



# DECISION

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

**Amy Brunskill**

v

**Federation Children Nth Geelong Pty Ltd**  
(C2023/2934)

DEPUTY PRESIDENT O'NEILL

MELBOURNE, 1 AUGUST 2023

*Application to deal with contraventions involving dismissal – blank application form lodged – application found to be made within prescribed time period*

## Introduction

[1] Miss Amy Brunskill has made an application to the Commission under s.365 of the *Fair Work Act 2009* (Cth) (the Act) to deal with contraventions involving dismissal. She contends that she was dismissed by the Respondent in contravention of section 351 of the Act.

[2] This decision deals with the question of whether the application was made within 21 days after the dismissal took effect, and if not, whether exceptional circumstances exist warranting an additional period of time to make the application.

[3] The issue was dealt with at a hearing on 19 July 2023, at which the applicant gave evidence in support of her application.

## Factual findings

[4] Ms Brunskill's evidence, which I accept, was that:

- a) She commenced employment with the Respondent on 23 January 2023, and on 28 April 2023 she was notified that she was being dismissed, effective 5 May 2023.
- b) On Monday 22 May 2023, the Applicant used the Commission's online lodgment system (OLS) to make the application. The Applicant downloaded and saved the blank application form (F8). She took a lot of time and care, using her partner's laptop, to fill out the form. She then saved the completed version of the form. In uploading the application to submit it, she accidentally uploaded the entirely blank form F8 and not the completed version that she intended to file which was saved in the same location on her partner's laptop.

- c) On 22 May 2023, the Applicant received a system-generated email with the subject “FWC Online Lodgment Service – Confirmation of Application Submission – Form F8 – reference number QQIU7.” The email read:

“You have submitted an application to the Fair Work Commission.

Your OLS reference number is QQIU7.

We will send you an email confirming lodgment and giving you a case number. Please quote the case number when calling or writing to us about your case.

Please keep the original of any documents you submitted online and your lodgment receipt for your records.


### Accessing your submitted application documents

Your form can be accessed using the **Online Lodgment Service**.

Your feedback is important to us.”

.....

- d) Attached to the email was the following lodgment receipt:



Fair Work  
Commission

**Application Form**  
Submitted Date: 22-May-2023 19:06:32 +1000 Australian Eastern Standard Time (New South Wales)  
Reference Number: QQIU7

**Applicant**

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Applicant details

**Person Details**

Given Name(s)	Last Name
Amy	Brunskill

**Contact Details**

Email Address	Phone Number
amy.brunskill@hotmail.com	(04) 8746 0171

**Application**

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Application details

**Application**

Application Type: Disputes - s.385 - Application to deal with contraventions involving dismissal  
Application Location: MELB

**Comments**

**Additional Documents**

- e) The next contact occurred one week later when, on 29 May 2023, Commission staff sent the applicant a letter in the following terms:

“Dear Amy Brunskill

**Your general protections application is incomplete.**

We need more information from you before your case can go any further.

**Case number** C2023/2934

**Case name** Miss Amy Brunskill v

We have received your general protections application. Some information is missing.

We need this information before we can go ahead with your case.

**What you need to do**

**By Monday, 12 June 2023:**

1. Update your application form with the missing information. The information we need is described below.
2. Send us your completed form and any supporting documents to [perth@fwc.gov.au](mailto:perth@fwc.gov.au). Please include your case number C2023/2934.

We have attached a copy of your form. If you can't update your form, you can download a new copy of the [F8 dismissal application form](#) from our website.

**The information we need**

- Your Forms F8 and F80 were blank.
- You must sign and date your form before your case can go ahead. Please sign and date your form and send it back to us as soon as you can.

**If you decide not to continue**

If the case is settled, or if at any stage you decide to withdraw your application, please let us know as soon as you can. Send us a completed Form F50 Notice of discontinuance or:

- call us on 1300 799 675
- email [perth@fwc.gov.au](mailto:perth@fwc.gov.au)
- write to us by post or fax. Details are on our contact us webpage.

This will end your case.

Remember you have until **Monday, 12 June 2023** to complete your application.

If you have any questions about this letter, please call 1300 799 675 or email perth@fwc.gov.au.

Yours sincerely”

.....

