



# DECISION

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

**Spenser Clarke**

v

**Uniti Group Ltd (Uniti Wireless)**  
(C2022/8114)

COMMISSIONER SCHNEIDER

PERTH, 28 APRIL 2023

*Application to deal with contraventions involving dismissal*

[1] Mr Spenser Clarke (the Applicant) made an application to the Fair Work Commission (the Commission) under section 365 of the *Fair Work Act 2009* (Cth) (the Act) for the Commission to deal with a dispute arising out of the Applicant’s allegations that the Applicant has been dismissed from their employment with Uniti Group Ltd (Respondent) in contravention of Part 3-1 of the Act.

[2] It appears that the application may have been lodged outside the required 21-day period.

[3] Before considering the merits of the application, the Commission must be satisfied that the application was not made out of time and, if it was, whether there are exceptional circumstances giving rise to an extension of time.

## Relevant law

[4] Section 366(1) of the Act provides that such an application must be made:

- (a) within 21 days after the dismissal took effect; or
- (b) within such further period as the Commission allows.

[5] As the Full Bench has stated, “the 21 day period prescribed... does not include the day on which the dismissal took effect.”<sup>1</sup>

[6] The Full Bench further stated, “if the final day of the 21 day period falls on a weekend or public holiday, the prescribed time will be extended until the next business day.”<sup>2</sup>

[7] Section 366(2) of the Act allows for the Commission to exercise discretion in granting a further period for an application to be made. The Commission must be satisfied there are *exceptional circumstances* permitting such discretion to be exercised, taking into account:

- (a) the reason for the delay; and
- (b) any action taken by the Applicant 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 Applicant and other persons in a similar position.

[8] Each of the above matters must be considered in assessing whether there are exceptional circumstances.<sup>3</sup>

[9] Briefly, exceptional circumstances are circumstances that are out of the ordinary course, unusual, special, or uncommon. The circumstances themselves do not need to be unique nor unprecedented, nor even very rare.<sup>4</sup>

[10] Exceptional circumstances may 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>5</sup>

[11] The reason for the delay is not in itself required to be an exceptional circumstance. It is one of the factors that must be weighed in assessing whether, overall, there are exceptional circumstances.<sup>6</sup>

[12] An applicant does not need to provide a reason for the entire period of the delay. Depending on all the circumstances, an extension of time may be granted where the applicant has not provided any reason for any part of the delay.<sup>7</sup>

[13] The determination of whether exceptional circumstances exist requires the consideration and assessment of all relevant circumstances.<sup>8</sup>

[14] This decision contemplates the relevant considerations in section 366(2) of the Act in the context of the current application.

[15] The dismissal of the Applicant took effect on 10 November 2022. The final day of the 21-day period was therefore 1 December 2022 and ended at midnight on that day. The application was made on 7 December 2022. The application was made six days late.

### **Submissions – Evidence – Criteria**

#### ***Reason for the delay***

[16] For the application to have been made within 21 days after the dismissal took effect, it needed to have been made by midnight on 1 December 2022.

[17] The delay is the period commencing immediately after that time until 7 December 2022, although circumstances arising prior to that delay may be relevant to the reason for the delay.<sup>9</sup>

[18] The reason for the delay is not in itself required to be an exceptional circumstance. It is one of the factors that must be weighed in assessing whether, overall, there are exceptional circumstances.<sup>10</sup>

[19] An applicant does not need to provide a reason for the entire period of the delay. Depending on all the circumstances, an extension of time may be granted where the applicant has not provided any reason for any part of the delay.<sup>11</sup>

[20] The Applicant submitted several reasons for the delay.

[21] The Applicant suffers from a long-term mental health condition, arising from issues experienced in previous employment in 2014.

[22] The Applicant has been receiving support from his treating doctor for an extended period of time prior to his employment with the Respondent and prior to making this application.

[23] The Applicant submits that his mental health condition was impacted following the termination of his employment from the Respondent, stating that his termination was a “*trigger*” and caused his mental health to deteriorate following the dismissal.

[24] After receiving his termination letter from the Respondent, the Applicant says he went into a flight or fight mode and, as a part of his condition, he tried to “*avoid*” that his employment had been terminated.

[25] The Applicant also submits that, during this period, he struggled to write emails or complete his application in a logical or coherent manner.

[26] The Applicant explained that he could spend a considerable period of time trying to draft an email or his application, however, the end product would be of little value.

[27] The Applicant submits that, due to the nature of his mental health issues and specific symptoms he has, completing paperwork like the application is particularly difficult, so this further delayed filing the application.

[28] The Applicant provided a copy of a letter from his treating medical specialist which confirmed the Applicant’s mental health condition and the potential impacts this could have on the Applicant.

[29] In relation to the reason for the delay, the Respondent submitted that the reasons provided by the Applicant were not exceptional, for the purposes of the test in question, and that the evidence provided by the Applicant was minimal and unable to be tested.

