

[2022] FWC 2572 [Note: An appeal pursuant to s.604 (C2022/6960) was lodged against this decision refer to Full Bench decision dated 9 March 2023 [[\[2023\] FWCFB 51](#)] for result of appeal.]



DECISION

Fair Work Act 2009
s.365—General protections

Matthew Duncan Hatch

v

Woodside Energy Ltd
(C2022/2787)

DEPUTY PRESIDENT YOUNG

MELBOURNE, 26 SEPTEMBER 2022

Application to deal with contraventions involving dismissal – extension of time – circumstances not exceptional – application dismissed.

[1] This decision concerns an application by Mr Matthew Duncan Hatch (Applicant) under section 365 of the *Fair Work Act 2009* (Act) for the Commission to deal with a general protections dispute involving dismissal (GP Application). Section 366(1) requires that such an application be made within 21 days after the dismissal took effect or within such further period as the Commission allows under section 366(2).

[2] It is uncontested that Mr Hatch’s employment with Woodside Energy Ltd (Respondent) ended on 13 April 2022. The GP Application was lodged on 5 May 2022. The period of 21 days ended at midnight on 4 May 2022 and the GP Application was therefore lodged 1 day out of time. Mr Hatch seeks that the Commission allow a further period of time for the GP Application to be made. The Respondent opposes the grant of an extension of time.

[3] A hearing was held by Microsoft Teams Video on 12 September 2022. The Applicant was self-represented and pursuant to section 596 of the Act, Mr Giacomo Giorgi from Herbert Smith Freehills, appeared on behalf of the Respondent.

Background and factual findings

[4] Mr Hatch commenced employment with the Respondent in September 2012 as an Environmental Advisor. The Respondent terminated Mr Hatch’s employment on 13 April 2022. Mr Hatch resides in Western Australia.

[5] Mr Hatch sent the GP Application by email to the Melbourne Registry at 11.59 pm Australian Western Standard Time (AWST) on 4 May 2022. That email was received by the Melbourne Registry at 1.59 am Australian Eastern Standard Time (AEST) on 5 May 2022. The GP application was also sent the Perth Registry at 12.12 am AWST on 5 May 2022.

[6] At 9.20 am AEST on 5 May 2022 the Commission wrote to Mr Hatch and advised that an email had been received from him on 5 May 2022 but the GP Application had not been received because the Commission could not access the document; that is, the GP Application was not in a readable format. Mr Hatch was asked to provide the GP Application, without any security restrictions, in one of five specified formats. Mr Hatch emailed the GP Application to the Brisbane and Perth Registries as a PDF document at 10.47 am AEST that day.

Consideration

[7] The Act allows the Commission to extend the period within which a general protections application involving dismissal must be made if it is satisfied that ‘exceptional circumstances’ exist. This establishes a high hurdle for an applicant.¹

[8] The meaning of exceptional circumstances was considered by the Full Bench of what was then Fair Work Australia in *Nulty v Blue Star Group Pty Ltd*,² where it was noted that, in order to be exceptional, circumstances must be out of the ordinary course, or unusual, or special, or uncommon, although they need not be unique or unprecedented. The Full Bench also noted that 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.³

[9] Under section 366(2) of the Act, the Commission may allow a further period of time for an application under section 365 to be made, if it is satisfied that there are exceptional circumstances, taking into account the following:

- (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.

Reason for delay

[10] The Act does not specify what reasons for delay might tell in favour of granting an extension, however, decisions of the Commission have referred to an acceptable⁴ or a reasonable explanation.⁵ In *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd*⁶ the Full Bench noted that the absence of an explanation for any part of the delay, will usually weigh against an applicant in the assessment of whether there are exceptional circumstances, and a credible explanation for the entirety of the delay will usually weigh in the applicant’s favour, however, all the circumstances must be considered.⁷ The period of the delay to be considered is the period commencing immediately after the time for lodging an application has expired and ending on the day on which the application is ultimately made. However, the circumstances

from the date the dismissal took effect must be considered in assessing the explanation for the delay.⁸

