DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Mr Matthew Stephen Evison
v
PROCLOZ Pty Ltd
(C2022/7683)

COMMISSIONER YILMAZ MELBOURNE, 9 FEBRUARY 2023

Application to deal with contraventions involving dismissal - application made outside the prescribed 21 days – whether there are exceptional circumstances - extension of time granted.

[1] On 18 November 2022, Mr Matthew Stephen Evison lodged an application pursuant to s.365 of the *Fair Work Act 2009* (the Act) against Procloz Pty Ltd (Procloz). Mr Evison commenced employment on 23 August 2022 and his dismissal took effect 20 October 2022.

[2] Procloz is a labour hire business supplying labour to various industries. Mr Evison was employed by Procloz on 23 August 2022 as an Agency Partner Manager to perform work for Procloz's client Papaya Global to work on a third-party business identified as TapCart.[1]

[3] Procloz submits that it is the employer, while Mr Evison described TapCart as his employer with Procloz as the party disbursing his monthly salary. Procloz tendered in evidence Mr Evison's contract of employment which does identify Procloz as the employer however, it places an obligation on Mr Evison to follow all directions, policies and procedures of the client, which in this instance is Papaya Global or TapCart. During the hearing both parties confirmed that daily communications and instructions to Mr Evison were direct from TapCart management including TapCart HR as opposed to Procloz. Ms Gupta the Managing Director of Procloz further informed the Commission that Procloz did not manage Mr Evison and its payment of wages to Mr Evison was on instruction of TapCart management.

[4] Mr Evison was self-represented and Procloz was granted leave to be represented by a lawyer.

Dates of commencement and termination of employment

[5] While Mr Evison initially contended that he commenced employment on 22 August 2022, the contract of employment confirmed the commencement date was 23 August,[2] which was not in dispute. I am satisfied on the evidence that Mr Evison was employed on 23 August 2022.

[6] While both parties had identified that 19 October 2022 was the date of termination, the evidence shows that Procloz, sent an email on 20 October 2022 attaching letter dated 19 October 2022 terminating Mr Evison's employment.[3] Mr Evison submits that he received an email on 19 October 2022 from TapCart informing him of their decision to terminate their Australian interests and in turn his engagement as the Australian representative. This email was not tendered in evidence, nor was there any contention regarding the email.

[7] As Procloz is Mr Evison's employer, the termination took effect when it advised him of his termination, i.e. on 20 October 2022. Despite the letter being dated 19 October 2022, Procloz sent the correspondence on 20 October 2022.[4] While Mr Evison was aware of TapCart's decision and the effect on his employment, the termination of employment occurs when the employer advises its employee. On 20 October 2022, Procloz advised Mr Evison that his employment was terminated with his last day of work as 19 October 2022 and paid one week in lieu of notice. I am satisfied that the termination of employment was on the 20th of October and not the 19th. In any event an employer cannot backdate a dismissal.

Extension of time

[8] Section 366(1) of the Act requires that an application under s.365 be made within 21 days after the dismissal took effect, or in such further time as the Commission may allow. The application was lodged 8 days after the 21-day statutory time limit.

Applicant's submissions

[9] Mr Evison submits that he was bullied, harassed and experienced victimisation from the VP of Sales and HR by his employer's client (TapCart of Papaya Global) into which he was placed to perform services as Agency Partner Manager, Australia. It is submitted that on 30 September 2022 he made a report to HR of TapCart that he was bullied and harassed and that he feared victimisation due to his complaint.

[10] Mr Evison submits that he did not report the conduct or his complaint to TapCart's HR to his employer- Procloz.