[30] The Respondent submitted that the Applicant’s explanations for the delay in filing his application was inconsistent with other statements. Namely, the Applicant stated in one instance that he was “*traumatised into inaction*”, but at the same time spent “*many hours, on many draft*”.

[31] The Respondent submits that the Applicant's letter from his treating medical specialist should be weighed accordingly given the medical specialist did not provide a witness statement and was not available for cross examination.

[32] The Respondent submits that the documents provided by the Applicant confirm his mental health condition diagnosis, however, do not provide any evidence that the Applicant was unable to file his application prior to the 21-day time limit.

[33] The Respondent highlighted that the letter from the treating medical specialist did not confirm that the diagnosis was the reason for delay, the letter merely confirmed the diagnosis and stated it:

“**may** impair his ability to respond to written notifications and therefore failure to act on them within standard timeframes”. (Emphasis added)

[34] The Respondent further submits that, even if the Applicant's mental health condition was the reason for his delay, it does not meet the requirements of being an *exceptional circumstance* within the meaning of section 366(2) of the Act.

[35] The Respondent highlighted that, in the Applicant's covering email to the Commission, on 7 December 2022, the Applicant stated:

“Please find enclosed my ‘late’ application, however I have just noted that I got the date wrong for the dismissal, which adds one day, and the official date of termination is dated 17/12/22, which includes the week paid in lieu, so I don't know if I am within time, or not!”

[36] The Respondent submitted that, in response to the Applicant's position, instead of the mental health condition being the cause of the delay, the Applicant had made an error in filing his application within the required time frame and was now seeking to explain his delay in filing by relying on his mental health issues.

### *Findings*

[37] Having regard to the above, particularly the nature of the Applicant's mental health condition, it is understandable that the Applicant may have experienced additional issues in preparing his application.

[38] The reason for delay itself is not the only criteria to be assessed in determining whether exceptional circumstances exist. It must be weighed against the following.

### ***What action was taken by the Applicant to dispute the dismissal?***

[39] The Applicant submits that he contacted Mr Jesse Welsh (Mr Welsh), Customer Service Manager of the Respondent, as a relevant consideration for this criterion. However, the information provided by the Applicant was limited.

[40] The Respondent notes that the Applicant emailed Mr Welsh on 22 November 2022. The Respondent further notes that the Applicant alluded to filing a “*wrongful dismissal*” application in this correspondence.

[41] The Respondent submitted that the Applicant’s email stated the following:

- The Applicant would forward his “*submission to the Fair Work Commission within the next two days, depending on (his) ability to do so*”.
- The Applicant’s email invited the Respondent to provide a Response “*should [the Respondent] wish to do so*”.

[42] There were no submissions provided by either party that the Applicant sought to commence an internal review of the dismissal or similar course of action for which the Applicant could reasonably have been expecting an outcome from prior to filing his application.

[43] There is also no evidence from the Applicant that he was provided with a response to his email, dated 22 November 2022, from the Respondent which may have given him a reasonable belief that his termination from the Respondent was under review and could have delayed him filing this application.

[44] In all the circumstances, I do not find that the Applicant took any action to dispute the dismissal.

***What is the prejudice to the employer (including prejudice caused by the delay)?***

[45] The Respondent submits that it would suffer prejudice if an extension of time were granted.

[46] Specifically, the Respondent submits that, if an extension of time were granted, it would suffer prejudice, being additional time, cost, and effort to defend the application if the extension of time is granted and the application is allowed to proceed.

[47] The Applicant submits that the Respondent will suffer no prejudice and that the Applicant has suffered a prejudice because the Respondent raised this objection.

[48] The Applicant’s assertion that the Respondent raising this jurisdictional objection is prejudicial to the Applicant is misconceived and incorrect. The Respondent is well within its rights to make submissions in relation to the jurisdictional objection.

[49] If an application is lodged outside of the time frame and no extension has been granted, the Commission has no jurisdiction to deal with the application. The extension of time issue must be dealt with.

[50] Even if the Respondent did not make submissions in relation to the jurisdictional objection, the Applicant must still satisfy the Commission that an extension of time for his application should be granted.

*Findings*

[51] In all the circumstances, I do not find that any material prejudice would be suffered by the Respondent if an extension of time were granted. The usual costs and resources required to defend a claim are not generally found to be a form of prejudice, I am satisfied that the case here.

***What are the merits of the application?***

[52] The competing contentions of the parties in relation to the merits of the application are set out in the filed materials.

[53] Having examined these materials, it is evident to me that the merits of the application turn on contested points of fact. 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 section 366(2)(d)*”.<sup>12</sup>

[54] It is not possible to make any firm or detailed assessment of the merits. The Applicant has an apparent case, to which the Respondent has an apparent defence.