[11] As to the reasons for the delay, Mr Hatch submits that there was no delay in lodgement as he lodged the GP Application at 11.59pm AWST.⁹ Mr Hatch submits that the email address listed on the Commission’s “Deadline” webpage (Webpage) was not a defined link and had no reference to a timezone or state.¹⁰ Further, he submits that the Webpage simply says “*We accept documents no later than 11.59pm on the deadline*” with no specific reference to that time being AEST¹¹ and that he was not aware that the GP Application would be lodged with the Melbourne Registry until he clicked the email hyperlink on the Webpage.¹² Mr Hatch submits that the footnote to Rule 14(1) of the *Fair Work Commission Rules 2013*(Rules) provides “*The email addresses approved for lodgement of documents are available at <http://www.fwc.gov.au>*” and that in light of the reference to email addresses in the plural he reasonably thought this was a reference to the email addresses provided on the Commission’s “contact us” webpage, which includes State specific addresses.¹³ Additionally, Mr Hatch submits that the “Apply or Lodge” section of the Commission’s website has a subheading of “Approved File Types & Email addresses” which fails to list any “approved email addresses”.¹⁴

[12] Additionally, Mr Hatch says that the following “*additional unforeseen circumstances*” arose, precluding him from lodging the application prior to 4 May 2022 and resulted in the lodgement being received by the Melbourne Registry at 1.59am AEST on 5 May 2022 consequent upon the “*conflicting information provided from the Commission specific to “approved application emails”*”:

- (a) internet connectivity issues on 4 May 2022 which precluded him from submitting the GP Application earlier and required him to purchase a new router;
- (b) the GP Application was prepared on a “*non-mobile computer*”;
- (c) prior to 4 May 2022 he was preoccupied with seeking new employment;
- (d) he spent considerable time and effort in preparing the GP Application, including reading and interpreting the legislation relevant to his application;
- (e) at the time of his dismissal he made a conscious decision to take an extended break to manage his psychological health.¹⁵

[13] Turning first to whether the GP Application was lodged out of time, it is uncontested that the application was received by the Melbourne Registry at 1.59 am AEST on 5 May 2022 (Document 1). Mr Hatch then forwarded the GP Application to the Perth Registry at 12.12 am AWST on 5 May 2022 (Document 2). The GP Application was not provided in a readable form until 10.47 am AEST on 5 May 2022 (Document 3). The 21 day period expired at 11.59 pm AEST on 4 May 2022.

[14] Rule 13(2)(c) of the Rules provides that a document may be lodged with the Commission by emailing the document in accordance with Rule 14. Rule 14(1) provides that documents may be lodged by emailing the document to an email address approved by the General Manager for the lodgement of documents by email. As set out above, the footnote to

Rule 14(1) provides “*The email addresses approved for lodgement of documents are available at <http://www.fwc.gov.au>.*” Rule 14(4) provides that if the document lodged pursuant to Rule 14 is a document commencing the matter, the General Manager must send an acknowledgement of lodgement, an application is not taken to have been lodged until the acknowledgement of lodgement has been sent and once the acknowledgement has been sent the application is taken to have been lodged at the time it was received electronically by the Commission.

[15] The Commission did not provide an acknowledgment of lodgement in relation to either Document 1 or Document 2. Accordingly, those documents are not taken to have been lodged pursuant to Rule 14. Further, both were lodged outside the 21 day statutory time frame in their respective time zones. The Commission provided an acknowledgement of lodgement in respect of Document 3, upon receipt of the GP Application in readable form. Accordingly, it is the time at which Document 3 was received that is the time at which the GP Application is taken to have been lodged. The GP Application was therefore lodged one day out of time.

[16] As to Mr Hatch’s confusion as to the Registry to which the GP Application ought be lodged and the resulting time zone change, firstly, it is well established that ignorance of one’s rights is not an acceptable explanation for late lodgement.¹⁶ Secondly, whilst I accept that the Webpage does not have a defined link, does not reference the time zone within which the “deadline” is considered and also that Rule 14(1) contains the footnote as asserted by Mr Hatch, the information referred to by Mr Hatch is general information provided on the Commission’s website and not specific to a general protections applications involving dismissal. The Commission’s website provides specific information in relation to such applications. Under the information headed “About general protections”, there is a page entitled “Apply for general protections -dismissal (Form F8)”. That page has a heading entitled “Apply now” which contains a link to the Form F8 and provides as follows:

“Email your completed form to melbourne@fwc.gov.au by no later than 11:59pm Melbourne time on the 21st day after your dismissal took effect.”