- f) The Applicant first became aware that she had submitted a blank application form when she was contacted by the Commission and received the above letter from the Commission on 29 May 2023.
- g) The Applicant has significant mental health challenges, including anxiety and ADHD for which she receives treatment. She found the application process overwhelming and said that she takes longer than the average person to complete forms.
- h) On 2 June 2023 the Applicant submitted a completed application form F8. The completed form was the form completed and saved but not uploaded on 22 May 2023. The Applicant made no changes to the saved form before submitting it.

[5] On 9 June 2023 the Respondent was served with a copy of both the blank and complete form F8s and was required to provide a response by 16 June 2023. Both parties were advised that the application was made outside the 21-day time limit.

### **Requirements for making an application**

[6] Section 366 of the Act states that an application under s365 must be made within 21 days after the dismissal took effect, or within such further period as the Commission allows under s366(2) of the Act. Section 367 provides that an application must be accompanied by any fee prescribed by the regulations.

[7] Section 585 of the Act provides that an application must be in accordance with any procedural rules for that type of application. Section 586 provides that the Commission may allow a correction or amendment of any application on any terms it considers appropriate, or to waive an irregularity in the form or manner in which an application is made to the Commission.

[8] Regulation 3.02 of the *Fair Work Regulations 2009* (Cth) (**Regulations**) prescribes the fee for making an application, together with a method for indexing the fee. Sub regulation 3.02(8) provides for an application fee to be refunded in certain circumstances, including if the “application” is discontinued before specified events.

[9] The *Fair Work Commission Rules 2013* (Cth) (**Rules**) deal further with the requirements regarding applications. Rule 15 deals with lodgment of documents using the Commission's electronic lodgment facilities and includes:

...

(2) If a document lodged in accordance with this rule is an application commencing a matter:

- (a) the General Manager must send an acknowledgement of lodgment, by email, to the person lodging the document; and
- (b) the application is not taken to have been lodged until the acknowledgement of lodgment mentioned in paragraph (a) has been sent; and
- (c) once the acknowledgement of lodgment mentioned in paragraph (a) has been sent, the application is taken to have been lodged at the time it was received electronically by the Commission.

[10] Also relevant is Rule 8 which provides that where there is an approved form, the approved form must be used, although it is sufficient compliance if a document is substantially in accordance with the approved form. Rule 9 relevantly allows for applications under s365 to be made by telephone. Rule 13 sets out general requirements for lodging documents, including that they must be typewritten or clearly written or reproduced. Rule 6 provides a discretion for the Commission to dispense with compliance with the Rules.

### **Consideration**

[11] As Ms Brunskill's dismissal took effect on 5 May 2023, the 21-day period for making an application expired at midnight on 26 May 2023. The blank application was submitted on 22 May 2023, and the subsequent complete application was made on 2 June 2023.

[12] Two questions are raised by this sequence of events. Firstly, by submitting a blank application form did the Applicant 'make an application' on 22 May 2023 for the purposes of s366 of the Act? If so, then the application was made within time and no extension of time is required. If not, the application was made 7 days late and the question is whether there are exceptional circumstances that warrant additional time being allowed for the Applicant to make the application.

### **Was the blank form F8 lodged on 22 May 2023 an 'application'?**

[13] Ms Brunskill's 'application' was made using the Commission's online system. The process for making an application this way is as follows. After registering as a user, an applicant is directed to download the Form F8 application form, complete it, save it to their computer or device, and then upload it. After uploading the application form and either paying the required fee or completing and submitting a fee waiver application form, uploading any additional documents or information, the applicant is taken to a further screen, asked to select their geographical location and then hit 'continue'. By clicking 'continue' the application is

submitted and a new screen appears advising “Submission complete”. This screen displays a reference number and advises that a copy of the lodgement receipt has been sent to the person’s email address along with “A copy of your uploaded documents can be downloaded from the History tab”. Prior to or at the time of submitting the application, no preview or other information about the uploaded form is displayed.

**[14]** The lodgment receipt that is emailed to the applicant contains the reference number provided, the date and time the application form was submitted, the applicant’s contact details and the application type.

