

[2020] FWC 22

The attached document replaces the document previously issued with the above code on 24 April 2020, to correct a typographical error at paragraph [35].

Associate to Deputy President Mansini

27 April 2020.



# DECISION

*Fair Work Act 2009*  
s.365—General protections

**Simone Selic**

(Applicant)

v

**The Corporation of the Synod of the Diocese of Brisbane t/a Coomera**

**Anglican College**

(Respondent)

(C2019/4165)

DEPUTY PRESIDENT MANSINI

MELBOURNE, 24 APRIL 2020

*Application to deal with a general protections dispute involving dismissal – application filed out of time – circumstances not exceptional – application dismissed.*

[1] This decision concerns whether to extend the time within which to lodge an application for the Commission to deal with a general protections dispute involving dismissal, made under s.365 of the *Fair Work Act 2009* (Cth) (Act).

[2] I have determined that Mrs Simone Selic (the Applicant) did not file within the statutory timeframe and should not be allowed a further period within which to lodge her application. The reasons for that decision follow.

## Chronology of relevant events

[3] On 7 November 2018, the Applicant accepted a full time “contract” position as Secondary Teacher at Coomera Anglican College (the College and Respondent). The appointment was to provide cover for a teacher on maternity leave and to be effective from 1 January 2019 and conclude on 31 December 2019. The contract included provision for termination on notice by either party in accordance with the *Queensland Anglican Schools Enterprise Agreement 2018* and for the notice period to be reduced by mutual agreement.<sup>1</sup>

[4] Prior to commencing, on 4 December 2018, the Applicant met with the then Principal of the Respondent and advised that she was pregnant but intended to work until the end of Term 2, 2019. After commencing the role, the Applicant provided medical certification that she was able to work until 31 May 2019. Although the Applicant disputes the Respondent’s contention about her (in)eligibility there is no dispute that the Applicant did not at any time apply for paid parental leave.

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<sup>1</sup> Attachment 1 to the Application dated 5 July 2019.

[5] Then, on 15 May 2019, the Applicant had a casual conversation with the Respondent's Human Resources Manager who suggested (due to her observations of the Applicant's pregnancy related fatigue) that the Applicant may want to go on unpaid leave earlier than planned. Later that day, the Applicant requested approval to mark assignments from home in the week of 27 to 31 May 2019 which was approved.

[6] On 16 May 2019, the Applicant emailed the Human Resources Manager with a request that read as follows:

*"As per our conversation yesterday, due to the progress of my pregnancy, I would like to finish teaching secondary classes on Friday 24<sup>th</sup> May, and return Monday 1<sup>st</sup> October. In relation to Humanities and this term's assessment, I have consulted with Lee Molyneux in order that I can mark drafts at home during Week 6 as per the term assessment planner, which he is happy to go ahead.*

*Please let me know if there is anything I need to follow up on."*<sup>2</sup>

[7] Also on 16 May 2019, the Human Resources Manager requested the Applicant meet with herself and the Head of Junior Secondary at the College in which they discussed a chicken pox outbreak at the College. The Applicant was already aware and had sought advice from the College nurse and her midwife. The Respondent decided that the Applicant would cease work the following day (17 May 2019) for reasons which it said were due to its concerns about the Applicant's safety, but would be paid until 24 May 2019 given she had otherwise intended to work until that day. It is agreed that the Applicant indicated in this meeting that she intended to return to work in Term 4, 2019 and the Human Resources Manager said that there was no guarantee of work available in Term 4. The Applicant contends that she said she would contact the Human Resources Manager closer to the time, however the Respondent witnesses deny this.<sup>3</sup> The Human Resources Manager subsequently emailed to confirm that the Applicant *"may leave the College tomorrow, Friday 17 May 2019 based on your wellbeing and our duty of care to you"* and also undertook to provide a letter confirming the arrangements that had been discussed.<sup>4</sup>

[8] On 17 May 2019, the Human Resources Manager handed a letter to the Applicant which stated:

*"I refer to your meeting yesterday with Greg Golder – Head of Junior Secondary and Virginia Cason – Human Resources Manager regarding the finishing date of your employment.*

*We acknowledge receipt of your email to Virginia (15 May 2019) confirming that you would like to cease work on Friday 24 May, however following a conversation with Virginia and with regard to your wellbeing, we will cease your employment, today, Friday 17 May 2019. We have decided to take this action as part of our duty of care to you and the students.*

*As you intended to finish on Friday 24 May, we will remunerate you for next week. All other entitlements will be paid to you in the next pay period.*

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<sup>2</sup> Attachment 6 to the Application dated 5 July 2019.

