unlikely to, and has not in fact caused any prejudice to Marel, save for the usual prejudice that accompanies any grant of an extension of time and that of itself should not justify refusing to grant an extension.

[41] Mr Hall submitted that any prejudice said to have been suffered by the Respondent is very minor and should be a neutral consideration. I am satisfied that there would be no prejudice suffered by Marel if an extension of one day were granted and this favours Mr Hall.

Merits of the Application – s 366(2)(d)

[42] Mr Hall submitted:

- there is merit in his general protections application;
- it is sufficient for the purposes of s.366(2)(d) of the Act that it be established that the general protections application is not without merit²⁷; and
- where there are disputed facts, it is not appropriate to embark on a detailed consideration of the substantive case when considering the merits for an extension of time.²⁸

[43] Marel submitted that Mr Hall was not dismissed unlawfully and that his application had no merit. Marel submitted therefore Mr Hall's application should be dismissed.

[44] Mr Rankin said in his statement that on 25 May 2017, he attended the Brisbane office while Mr Hall was in Europe meeting with the global executive team. He said he recalls four employees who report directly to Mr Hall verbally raising a number of concerns about Mr Hall to him. He also said approximately three to four weeks earlier, an incident involving Mr Hall and another employee was raised with him.²⁹

[45] Mr Rankin said he noted all of the reported concerns in an email which he sent to the executive team in Europe. He said on 29 May, one of the employees that reported to Mr Hall sent him an email with a written statement outlining her complaints against Mr Hall.³⁰

[46] Mr Rankin said that based on the complaints and because Mr Hall was still on probation he decided to end Mr Hall's employment. Mr Rankin said that on 6 June 2017, he discussed with the Executive Vice President his email of 29 May and the executive team supported his decision to terminate Mr Hall based on concerns raised by employees in the finance team.³¹

[47] It was put for Marel in submissions that given Mr Rankin was not required for cross examination at the hearing before the FWC on 4 September, despite him giving the reasons for his decision to terminate Mr Hall in his statement, and the pivotal nature of the evidence of a decision maker in adverse action matters, this tells against Mr Hall on the issue of the merits consideration under s 366(2)(d). I do not accept this to be so. It is apparent from all of

the material including the two witness statements that Mr Hall will assert that the motivation for his dismissal was related to his earlier allegation of fraudulent record keeping, whilst Marel asserts that the reason was complaints made about him by other employees. The competing contentions give rise to factual disputes that I should not give detailed consideration as they go to the substantive case. I am satisfied that it is appropriate to regard the consideration under s 266(2)(d) as a neutral matter.

Fairness as between the Person and other persons in a like position – s 366(2)(e)

[48] Mr Hall submitted that given the matters articulated above on his behalf, particularly within the context of a delay of one day in filing the general protections application, and taking into account the similar circumstances in cases such as *Garson, Johnson* and *Wolfgang*, it would be unfair for the Commission to not grant an extension of time within which to file the general protections application.

[49] Marel submits that it is entitled to consistency with other matters that have come before the FWC concerning extension of time applications.

[50] I regard s 366(2)(e) as a neutral consideration in this matter.

Conclusion

[51] I am satisfied that there are exceptional circumstances taking into account each of the matters to be considered in s 366(2)(b). On that basis, the application for an extension of time is granted.

COMMISSIONER

Appearances:

Mr M Brown of Reichman Lawyers for the Applicant

Mr M Proctor of ClarkeKann Lawyers for the Respondent

Hearing details:

2017,

Brisbane:

September 4

Printed by authority of the Commonwealth Government Printer

<Price code C, PR595785>

¹ Exhibit 1.

² Exhibit 2.

³ Exhibit 1 at 99 – 111.

⁴ Exhibit 1 at 101.

⁵ Exhibit 1 at 102 attachment N.

⁶ Exhibit 1 at 104.

⁷ Statement of Michael Hall, dated 10 August 2017 at paragraph 67.

⁸ *Cem Ozsoy v Monstamac Industries Pty Ltd* [2014] FWC 479.

⁹ *Cem Ozsoy v Monstamac Industries Pty Ltd* [2014] FWC 479 at [20].

¹⁰ *Cem Ozsoy v Monstamac Industries Pty Ltd* [2014] FWC 479 at [18].

¹¹ *Cem Ozsoy v Monstamac Industries Pty Ltd* [2014] FWC 479 at [21].

¹² Statement of Michael Hall, dated 10 August 2017 at paragraph 88.

¹³ *Cem Ozsoy v Monstamac Industries Pty Ltd* [2014] FWC 479 at [20].

¹⁴ [2015] FWCFB 287.

¹⁵ [2015] FWCFB 287 at [12].

¹⁶ *Shawn Garson v Urban Land Authority T/A Places Victoria* [2013] FWC 6585 at [13].

¹⁷ Exhibit 1 at 69 – 72.

¹⁸ Exhibit 1 at 79 – 81.

¹⁹ Exhibit 1 at 78, 84 – 85.

²⁰ Exhibit 1 at 88 – 96.

²¹ Exhibit 1 at 69 attachment H.

²² Exhibit 1 attachment J.

²³ Exhibit 1 attachment K.

²⁴ Exhibit 1 attachment L.

²⁵ Exhibit 1 attachment M.

²⁶ Exhibit 1 at 92.

²⁷ *Sparkes v Chubb Fire and Security Pty Ltd* [2012] FWA 5204 at [44].

²⁸ *Syme v ENI Industries Pty Ltd* [2013] FWC 6061 at [36].

²⁹ Exhibit 2 at 11 – 12.

³⁰ Exhibit 2 at 14.

³¹ Exhibit 2 at 18.