**[15]** The lodgment receipt also advises that a copy of the application form and any other documents submitted can be viewed and downloaded through the History tab. However, although this can in fact be done by clicking on the relevant reference number, doing so is not intuitive and there are no visual indicators pointing to this. The reference number is neither highlighted nor readily identifiable as a link to further documents that can be drilled down into. There is no indication that the reference number is a link, for example by the use of underlined text indicating a hyperlink. The download symbol (↓) on the page, if clicked, downloads the receipt not the application form.

**[16]** The document submitted by the Applicant on 22 May 2023 was an entirely blank application form F8. The form F8, like other Commission application forms are simple documents, quite different to documents and pleadings in a Court or other setting. They are designed to elicit certain information, with the F8 seeking:

- (a) Information about the applicant: their contact details, information about their representative (if any), communication and special needs preferences and requirements;
- (b) Information about the respondent: their name and contact details;
- (c) Dates of the applicant’s employment and dismissal by the respondent;
- (d) Whether the application is made within 21-days of the dismissal taking effect;
- (e) The applicant’s knowledge of how many employees were employed at the workplace;
- (f) Whether any other claims regarding the dismissal have been made;
- (g) The outcome the applicant is seeking by lodging the application;
- (h) The alleged contravention: the actions of the employer, the sections of the Act alleged to have been contravened, and how the dismissal is alleged to have contravened the sections identified;
- (i) Whether the applicant consents to their details being provided for research purposes;
- (j) The signature, position and date of application.

**[17]** The Act does not define what constitutes an application. The Macquarie Dictionary definition of ‘application’ relevantly includes:

*noun* **1.** the act of putting to a special use or purpose: *the application of common sense to a problem.*

...

**7.** the act of requesting.

**8.** a written or spoken request or appeal.

...

[18] An incomplete application form is not necessarily invalid. In *Arch v Insurance Australia Group Services*<sup>1</sup> a Full Bench found that the date of filing of an application was on 22 May 2019, the date an incomplete application had been submitted. In that case, the original document was missing the first three pages of the application form, and a completed form was submitted 43 days later. The original document was accompanied by several supporting documents including the letter of termination.

[19] The Full Bench followed the approach taken in an earlier case involving an applicant who had used the wrong form to make an unfair dismissal application, of examining the substance rather than the form of what had occurred. The Full Bench concluded that taking into account all the information provided by Mr Arch, including the supporting documents, there was ‘no room for doubt’ that it was intended to be a general protections dismissal application.<sup>2</sup>

[20] The Full Bench also detailed the communication that passed between Commission staff and the applicant, and which proceeded on the basis that Mr Arch had filed a general protections dismissal application on the date he submitted the incomplete form, stating:

We have set out the chronology of what followed in some detail above. It is clear that the Commission’s registry immediately proceeded on the basis that Mr Arch had filed a general protections dismissal application on 22 May 2019. It was recorded as such on CMS and assigned a matter number. The following day, the Commission obtained from Mr Arch the prescribed filing fee for a general protections dismissal application and informed IAG in writing that it had received such an application in respect of Mr Arch’s former employment with IAG. Subsequent advice to Mr Arch about the need for him to provide a complete Form F8 proceeded, as we have earlier set out, on the express premise that Mr Arch had filed a general protections dismissal application on 22 May 2019, albeit an incomplete one. Mr Arch was repeatedly advised by the Commission that if he did not file a completed document, he was at risk of having his application dismissed – advice that was premised on there being an extant application capable of being dismissed. He was never advised (prior to the decision) that the Commission did not regard him as having filed an application for the purpose of s 366 on 22 May 2019 with the consequence that time was still running for the purpose of that provision. In the circumstances described, it would be unconscionable for the Commission to subsequently proceed on the basis that Mr Arch did not file any application for the purpose of s 366 until 4 July 2019.<sup>3</sup>

[21] The Bench then found that while Mr Arch did not file an application in the prescribed form on 22 May 2019 as required by the Rules, ‘non-compliance with s 585 does not invalidate an application’ because s.586 provides a procedural power to deal with such applications.