<sup>3</sup> Affidavit of Gregory Robert Golder at 25; Affidavit of Virginia Lee Cason at 41.

<sup>4</sup> Attachment 6 to the Application dated 5 July 2019.

*I would like to take the opportunity to thank you for your contribution to our College.”<sup>5</sup>*

[9] On the afternoon of 17 May 2019, the Applicant was informed that she was required to return her lanyard and laptop. The Applicant returned the items that same day. She says she understood this to be the ordinary course when going on leave.

[10] On 31 May 2019, the Respondent made a payment to the Applicant which it maintains was for all outstanding wages and entitlements. The Applicant says that she was not provided with a final payslip and therefore is not able to verify this payment.

[11] On 19 June 2019, the Applicant received a letter from the Queensland College of Teachers notifying that she was no longer registered as a teacher working at the College.<sup>6</sup> There is no dispute that the Applicant did not contact the Respondent after receiving this letter, which the Applicant says was due to her “*shock and disbelief*” at the Respondent’s actions.

[12] On 26 June 2019, the Applicant filed an unfair dismissal application with the Commission. On 27 June 2019, the Applicant discontinued her unfair dismissal application after being advised by a Commission staff member that she had worked for the Respondent for less than the six month minimum employment period. On 5 July 2019, this application was lodged with the Commission.

#### **Was the application filed out of time?**

[13] Section 366 requires that a general protections application involving dismissal be made within 21 days after the dismissal took effect, or within such further period as the Commission allows under s.366(2).

[14] In this case, there would appear to be a legitimate jurisdictional issue regarding whether the Applicant’s employment ended at her own initiative. However, at least on its face, the application alleges dismissal in contravention of Part 3-1 of the Act and this is sufficient for the Commission to deal with it pursuant to s.365 of the Act.<sup>7</sup>

[15] It remains necessary to identify a date on which the alleged dismissal took effect. In her original application, the Applicant identified the effective date of her dismissal as 17 May 2019 but also states that she did not know that she was dismissed until 19 June 2019, when she received the correspondence from the Queensland College of Teachers.<sup>8</sup> The Applicant later submitted that her dismissal was not confirmed until 19 June 2019.<sup>9</sup> The Respondent contends that the Applicant’s dismissal took effect on 17 May 2019.

[16] A dismissal does not take effect unless and until it is communicated to the employee who is being dismissed. On the evidence before the Commission, I accept that the letter handed to the Applicant on 17 May 2019 constitutes a communication that the employment had come to an end. It plainly refers to the Applicant’s employment “finishing”, and the associated arrangements in final terms. That it does not refer to “termination” or “dismissal” is reflective of the Respondent’s perspective about the way the employment relationship came to an end. However I do not accept that the employment came to an end effective 17 May

<sup>5</sup> Attachment 7 to the Application dated 5 July 2019.

<sup>6</sup> Attachment 3 to the Application dated 5 July 2019.

<sup>7</sup> *Hewitt v Topero Nominees* [2013] FWCFB 6321 at [50].

<sup>8</sup> At items 1.3; 1.2 and 1.4 of the application form, respectively.

<sup>9</sup> Item 1d of Applicant’s Outline of Submissions.

2019 as the Respondent contends. The letter provides that the Applicant will be remunerated for the remainder of the period until 24 May 2019 and entitlements paid in the next pay period, not immediately or in lieu of notice. Accordingly, I find that the alleged dismissal was communicated on 17 May 2019 and the employment came to an end effective 24 May 2019.

[17] The period of 21 days ended at midnight on 14 June 2019. As the application was not lodged until 5 July 2019, it was lodged 21 days out of time.

[18] The Applicant asks that the Commission allow a further period for the application to be made. The Respondent opposes.

### **Are there exceptional circumstances?**

[19] Having concluded that the application was made after the prescribed timeframe, it is necessary for the Applicant to obtain an extension of time under s.366(2) to make the application. This can only occur if I am satisfied that there are “exceptional circumstances”. The matters of which I must be satisfied are set out in s.366(2) of the Act.