[11] Mr Evison submits that his dismissal is a contravention of his workplace rights in terms of s.340 (protection of workplace rights) and s.352 (temporary absence- illness or injury). He made a complaint to HR on 30 September 2022 and proceeded to take personal leave due to workplace stress on 10 October 2022 for a period of one month. Procloz dismissed Mr Evison on 20 October with a letter attached to an email for the reason that the client withdrew services from Australia on 13 October 2022.[5] Mr Evison was paid outstanding ordinary hours, accrued annual leave and notice of one week in lieu calculated to 19 October 2022.[6]

Respondent's submissions

[12] Procloz submits that Mr Evison was engaged to provide services to its client's business TapCart and was the only employee in Australia. On 13 October 2022, Procloz received correspondence from Customer & People Success for TapCart that it was closing its operation in Australia immediately, and therefore did not require further services from Procloz.[7] .

[13] Procloz contends that due to the closure of the business for which Mr Evison was engaged, he was dismissed for reason of redundancy consistent with clause 23 of his contract of employment. A letter of termination, dated 19 October 2022, was emailed to Mr Evison which confirmed the reason for dismissal.[8]

[14] Procloz contends that it had no knowledge of Mr Evison's alleged complaint about bullying, harassment, nor any alleged retaliatory behaviour prior to or at the time of his dismissal. However, Procloz does submit that it was aware of Mr Evison's absence on personal leave and that the dismissal occurred during this period.

[15] Procloz deny the reason for dismissal was due to a prohibited reason but rather due to genuine redundancy consistent with clause 23 of the contract of employment. Further it submits that the application is unmeritorious, is filed outside the statutory time frame and consequently should be dismissed.

Consideration

[16] General protections applications involving dismissal must be made within 21 days.

[17] However, s.366(2) permits the Commission to consider an extension to the period for filing an application if there are exceptional circumstances, taking into account the following considerations:

> '(a) The reason for the delay; and
> (b) Steps taken to dispute the termination; and
> (c) Prejudice to the employer; and
> (d) Merits of the application; and
> (e) Fairness between the person and other persons in a like position'

[18] The meaning of 'exceptional circumstances' was considered in *Nulty v Blue Star Group Pty Ltd* (Nulty)[9] where it was held that:

> "To be exceptional, circumstances must be out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare. Circumstances will not be exceptional if they are regularly, or routinely, or normally encountered. 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 are seen as exceptional. It is not correct to construe "exceptional circumstances" as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural "circumstances" as if it were only a regular occurrence, even though it can be a on off situation. The ordinary and natural meaning of "exceptional circumstances" includes a combination of factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon."[10]

[19] I now turn to Mr Evison's arguments for an extension of time in relation to each of the considerations of s.366(2).

The reason for the delay

[20] The general protections involving dismissal application was lodged with the Commission on 18 November 2022, 8 days late. Mr Evison initially assumed his application was made within the 21-day statutory time frame because the payment of his entitlements was made on 31 October 2022. However, in his outline of submissions, Mr Evison submits that he understood the delay error objection raised by Procloz and realised his application was out of time. He submits that the delay was due to being on leave for medical reasons. He submits that his medical practitioner advised that he take leave because he could not sleep, think straight and was on edge.[11] He says the reason for his medical condition was an unsafe work environment where he was under duress and subject to retaliatory behaviour. Mr Evison tendered in evidence the medical certificate received from his general practitioner dated 10 October 2022 stating that he required one month off work until his mental health improves.

[21] In Mr Evison's outline of submissions he states that he was unaware of the 21 day time frame for filing an application.

[22] Procloz contends that it sent an email on 19 October 2022 dismissing Mr Evison and refers to the bundle of emails attached to the outline of submissions. However, the bundle of emails shows that the email was sent on 20 October 2022 at 7.38pm, while the letter of termination was dated 19 October 2022.

[23] Procloz submit that the payslip, letter of termination and emails confirm the date of dismissal was 19 October 2022. However, the emails do not confirm this date and the payslip tendered in evidence confirms the period covered is 1 October to 31 October 2022.[12]

[24] Despite the inconsistency in evidence concerning the date of dismissal, Mr Evison was aware of his dismissal and his application was delayed by 8 days.