[22] The Bench went on to say:

Second, s 587(1)(a) provides that the Commission may dismiss an application if it is not made in accordance with the FW Act. Thus, where a defective application is filed, it may be the subject of correction, waiver or dismissal. It may also be discontinued under s 588. But the FW Act does not disclose an intention to treat it as being entirely invalid and of no effect. The advice given by the Commission staff to Mr Arch from 22 May

2019 until 4 July 2019 (when he finally provided an application in proper form) was at all times consistent with this legal position.<sup>4</sup>

[23] Also relevant is the Full Bench decision in *Hatch v Woodside Energy Ltd.*<sup>5</sup> In that case the Full Bench held that the applicant had lodged an application within the 21-day period when Mr Hatch emailed an application which was unable to be opened because of the format of the file or security restrictions. Upon being advised of the issue, the applicant promptly resent the application in a readable format, but this was one day late.

[24] The Bench said at paragraph [48]:

Put another way, an application might suffer a range of (potentially fatal) defects and could still be capable of being “made”, albeit it might be liable to dismissal if those defects are not cured or, in the case of the procedural rules, the requirement to meet them is not excused. There may be circumstances where the defects or deficiencies in a purported application are sufficiently significant that an application cannot even be said to have been “made”. Save for the issue raised about the Appellant’s Form F2 initially being unable to be read, we do not consider this is such a case and say nothing further on that matter.<sup>6</sup>

[25] The Bench noted there is a distinction between when an application is ‘made’ for the purposes of s.366 of the Act and when it is ‘lodged’ for the purpose of the Rules, and that while there is overlap between the two concepts, they are not always the same.<sup>7</sup> The Bench gave an illustration that an application would have been ‘made’ for the purposes of s.366 if the acknowledgement email contemplated by Rule 14(4) (the equivalent of Rule 15(2) above in relation to applications sent by email) was not sent, and consequently the application would ‘not taken to have been lodged’. In the present case, the acknowledgment of lodgment was sent and accordingly the application was taken to have been lodged in accordance with the Rules. However, that the application was ‘lodged’ is not the same as whether the application was ‘made’.

[26] The Commission regularly deals with applications that are incomplete or where the prescribed fee is unpaid (or not waived) at the time the application is made. The degree of incompleteness also varies significantly from an unpaid application fee at one end of the spectrum, to most if not all relevant information not being provided at the other end. Applicants in these instances are generally advised that they need to provide a complete application and that if they fail to do so, their application may be dismissed. A significant number of applications are subsequently dismissed pursuant to s.587 of the Act, following unsuccessful attempts to contact the applicants to provide the missing information. Such decisions are made on the basis that whilst incomplete, they are nonetheless valid ‘applications’ that then need to be dismissed. The extent of the incompleteness can be seen for example in *Josh Bolton*<sup>8</sup> where the application omitted the respondent’s details, the date the applicant commenced employment, the reasons given for the dismissal or why the dismissal was alleged to be unfair, and the application fee was not paid and no waiver form completed. In *Hart-Reid v Queensland Health*<sup>9</sup> a s.739 application did not include the respondent’s details, the applicable industrial instruments, or the relevant dispute settlement procedure under which the application was brought. In *Devereux v Catholic Early EdCare*<sup>10</sup> the respondent’s details were not provided.



[27] Even where completed applications are lodged, the level of ‘completeness’ varies dramatically from a comprehensive, detailed document fulsomely answering all questions, to applications where information is missing, or minimal, irrelevant or incorrect. There is no mandated standard of completion.

[28] It is difficult to discern a basis, for the purposes of s.366, for treating an application form that is blank as not being an application, but an application form that is missing or contains incorrect essential information is an application. The lack of a meaningful distinction between the two is particularly significant given the Commission is not a Court, is statutorily obliged to perform its functions and exercise its powers in a manner that is fair and just, is quick, informal and avoids unnecessary technicalities, and is not bound by the rules of evidence and procedure.<sup>11</sup> In the context of a relatively short period in which to make an application of 21 days, a generous and purposive construction of what it means to ‘make an application’ is to be preferred. In my view, the blank application submitted within time is not necessarily to be treated as being entirely invalid and of no effect.

[29] As the Full Bench in *Hatch* noted, an application with potentially fatal defects might be liable to dismissal.<sup>12</sup> The Act provides a means to deal with the circumstance of an entirely blank application being made, with the capacity under s.587 of the Act to dismiss the application if the completed form is not promptly submitted.

[30] In the present circumstances, I consider that it was sufficiently clear that the Applicant was seeking to make a general protections dismissal application. Consistent with the dictionary definition of ‘application’, through her action of submitting a general protections involving dismissal application form, although blank, the Applicant nonetheless conveyed that she was making such a request or claim.