[17] Accordingly, the publicly available information clearly states that general protections applications involving dismissal are emailed to the Melbourne registry and must be lodged by 11.59pm Melbourne time on the 21st day after the dismissal took effect. It is also difficult to see how Mr Hatch accessed the Form F8 without accessing the “Apply now” page and therefore also the information contained on that page. Mr Hatch’s confusion, mistake or incorrect interpretation of the information provided on the Webpage and in the Rules does not provide a reasonable or acceptable explanation for the delay.

[18] For the same reasons, I reject Mr Hatch’s submissions concerning the “Apply or Lodge” section of the Commission’s website. They also do not provide a reasonable or acceptable explanation for the delay.

[19] As to Mr Hatch’s submissions concerning his internet connection issues, Mr Hatch’s evidence at hearing was that his internet connection is stable and that connectivity issues on his network are out of the ordinary. Mr Hatch relied on a fault reference notification from Aussie Broadband received at 7.08 pm¹⁷ on 4 May 2022 and a receipt from the “Good Guys” for the purchase of a new router (Receipt) on that day.¹⁸ I do not consider this provides a reasonable or acceptable explanation for the delay in filing. Firstly, notwithstanding Mr Hatch’s evidence, I

consider there to be nothing unusual, uncommon or special about internet or other computer related difficulties when attempting to send documents electronically. They are difficulties often encountered. Further, had Mr Hatch attended to the filing of the GP Application earlier, and not left the lodgment to the afternoon of the very last day of the 21st day following his dismissal, it could have been filed via other means and his internet difficulties overcome. Secondly, Mr Hatch's evidence at hearing was that the purchase of the new router was completed around 4.30 pm. Accordingly, Mr Hatch could have, at that time, taken other steps to ensure that the GP Application was filed in time, such as by telephone. Thirdly, the Receipt indicates that a range of other household items were purchased at the same time as the router. I consider this indicates a lack of urgency on Mr Hatch's behalf to attend to the filing of the GP Application within the statutory time frame. Fourthly, there is no evidence before the Commission as to precisely what technical or connectivity issues Mr Hatch was experiencing. However, I note that the fault notification from Aussie Broadband is timestamped at 7.08pm, which is some hours after the purchase of the router. Therefore, there is no evidence that Mr Hatch experienced any internet or computer difficulties prior to the purchase of the new router. Additionally, there is no evidence as to what steps Mr Hatch took in regards to lodging the GP Application (if any) between 4.30pm AWST when he purchased the router, and 11.59 pm AWST when he lodged the GP Application. I do not consider that Mr Hatch's internet connectivity issues provide a reasonable or acceptable explanation for the delay in filing.

[20] As to the submission that the application was prepared on a "*non-mobile computer*", I am unable to see how this in any way provides an explanation for the delay. The GP Application could have been lodged by telephone, using a friend or family member's internet connection or using a public internet service. Further, Mr Hatch's evidence at hearing was that the GP Application was stored on a cloud-based server and therefore the GP Application was accessible from any device at any location with internet access. This does not provide a reasonable or acceptable explanation for the delay in lodgment.