[25] There must be a credible reason for the delay.[13] A lack of awareness of the time frame for applications is not an exceptional circumstance nor credible reason for delay. Mere ignorance of the statutory time limit is not an exceptional circumstance.[14]

[26] Further, Mr Evison relies on his medical certificate and medical reason for the delay. I do not agree that the lateness of the application is due to a medical condition as the medical certificate provides no indication that Mr Evison had any incapacity to make an application. The medical certificate is dated 10 October 2022 and provides that Mr Evison has *work related stress* and requires *one month off work until his mental health improves*.[15] The medical certificate does not support Mr Evison's contention that his medical condition was the cause of the delay. In addition, an assessment of the bundle of emails tendered in evidence by Procloz indicates that Mr Evison had capacity to challenge his final payment of his entitlements, therefore this capacity is inconsistent with Mr Evison's statement that he was incapable of filing within time.

[27] I am not satisfied that Mr Evison has demonstrated credible reasons regarding this consideration, and I consider the reasons given for the delay do not weigh in his favour.

Steps taken to dispute the termination

[28] Mr Evison submits that he sought clarification of the reason for dismissal as he was on medical leave at the time. He further submits it was not altogether clear if the dismissal was immediate or on his return to work. In this regard he referred to TapCart's unlimited sick leave entitlement which he believed he was entitled to. Further Mr Evison submits that his medical certificate was immediately sent to TapCart and the decision to withdraw from Australia followed. Procloz submit they were informed of the decision to withdraw from Australia on 13 October 2022, however, Mr Evison was informed by TapCart on 19 October 2022 and by Procloz the following day.

[29] Mr Evison's complaint on 30 September 2022 to TapCart's HR concerned bullying, harassment and fear of victimisation. He admits to not informing Procloz, and Procloz submit they have no knowledge of the complaint made. On 7 October 2022, Mr Evison did not attend a TapCart meeting which became the focus for a disciplinary process. However, the disciplinary meeting did not occur on 11 October as Mr Evison obtained a medical certificate to cover one month absence on medical leave from 10 October 2022. He does confirm that his communications were direct with TapCart including their decision to end his engagement, and not Procloz, on the understanding that he reported directly to TapCart. Procloz submit they had no knowledge of any of the events leading to TapCart's withdrawal and Mr Evison's dismissal other than receipt of the medical certificate ad the notification on 13 October 2022. On this basis Procloz limit their submissions to their communications with Mr Evison direct and do not address Mr Evison's submissions concerning his steps challenging his dismissal with TapCart.

[30] Procloz dispute that Mr Evison challenged his dismissal and tendered in evidence an email bundle which demonstrates that Mr Evison questioned his final payment of entitlements and not the dismissal.

[31] While there is no dispute that there is no evidence Mr Evison challenged the dismissal with Procloz, given the accepted direct reporting structure with Procloz and an absence of evidence to dispute Mr Evison's submission I do consider this consideration neutral.

Prejudice to the employer

[32] Mr Evison submits the delay does not prejudice Procloz and it provides no evidence of prejudice.

[33] However, even the mere absence of prejudice is an insufficient basis to grant an extension, therefore this consideration is neutral.

Merits of the application

[34] Mr Evison submits that on or around 19 October 2022 he was emailed correspondence from Procloz that he was dismissed immediately because the client, which was based in the

United States determined that they were cutting ties with Australia immediately, with no explanation for their decision.

[35] Mr Evison submits that when he commenced reporting to TapCart all was well until his direct line manager left the organisation. The interim replacement line manager was the VP of Sales, which he describes as having no experience in sales. It is submitted that due to the belittling and harsh communication from his manager he approached HR. On Friday 30 September 2022, Mr Evison formally reported to HR that he was being bullied, harassed and threatened by the VP of Sales. While he was concerned of possible retaliation for making a complaint, he contends that he reported that he was threatened with termination should he not agree with or comply with the VP of Sales. He submits that even though HR advised that they spoke to the VP and assured him all should be fine, he did pursue therapy to better cope with the anxiety relating to the incidences at work.