[31] It is also relevant that the receipt generated upon lodgment and the email enclosing a copy of the receipt both refer to an ‘application’ having been submitted. There was nothing to indicate that documents submitted are not applications unless and until they are assessed and confirmed to be complete. The correspondence dated 29 May 2023 advised that the “application” was incomplete, that more information was needed before the case could proceed, and that the Applicant had to “update [her] application form”. It is premised on there being a valid application, albeit incomplete, and that the applicant should contact the Commission or send a Form F50 Notice of discontinuance if she decides to “withdraw [her] application” and that this would ‘end [her] case’.

[32] In several respects, these circumstances are similar to those discussed by the Full Bench in *Arch* at paragraph [33] above, and the conclusion that it would be unconscionable for the Commission to subsequently proceed on the basis that no application had been filed for the purpose of s.366, is just as apposite here.

[33] The Applicant first became aware that she had submitted a blank application form when she received the above letter from the Commission on 29 May 2023. She then acted reasonably promptly in filing the form that she had completed on 22 May 2023, with no changes. If she had not done so, her ‘application’ would have been liable to be dismissed under s.587 of the Act.

[34] On balance, I consider that the blank and unsigned application form submitted by the Applicant on 22 May 2023 constituted an application made within the meaning of s.366 of the Act. I waive compliance with the Rules to the extent necessary.

[35] I consider that the approach that I have taken is also consistent with other aspects of the statutory framework. For example, as noted above, Regulation 3.02 provides for an application to be refunded if “the application” is subsequently discontinued. If a blank application form was submitted but was not considered to be an application, then any fee paid would not be able to be refunded, as there would be no application to be discontinued. I do not consider this to be the legislative intent.

[36] As I have found the application was made on 22 May 2023, this was within 21 days after the dismissal took effect on 5 May 2023, and no additional time needs to be allowed.

### **Should an extension of time be allowed?**

[37] However, if I am wrong and the ‘application’ made on 22 May 2023 was not a valid application, I have also considered whether there are exceptional circumstances and if so, whether it is appropriate to grant additional time for the Applicant to make her application.

[38] The Applicant was dismissed effective 5 May 2023 and the completed application made on 2 June 2023. The application was therefore 7 days outside the 21-day time period.

[39] Additional time can be allowed under s.366 of the Act if there are exceptional circumstances. These are circumstances that are “out of the ordinary course, or unusual, or special, or uncommon” but that “need not be unique, or unprecedented, or very rare”.<sup>13</sup>

[40] In deciding whether I am satisfied that there are exceptional circumstances, I must consider:

- the reason for the delay;
- whether the person first became aware of the dismissal after it had taken effect;
- any action taken by the person to dispute the dismissal;
- prejudice to the employer (including prejudice caused by the delay);
- the merits of the application; and
- fairness as between the person and other persons in a similar position.

[41] 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>

### ***Reason for delay:***

[42] I am satisfied that the Applicant has provided an acceptable explanation for the delay in lodging her application. She sought to lodge the application on 22 May 2023, but failed to do so by accidentally uploading the incorrect document. The Applicant only became aware that the application form she had uploaded was blank was on 29 May 2023, when she received the letter from Commission staff set out at paragraph 4(e).

[43] I consider that it would be relatively easy to accidentally upload the incorrect document using the Commission's online system considering the need to download the blank form, complete it, save it, then upload it. The risk of this occurring is increased by the absence of any preview of the document being submitted or simple and intuitive access to the uploaded document.

[44] I also have taken into account, without any intended criticism of Commission staff, that the applicant's 'application' was not dealt with for 7 days. Had it been able to be dealt with more promptly the Applicant could have been alerted to the issue and had an opportunity to address it within the 21-day time period.

[45] I have also taken into account that the receipt provided upon lodgment on 22 May 2023 provided to the Applicant does not convey any sense of urgency or timeliness, and simply provided the Applicant with 14 days to provide a completed application.

[46] I am satisfied that these circumstances coupled with the Applicant's disability and mental health issues, provide an acceptable explanation for the delay in lodging the application. This consideration weighs in favour of a finding of exceptional circumstances.