[55] In the circumstances, I find that it is not possible to make an assessment of the merits of the application.

***Fairness as between the Applicant and other persons in a similar position***

[56] The Applicant did not make any submissions in relation to this point.

[57] The Respondent submitted that, to the extent that the above submissions are accepted by the Commission, it would be unfair (as between the Applicant and another person in a like situation) to allow the application.

*Findings*

[58] Having regard to the matters referred to above, I find that, whilst the Applicant is impacted by the issues effecting his mental health, these circumstances are not unique, unusual, or exceptional in nature. I am satisfied that granting the Applicant and extension, solely in reliance on the Applicant’s reasons, would be unfair to other applicants who have advanced similar submissions or were in similar circumstances and whose applications were not granted an extension of time.

[59] As noted before, the reasons advanced need not be exceptional for an extension to be granted, and the reasons are not the only criteria to be considered in finding exceptional circumstances.

***Is the Commission satisfied that there are exceptional circumstances, taking into account the matters above?***

[60] I must now consider whether I am satisfied that there are exceptional circumstances, taking into account my findings regarding each of the matters referred to above.

[61] Briefly, exceptional circumstances are circumstances that are out of the ordinary course, unusual, special or uncommon but the circumstances themselves do not need to be unique nor unprecedented, nor even very rare.<sup>13</sup>

[62] Exceptional circumstances may 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>14</sup>

[63] First and foremost, it should be noted that I am sympathetic to the Applicant and the challenges he is facing from his mental health condition and the impact it has had on his employment and life.

[64] However, in consideration and assessment of all the criteria above, I am not satisfied there is sufficient evidence or circumstances to warrant a finding of *exceptional circumstances* for the purpose of section 366(2) of the Act.

[65] The development of mental health issues, including the triggering or relapse of pre-existing conditions, after a dismissal is unfortunate and personally difficult for the individual experiencing the issues. However, such a reaction to a dismissal is sadly commonplace and this factor alone does not give rise to exceptional circumstances. This is not to say no mental health crisis arising from a dismissal and contributing to late lodgment could warrant a finding of exceptional circumstances. The evidence and submissions regarding the nature and severity of the condition, alongside the other criteria in the Act, must be assessed in coming to such conclusion.

[66] As the Respondent highlighted, the medical evidence provided by the Applicant confirms his diagnosis, however it does not confirm nor provide any suggestion that the Applicant was incapacitated for the entire period of delay, or for an extended period following his dismissal, that could explain the reason for his delay in filing his application and perhaps weigh stronger in favor of *exceptional circumstances*.

[67] The Applicant has explained the challenges and issues he faced in completing his application. Whilst I accept that his mental health condition hampered the ease with which he could complete his application, and I am sympathetic to the challenges faced by the Applicant, I am not satisfied that the circumstances of the lodgment meet the criteria outlined as being *exceptional circumstances* as required by section 366(2) of the Act.

[68] Having regard to all of the matters listed at section 366(2) of the Act, I am not satisfied that there are exceptional circumstances.

## **Conclusion**

[69] Not being satisfied that there are exceptional circumstances, there is no basis to allow an extension of time.

[70] The Applicant's application for the Commission to deal with a dismissal dispute is therefore dismissed. An Order to that effect has been issued.<sup>15</sup>



COMMISSIONER

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<sup>1</sup> [\[2020\] FWCFB 553](#), [10]. See also *Acts Interpretation Act 1901* (Cth) s 36(1) as in force on 25 June 2009; *Fair Work Act 2009* (Cth) s 40A.

<sup>2</sup> [\[2020\] FWCFB 553](#), [10]. See also *Acts Interpretation Act 1901* (Cth) s 36(1) as in force on 25 June 2009; *Fair Work Act 2009* (Cth) s 40A; [\[2015\] FWCFB 1877](#).

<sup>3</sup> [\[2018\] FWCFB 901](#), [39].

<sup>4</sup> [\[2011\] FWAFB 975](#), at [13].

<sup>5</sup> [\[2011\] FWAFB 975](#), at [13].

<sup>6</sup> [\[2018\] FWCFB 901](#), [39].

<sup>7</sup> [\[2018\] FWCFB 901](#), [40].

<sup>8</sup> [\[2018\] FWCFB 901](#), [17].

<sup>9</sup> [\[2015\] FWCFB 287](#), [12] (Watson VP and Smith DP).

<sup>10</sup> [\[2018\] FWCFB 901](#), [39].

<sup>11</sup> [\[2018\] FWCFB 901](#), [40].

<sup>12</sup> [\[2011\] FWAFB 975](#), [36].

<sup>13</sup> [\[2011\] FWAFB 975](#), [13].

<sup>14</sup> [\[2011\] FWAFB 975](#), [13].

<sup>15</sup> [\[PR761490\]](#).