[21] By leaving the filing of the GP Application to the last day Mr Hatch strongly increased the prospect that if something was to go wrong, or technical difficulties were encountered, the application would be lodged out of time. Mr Hatch submits that he was precluded from filing the GP Application earlier in the 21 day period following his dismissal because he was preoccupied with find new employment to ensure he was able to support his family, spent considerable time reading and interpreting the relevant legislation and because he made a conscious decision to take an extended break to manage his health and wellbeing. I reject that any of these matters provide a reasonable or acceptable explanation for the delay in lodgment. Firstly, there is nothing unusual or special or uncommon in the need to seek new employment when one's prior employment has ended. Most employees have financial commitments which, of necessity, require them to seek new employment. Further, in my view, although regrettable, financial distress following the termination of one's employment and the consequent loss of income cannot be said to uncommon or special or unusual. Secondly, reading and interpreting legislation to enable an application to be lodged is also, in my view, commonplace and required by all self-represented applicants to enable them to understand their rights and lodge the correct application for the remedy sought. It also cannot be said to be special or uncommon or unusual. Further, whilst a person may be represented by a lawyer or paid agent with permission of the Commission, as set out in the Explanatory Memorandum to the Act,¹⁹ a person dealing with the Commission will generally represent themselves. There is therefore nothing special or unusual or uncommon in reading relevant material to enable one to do so. Thirdly, whilst I accept that

Mr Hatch may have been distressed and upset following his dismissal, this is both a common and understandable reaction to the loss of one's employment. Mr Hatch did not file any evidence of any diagnosed mental health issue or concern, either arising from the dismissal or from the matters he says occurred before the dismissal,²⁰ in support of his need to “*emotional regroup and take time away from the issue*”²¹ following his dismissal. Nor is there any evidence that Mr Hatch was in any way incapacitated in the 21 days following his dismissal such that he did not have capacity to lodge the GP Application within time. Further, if Mr Hatch had capacity to seek new employment in this period, it is difficult to see how he also did not have capacity to lodge the GP Application on time.

[22] I do not consider that either alone or collectively, the reasons for the delay in lodgement advanced by Mr Hatch provide a reasonable or acceptable explanation for the delay. This weighs against the grant of an extension of time.

Action taken by the person to dispute the dismissal

[23] Mr Hatch took no action to dispute his dismissal.²² This weighs against the grant of an extension of time.

Prejudice to the employer

[24] The Respondent concedes, correctly in my view, that it has not suffered any particular prejudice, including any prejudice caused by the delay. However, the mere absence of prejudice is not in itself a factor that would warrant the grant of an extension of time. I consider this to be a neutral factor in the present case.

Merits of the application

[25] An application to extend time is essentially an interlocutory matter that does not allow 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.

[26] It appears uncontested that the Respondent dismissed the Applicant and that adverse action, in the form of dismissal, was taken against him. At issue is whether that adverse action was taken for a prohibited reason pursuant to Part 3-1 of the Act.

[27] The Applicant submits that the substantive and operative reason for his dismissal was because he was exercising his workplace rights in response to his reasonable concern of a health safety hazard associated with entering the workplace, in accordance with section 84 of the *Work Health Safety Act 2020* (WA). From the material filed by the Applicant it appears that the Applicant's claim primarily concerns the alleged failure of the Respondent to investigate and assess the risk of cardiac injuries arising from the COVID-19 vaccination and to demonstrate that the procedure was safe, reasonable and proportionate.²³

[28] The Respondent submits that the Application was terminated for the sole reason of his failure to comply with the Respondent's COVID-19 Vaccination Procedure and his consequent inability to be ready and able to perform the duties required of his role.²⁴ It submits that the GP

Application has no reasonable prospects of success after a “*lawful, fair and considered consultation process*” prior to the introduction of the COVID-19 vaccine mandate.²⁵

[29] Given the interlocutory nature of these proceedings, it is not possible to form any firm or concluded view as to the merits of the GP Application. The evidence of both parties would need to be fully tested under oath. Further, it is well established that “*it will not be appropriate for the Tribunal to resolve contested issues of fact going to the ultimate merits for the purposes of taking account of the matter in s.366(2)(d)*”.²⁶ However, although the merits have not been fully tested, on the material currently before the Commission I incline to the view that GP Application has limited prospects of success. It appears to traverse matters already considered by the Commission on a number of occasions. Notwithstanding that, for present purposes, I am prepared to consider this a neutral factor.