[36] Mr Evison submits that he sent through to HR the threatening email from the VP of Sales in response to the feedback that Mr Evison provided on job candidates as he was asked. Procloz submits that neither the complaint or the alleged threatening email was sent to it nor was any of this material tendered in evidence. Mr Evison submits that he was not in a position to tender the materials because on his termination of employment on or around 19 October his access to all email correspondence ceased with TapCart and Procloz.

[37] On Thursday 6 October, Mr Evison did not attend a sales team meeting organised by the Marketing Manager. Mr Evison submits his previous manager's instruction was to attend meetings unless he had prior arrangements with sales leads. He submits that he informed the meeting organiser of his unavailability prior to the scheduled meeting. However, on the same day after the scheduled meeting, Mr Evison received a call from his VP of Sales directing him to attend all team meetings and stating that team meetings were mandatory. On the following day, he received an email to attend a meeting with the VP of Sales and HR scheduled for 11 October to address in writing his failure to attend the team meeting.

[38] On Monday 10 October 2022 Mr Evison went to see his general practitioner and proceeded on one month of personal leave. He submits that he sent the medical certificate to TapCart and received the letter of termination a few days later while on personal leave.

[39] Procloz deny that the dismissal was for any prohibited reason as it was unaware whether a complaint was made and his absence on medical leave was irrelevant as the dismissal was due to redundancy. Procloz made no substantive submissions in relation to the detail concerning the medical certificate or reasons for the absence. Procloz further in response to questions from the Commission submits it did not make any inquiries in relation to what triggered such a period of absence on medical grounds. The certificate clearly states the absence is due to workplace stress.

[40] I observe that the letter dated 13 October 2022 from TapCart to Procloz curiously is addressed "To whom it may concern" and states that TapCart is withdrawing its operation from Australia and no longer requires the services of Procloz. This first sentence and the words "to whom it may concern" suggests the document was prepared for another purpose rather than direct notice to Procloz to sever its commercial arrangement. The letter continues with:

> "Matthew Evison is not being terminated due to being sick or injured, he is being terminated due to a genuine redundancy as TapCart is discontinuing it's people operations in Australia and will be managing all Australian business remotely from the states. Matthew is the only person undertaking work in Australia for TapCart and TapCart has no other employees in Australia."[16]

[41] While the letter is unaddressed to any particular company or person, and even though it may state that the reason for dismissing Mr Evison is for genuine reasons, the context of the actions up to and after the date is relevant to the question whether it was a genuine redundancy.

[42] The correspondence confirms that TapCart is not withdrawing from Australia but is severing its relationship with Mr Evison and Procloz. The events immediately prior to the decision to dismiss did not suggest any evaluation of business operations, but rather Mr Evison was aggrieved and lodged a complaint with HR, he was instructed that attendance at meetings was compulsory and was about to be disciplined before he proceeded on one month of absence because of workplace stress. Should the evidence support Mr Evison's contentions, the reason for dismissal is unlikely to be determined to be a genuine redundancy. It is more likely a decision to remove a bullying complaint and to be a response to a temporary absence related to work.

[43] The absence of any discussions from TapCart to Mr Evison prior to the dismissal was not disputed, nor was there any evidence of discussion from TapCart to Procloz and no evidence of discussions between Procloz and Mr Evison. Procloz confirms that it did not consider any suitable alternative employment either. Instead Procloz sent to Mr Evison a letter of termination effective from one day prior to its notice dismissing him.

[44] The letter of termination incorrectly states that TapCart is withdrawing from Australia effective 13 October 2022. In actual fact the letter states it is withdrawing from its people operations, i.e. management of Mr Evison. The letter of termination further states that TapCart requested Procloz to terminate Mr Evison's employment, a curious request if Mr Evison was a direct employee of Procloz. The last paragraph suggests on payment of his entitlements Mr Evison has no claims on Procloz or its client.[17]

[45] Procloz confirmed during proceedings that it had the medical certificate in hand prior to emailing Mr Evison advising him of his termination of employment. Despite this, no action was taken to inquire further into why Mr Evison was on one month leave. I observe that while Procloz submits it is Mr Evison's employer, no actual management of Mr Evison occurred. Mr Evison was instructed and managed by TapCart, with only payment of wages through Procloz on TapCart's instruction. Consequently, Mr Evison's confusion as to who was his employer is quite understandable. Further considering the contract of employment that states that Mr Evison is subject to all policies and procedures of the client, Mr Evison's assumption that he was on unlimited personal leave consistent with TapCart's policies at the time of his dismissal may have some merit. In any event, Mr Evison was dismissed while on a period of sick leave due to workplace stress.