***Whether the person first became aware of the dismissal after it had taken effect:***

[47] The Applicant was aware when she received the email from the Respondent that her employment was ending on 5 May 2023. As a result, she had the benefit of the full 21-day period within which to lodge the application. I consider this to be a neutral consideration.

***Whether the applicant took action to dispute the dismissal***

[48] Whilst the Applicant requested a meeting with management to discuss her dismissal, I find that the Applicant did not otherwise take any steps, beyond lodging the application, to dispute her dismissal after it took effect. I consider this as a neutral factor.

***Prejudice to the employer (including prejudice caused by the delay)***

[49] There is no evidence of any particular prejudice to the Respondent of a relatively short delay period. I consider this weighs slightly in the Applicant's favour.

***Merits of the application***

[50] The merits of the application are a relevant consideration in determining whether there are exceptional circumstances and whether it is appropriate to exercise the discretion to extend the timeframe. For example, a highly meritorious claim may persuade the Commissioner to accept an explanation for delay that would otherwise have been insufficient.

[51] The Applicant contends that she was dismissed because of her 'mental/physical disability' and not for any "performance or professional reasons". According to her, she was told that the employer 'was on a timeline to decide [her] employment status, that 'if it's any comfort, it's not performance related', but was because of her 'capacity' and that it was too

difficult for them to manage her and her needs in the workplace long term. The response filed by the Respondent simply states that the Applicant's employment was terminated within the probation period set out in the signed contract of employment. The Applicant does not concede that her employment contract was subject to a probation period.

[52] There is insufficient material that has been filed to date to come to any firm view as to the merits or otherwise of the application. However, on the basis of the untested assertions of the Applicant coupled with the absence of any meaningful response, it appears that the Applicant has an arguable case and this weighs in her favour.

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

[53] This consideration concerns consistency with other relevant cases to ensure fairness between the Applicant and other persons. It involves considering, for example, how other cases involving similar circumstances were treated to ensure there is fairness in the treatment of Ms Brunskill's claim. However, cases will generally turn on their own facts.

[54] In *Hames v IWM (PBH) Pty Ltd*<sup>15</sup> Deputy President Beaumont granted an extension of time of 18 days following the submission of blank application forms.<sup>16</sup> Conversely, in *Hedger v the Trustee for Perrott Trust*<sup>17</sup> Deputy President Dobson declined to grant an extension of time in somewhat similar circumstances.

[55] In the circumstances, I have treated this as a neutral consideration.

**Conclusion**

[56] I find that several of the considerations I need to take into account weigh in favour of a finding of exceptional circumstances, and none weigh against.

[57] I am satisfied that there are exceptional circumstances for the lateness in making the application and consider that it is appropriate to grant additional time for the Applicant to make the application.

[58] The application will be scheduled for conciliation before a Commission staff member.



DEPUTY PRESIDENT

*Appearances:*

*Ms Brunskill, for the Applicant*

*Ms Vasilevska, for the Respondent.*

*Hearing details:  
Melbourne via video conference  
19 July 2023 at 10.00am*

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<sup>1</sup> *Shane Arch v Insurance Australia Group Services Pty Ltd* [\[2020\] FWCFB 601](#).

<sup>2</sup> *Ibid* at [32].

<sup>3</sup> *Ibid* at [33].

<sup>4</sup> *Ibid* at [35].

<sup>5</sup> [2023] FWCFB 51.

<sup>6</sup> *Ibid* at [48].

<sup>7</sup> *Ibid* at [20].

<sup>8</sup> [\[2017\] FWC 6763](#).

<sup>9</sup> [\[2023\] FWC 366](#).

<sup>10</sup> [\[2020\] FWC 5917](#).

<sup>11</sup> *Fair Work Act 2009* (Cth) s.577, s.591.

<sup>12</sup> *Hatch v Woodside Energy Ltd* [2023] FWCFB 51.

<sup>13</sup> *Nulty v Blue Star Group* (2011) 203 IR 1 at [13].

<sup>14</sup> *Ibid*.

<sup>15</sup> [\[2023\] FWC 690](#).

<sup>16</sup> The Deputy President did not give detailed consideration to whether the blank forms were an application.

<sup>17</sup> [\[2023\] FWC 802](#) (Decision currently under appeal).