Fairness as between the person and another person in a like position

[30] Applications to extend time generally turn on their own facts. Section 366(2)(e) is directed at ensuring that the Commission adopts a consistent approach to matters of a similar kind which are either currently before the Commission or which have previously been decided.²⁷ Further, the comparison should be limited to a comparison of persons who have also had their employment terminated and are capable of making an application under section 365.²⁸

[31] Mr Hatch submits that the lack of clarity on the Commission’s website, including the absence of a single page specifying approved email addresses, has the potential to disadvantage employees in Western Australia. Additionally, Mr Hatch submits that West Australian employees have 2-3 hours less time to prepare their application than employees located in the eastern states.²⁹

[32] The Respondent submits that these are irrelevant considerations as they do not go to the circumstances of the GP Application. Rather, they go to the application of the Rules and decisions which are a matter for the Commission to consider as a policy consideration. Further, the Respondent submits that Mr Hatch is in no different position to any other person terminated by the Respondent, or in general.

[33] I reject the Applicant’s submissions on this point. Firstly, as set out above, I do not consider there is a lack of clarity on the Commission’s website. The publicly available information regarding general protections applications involving dismissal makes clear that applications must be lodged with the Melbourne Registry by 11.59pm Melbourne time on the 21st day after the dismissal took effect. Secondly, that information reflects the requirements of section 366(1) of the Act that an application under section 365 must be made within 21 *days* after the dismissal took effect (Commission’s emphasis). Parliament therefore intended the relevant time frame to be calculated by reference to days only and does not differentiate between employees located in different time zones. Thirdly, the Applicant is in the same position as any other employee in Western Australia who seeks to make a general protections application involving dismissal. Finally, the submission that employees in Western Australia have 2-3 hours less to prepare their applications than employees located in the eastern states is flawed in logic. The time difference between employees located in different states applies at all stages of the process, including the time at which the employee is notified of their dismissal.

Conclusion

[34] The time limit that applies to the exercise of a person's right to bring an application under section 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.

[35] Having regard to all of the factors which I am required to take into account under section 366(2), I am not satisfied that the requisite exceptional circumstances exist in the particular circumstances of Mr Hatch's application, either when considered alone or collectively.

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



DEPUTY PRESIDENT

Appearances:

M Hatch for the Applicant

G Giorgi of Herbert Smith Freehills for the Respondent

Hearing details:

12 September

2022

Via Microsoft Teams Video

Final written submissions:

Applicant: 15 September 2022

Respondent: 16 September 2022

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¹ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFB 901 at [14]

² [2011] FWAFB 975

³ Ibid at [13]

⁴ *Blake v Menzies Aviation (Ground Services) Pty Ltd* [2016] FWC 1974, per Gostencnik DP at [9]

⁵ *Roberts v Greystanes Disability Services; Community Living* [2018] FWC 64, per Hatcher VP at [16]

⁶ [2018] FWCFB 901

⁷ Ibid at [39]

⁸ See *Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank* [2015] FWCFB 287 at [12] and *Ozsoy v Monstamac Industries Pty Ltd* [2014] FWCFB 2149 at [31]

⁹ Applicant's Outline of Argument, q.1d at [1]

¹⁰ Ibid at [3]

¹¹ Ibid at [4]

¹² Ibid at [5]

¹³ Ibid at [9]

¹⁴ Ibid at [10]

¹⁵ Ibid at [12]

¹⁶ *Nulty v Blue Star Group Pty Ltd* (2011) 203 IR 1

¹⁷ CB, pg 48

¹⁸ CB, pg 46; Email to chambers 15 September 2022

¹⁹ at [2291]

²⁰ Applicant's Outline of Argument, q1.d at [12(e)(i-xv)]

²¹ Applicant's Outline of Argument, q1.d at [14]

²² Applicant's Outline of Argument, q1.e

²³ Form F8 q.3.3; Applicant's Outline of Argument q.1h

²⁴ Respondent's Outline of Argument, Annexure A at [75]

²⁵ Form F8A q.2.2; CB pg 54

²⁶ *Nulty v Blue Star Group Pty Ltd* (2011) 203 IR 1 at [36]

²⁷ *Wilson v Woolworths* [2010] WA 2480 at [24-29]

²⁸ *Ballarat Truck Centre Pty Ltd v Kerr* [2011] FWAFB 5645 at [26]

²⁹ Applicant's Outline of Submissions , q1.i