[20] The exceptional circumstances test establishes a high hurdle for an applicant.<sup>10</sup> In this context, to be exceptional the circumstances must be out of the ordinary course, or unusual, or special, or uncommon, although they need not be unique or unprecedented.<sup>11</sup> 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 can be considered exceptional.<sup>12</sup>

[21] My consideration of the matters set out at s.366(2) follows.

### **Reason for the delay – s.366(2)(a)**

[22] The Act does not specify what reason for delay might tell in favour of granting an extension however decisions of the Commission have referred to an “acceptable” or “reasonable” or “credible” explanation.<sup>13</sup> The absence of an explanation for any part of the delay will usually weigh against an applicant in such an assessment whereas a credible explanation for the entirety of the delay will usually weigh in an applicant’s favour.<sup>14</sup> Ultimately, it is a question of degree and insight.<sup>15</sup>

[23] The period of the delay is that commencing immediately after the time for lodging an application had expired and ending on the day on which the application was lodged. However, the circumstances from the date the dismissal took effect may be considered relevant in assessing the explanation for the delay.<sup>16</sup>

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<sup>10</sup> *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWC 901 (Stogiannidis) at [14].

<sup>11</sup> *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [12] and *Perry v Rio Tinto Shipping Pty Ltd t/a Rio Tinto Marine* [2016] FWC 6963 (Perry) at [21].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Perry* at [23]; *Matthews v Roy Morgan Interviewing Services Pty Ltd* [2018] FWC 7355 at [7].

<sup>14</sup> *Stogiannidis* at [39].

<sup>15</sup> *Green v Bilco Group Pty Ltd* [2018] FWC 6818 at [8].

<sup>16</sup> *Shaw v Australia and New Zealand Banking Group Limited* [2015] FWC 287 at [12]; *Ozsoy v Monstamac Industries Pty Ltd* [2014] FWC 2149 at [31]-[33]; *Perry* at [23].

[24] The Applicant's primary reason for delay was that she was unaware that she had been dismissed until she received the letter from the Queensland College of Teachers on 19 June 2019. Had it been clear that she was terminated, she said she "*would have acted sooner*".<sup>17</sup> This submission is at odds with the undisputed fact that, at least as of 15 May 2019, the Applicant understood that there was no guarantee of any further employment with the College from October 2019 (when she had indicated she would be available for further work). The Applicant was then handed the 17 May 2019 letter which I have found is unambiguous in confirming the cessation and finalisation of the employment relationship. She also returned the College belongings on that same day without complaint. If the Applicant was unclear, she did not say so at the time of these final transactions with the Human Resources Manager. If the letter of 19 June 2019 was contrary to the Applicant's understanding of the status of her employment relationship with the College, she did not contact the College to discuss or dispute it. In addition, the Applicant said that she was waiting on a final pay slip as "*confirmation*" but, even if a pay slip or separation certificate was not received, she accepted that a payment was received on 31 May 2019. I do not accept that the Applicant's primary reason is an acceptable or credible reason for the delay.

[25] The Applicant provided a copy of a document that records that she gave birth on 30 May 2019<sup>18</sup> and submitted that there were some complications associated with the birth. The Respondent submitted that the record supplied should not be regarded as medical evidence as it is not signed or marked by a medical practitioner. Further that it does not demonstrate the effect of the note that says "*APH + placental abruption*". I accept that there is no medical evidence of the period of any incapacity. That said, on the Applicant's evidence and submissions, I accept that this is a legitimate explanation for at least 30 May 2019 and the days immediately thereafter. However this does not sufficiently explain the delay commencing immediately after the time for lodging the application had expired and ending on the day on which the application was lodged (from 12.01am on 15 June to 5 July 2019).

[26] I have also had regard to the Applicant's attempt to file an unfair dismissal application on 26 June 2019 which she withdrew on 27 June 2019. Accepting that the Applicant was perhaps unfamiliar with the jurisdiction and her rights, mere ignorance is not a reasonable or sufficient explanation for delay.<sup>19</sup> Further, it is not disputed that the Applicant was aware of, had the capacity to and did contact a range of available sources for advice. Even after being advised that her unfair dismissal claim could not succeed on 27 June 2019, there was a further 8 days' delay before filing this application for which there is no explanation.

[27] The absence of an acceptable, reasonable or credible explanation for the delay weighs against a conclusion that there were exceptional circumstances.