[46] Having considered the submissions and evidence tendered, I cannot conclude that Mr Evison does not have a meritorious application. While I have not tested the merit and it is not appropriate to do so in an extension of time, Mr Evison has suggested a causal link between his

workplace right, his exercising of his complaint to HR, his temporary absence and his termination of employment. Therefore, I do consider this consideration to weigh in Mr Evison's favour.

Fairness between the person and other persons in a like position

[47] Mr Evison contends that he was not given the support to succeed due to the behaviour from senior management and HR.

[48] Procloz contends that Mr Evison was not treated any differently to any other employee that is placed with a client and the role becomes redundant. It submits there are no exceptional circumstances in Mr Evison's case in respect to this consideration.

[49] However, Procloz was aware of the medical certificate prior to Mr Evison's termination of employment and while Mr Evison was an employee of Procloz, there was an accepted practice that daily reporting and management of Mr Evison was dealt with by TapCart and not Procloz. In a traditional employment relationship, the employer has responsibilities for its employees' wellbeing. In the Procloz model, there appears no such responsibility taken for Mr Evison in light of the workplace issues flagged in his medical certificate. While Procloz submit that Mr Evison was not treated any differently from any other Procloz employee placed with a client, this consideration relates to consistency of principles and fairness between Mr Evison and others in a like situation. Curiously Procloz took no interest in Mr Evison's medical condition or the reason for his absence from work. Had they taken an interest they would have known of the complaint made, the impending action by TapCart against Mr Evison and their sudden decision to withdraw from engaging personnel in Australia. Despite the decision of TapCart to withdraw from Australia, the employment obligations on Procloz remained. Mr Evison was not afforded any care or responsibility for his complaint, his safety and subsequent medical condition requiring one month absence from work. Consequently, I find this consideration in favour of Mr Evison.

Conclusion

[50] In this instance, I need to be satisfied that there are exceptional circumstances warranting an extension of time.

[51] It is on the balance of the considerations that I have decided grant an extension of time.

[52] Having considered all of the evidence and submissions against each of the factors set out in s.366(2), on balance the consideration of merit and fairness weigh in favour of an extension while the reason for delay does not, prejudice and challenge of the dismissal I did find neutral. Consequently, I am satisfied that there are exceptional circumstances warranting the granting of a further period for the making of an application under s.366(2). Accordingly, the matter will be listed for conference.

COMMISSIONER

Appearances:

Mr M.S. Evison *on his own behalf.*
Mr R. Tate *for the Respondent.*

Hearing details:

30 January 2023
Melbourne (By Video using Microsoft Teams)

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[1] Respondent's form F8A, attachment P2, letter of appointment.

[2] Ibid.

[3] Respondent's outline of submissions, attachment P1 bundle of emails, Email of 20 October 2022 at 7.38pm.

[4] Ibid.

[5] Ibid.

[6] Respondent's outline of submissions, attachment P2 pay slip.

[7] Respondent's form F8A Attachment P3, letter to Procloz.

[8] Respondent's form F8A Attachment P1, letter of termination of employment.

[9] [2011] FWAFB 975, [14].

[10] Ibid at [13].

[11] Applicant's outline of submissions, question 1d.

[12] Respondent's outline of submissions, attachment P2.

[13] *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, 299-300.

[14] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [14]; *Miller v Allianz Insurance Australia Ltd* [2016] FWCFB 5472, [23].

[15] Applicant's outline of submissions, Medical Certificate.

[16] Respondent's form F8A, attachment P3.

[17] Respondent's form F8A, attachment P1.