### **Action taken to dispute the dismissal – s.366(2)(b)**

[28] Action taken by an employee to contest the dismissal, other than lodging a general protections application, may favour the grant of an extension of time.<sup>20</sup> The Commission will consider any action taken to put the employer on notice that the issues in contest had not reached finality and would be contested in the near future.<sup>21</sup>

[29] It is not disputed that the Applicant did not take any action to challenge the alleged dismissal with the Respondent directly. On 26 June 2019, the Applicant made an application

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<sup>17</sup> Item 1i of the Applicant's Outline dated 26 August 2019.

<sup>18</sup> Newborn health examination – birth details, attached to the Applicant's Outline dated 26 August 2019.

<sup>19</sup> Nulty at [14].

<sup>20</sup> *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 at 300.

<sup>21</sup> *Wilson v Woolworths* [2010] FWA 2480 at [19]-[21].

for unfair dismissal which was withdrawn the following day and not served on the Respondent. Prior to being served this claim, the Respondent was not on notice that the Applicant intended to dispute the cessation of her employment.

[30] I consider the absence of any action taken to dispute the dismissal is a matter which weighs against a finding of exceptional circumstances.

**Prejudice to the employer – s.366(2)(c)**

[31] The Respondent properly accepts that it would not suffer any particular prejudice. I consider the absence of prejudice to weigh only slightly in favour of a finding of exceptional circumstances.

**Merits of the application – s.366(2)(d)**

[32] An application to extend time is essentially an interlocutory matter that does not allow for the merits to be fully tested. The merits are nonetheless a matter which I am required to take into account in assessing whether there are exceptional circumstances.

[33] On the materials before the Commission, there is a real question to be determined before an adverse action in the form of “dismissal” is established. The major difficulty for the Applicant in this respect is that she was engaged on a contract for a fixed term and was not able to fulfil her contractual requirements. She was entitled to give notice to end the contract prior to the specified end date, in accordance with the contractual terms, and it would appear on the evidence before the Commission that she did so. It was the Applicant that initially notified of her intention to cease working at the end of Term 2, which she revised to 31 May 2019 and then revised again to 24 May 2019.

[34] The Applicant contends that she was “forced” onto maternity leave on 17 May 2019 without consultation or alternatives offered, notwithstanding that she was medically certified to continue working. She believes the trigger for this was her 15 May 2019 request to cease work on 24 May 2019, not 31 May 2019. Prior to this time, there was no issue with the Applicant working or a lack of work.

[35] The Respondent maintains that the only reason for its decision that the Applicant cease working one week earlier than her requested date was due to its concerns about her health and presented witness evidence in support. It had previously implemented modifications to her role. The Applicant is alleged to have told the Human Resources Manager, on 15 May 2019, that she was extremely tired and might fall asleep in class or driving to or from the College. The Respondent maintains it had legitimate concerns for convening its discussion with the Applicant on 16 May 2019 and for its decision on 17 May 2019, which related only to her safety. The fact of her pregnancy was not a consideration. The Applicant was not entitled to parental leave due to her length of service and did not apply for paid parental leave. Further, the Respondent says there was no financial prejudice to the Applicant who was paid until her chosen end date on 24 May 2019.

[36] For these reasons, I consider the merits are weak but as presently untested at best weigh neutrally towards a finding of exceptional circumstances in this case.

**Fairness as between the person and other persons in a similar position – s.366(2)(e)**

[37] Applications to extend time generally turn on their own facts. The parties did not draw to my attention any relevant persons or cases that would be relevant in relation to the question of fairness as between the Applicant and other persons in a similar position.

[38] I consider this to be a neutral consideration in the present matter.

### **Conclusion**

[39] The time limit that applies to the exercise of a person's right to bring an application under s.365 reflects the Parliament's intention that this right be exercised promptly. The Act recognises that there are some cases where a late application should be accepted, namely where there are exceptional circumstances.

[40] Having regard to all of the matters that I am required to take into account under s.366(2), I am not satisfied that the requisite exceptional circumstances exist. I consider the absence of an acceptable, reasonable or credible explanation for the delay in filing the application weighs heavily against the grant of an extension in this case. The Applicant did not take steps to dispute the alleged dismissal which also weighs against, and the absence of prejudice to the Respondent weighs only slightly in favour of, such finding. The other factors are neutral. In my view, the circumstances of this case are not exceptional, either individually or when considered together.

[41] I decline to grant an extension of time under s.366(2). Accordingly, the Applicant's application under s.365 of the Act is dismissed.



DEPUTY PRESIDENT

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