



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Oliver Reeve

v

PKF (Gold Coast) HR Services Pty Ltd
(U2022/12234)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 28 FEBRUARY 2023

Application for an unfair dismissal remedy – extension of time – mental health – discretionary considerations – exceptional circumstances – time for late lodgement extended

[1] On 23 December 2022 Oliver Reeve (Mr Reeve or the applicant) lodged an unfair dismissal application under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) in relation to an alleged termination of employment by PKF (Gold Coast) HR Services Pty Ltd (PKF or the employer) which took effect on 25 November 2022.

[2] PKF filed a response on 19 January 2023. The employer contends that the application should be dismissed because it is out of time and because Mr Reeve was not dismissed.

[3] Mr Reeve’s application was made twenty-eight days after the alleged dismissal took effect, being seven days beyond the twenty-one day statutory time-limit. For the application to proceed it requires an extension of time. Mr Reeve seeks that extension.

[4] This decision deals with whether an extension should be granted.

[5] I issued directions on 30 January 2023 and by interlocutory decision on 9 February 2023¹ refused a late application by Mr Reeve for an adjournment.

[6] Materials were filed by Mr Reeve and by PKF.

[7] I granted permission to both Mr Reeve and PKF to be represented on the out of time issue.

[8] Although both Mr Reeve and PKF initially sought that the issue be determined ‘on the papers’, I conducted a hearing by video on 10, 13 and 23 February 2023. These latter two dates were scheduled to accommodate evidence from treating practitioners called by Mr Reeve. I conducted a hearing in light of s 397 of the FW Act which requires a conference or hearing to be held on a matter under Part 3-2 involving contested facts. It was apparent on the face of the materials filed that this matter likely involved a factual dispute at least as to Mr Reeve’s state of health and levels of impairment at relevant times.

[9] Mr Reeve gave evidence without objection despite no witness statement having been filed in his name. Also called by Mr Reeve were two treating practitioners:

- Dr David Barison, Psychiatrist; and
- Mr James Whiting, Clinical Psychologist.

[10] PKF called:

- Matthew Butler, Managing Director; and
- Calinda Ujdur, Director.

[11] Both parties made written and oral submissions.

[12] Following the hearing I reserved my decision.

Facts

[13] I make the following findings.

[14] PKF is a service company forming part of a larger global accounting and business advisory services entity.

[15] Mr Reeve was employed by PKF in a senior role as the Director of Audit and Assurance.

[16] Mr Reeve commenced employment on 14 March 2022.

Resignation

[17] In October 2022 Mr Reeve came to be concerned about certain workplace issues (including dealings with a divisional director). He lost confidence in the manner in which those issues were being handled by PKF and in particular by its Managing Director Mr Butler.

[18] On 31 October 2022 Mr Reeve gave four weeks' written notice of resignation.²

[19] The resignation took effect on 25 November 2022 although Mr Reeve's last day of work was 23 November 2022.

[20] Over the four week period of notice Mr Reeve worked principally from home, though occasionally did so from the office. During this period, Mr Reeve performed most of his normal duties and communicated with clients and others that he had resigned and was leaving the business.³

[21] Over the four week period of notice, Mr Reeve also gave thought to alternate employment and made online searches and enquiries though did not seek to progress applications to interview. Included in his search were roles outside the audit field. For example,

on 9 November 2022 Mr Reeve prepared an email concerning an advertised role at the Australia Zoo.⁴

[22] Over the four week period of notice, Mr Reeve had occasional dealings with Mr Butler, usually by email but occasionally in person. Mr Reeve's evidence was that he was upset with PKF and Mr Butler but did not wish to honestly convey his feelings.⁵ After stating some grievances in an email to Mr Butler on 1 November 2022 Mr Reeve concluded:⁶

“I feel I could not articulate this in our discussions as I was very upset.”

[23] On 7 November 2022 Mr Butler invited Mr Reeve for a morning coffee. The discussion was friendly. Mr Butler asked Mr Reeve about his plans. Mr Reeve stated that he had enjoyed working for the company, was happy for the opportunities afforded and that he held no ill-feeling. Mr Butler acknowledged that Mr Reeve had had a falling out with two employees.⁷

[24] However, not all interactions between Mr Reeve and Mr Butler were incident free. Some tensions arose on 9 November 2022 about tasks Mr Reeve needed to complete if he was to cease active work prior to his resignation taking effect.⁸

[25] Mr Butler subsequently agreed that Mr Reeve could cease active work on 23 November, two days prior to his resignation taking effect.

Mental health

[26] Unknown to PKF, Mr Reeve had for some eighteen months prior, including throughout his eight months of employment, been under the care of a treating psychiatrist (Dr Barison) and a psychologist (Mr Whiting). Mr Reeve had earlier been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Major Depressive Disorder.

[27] Two months prior to his resignation, Mr Reeve consulted his psychiatrist on 26 August 2022.

[28] On 26 October 2022, five days prior to resigning but in the midst of stress arising from workplace issues, Mr Reeve felt unwell and made an appointment with Mr Whiting on the next available date (13 December 2022).

[29] On 13 December 2022, eighteen days after his resignation took effect, Mr Reeve met Mr Whiting.

[30] Following his solicitors filing this application on 23 December 2022, Mr Reeve asked Mr Whiting for a report to support his claim for an extension of time. Mr Reeve did this when he again saw Mr Whiting on 11 January 2023.

[31] Mr Whiting prepared a report dated 16 January 2023.⁹

[32] Upon Mr Reeve's application for an extension being opposed by PKF, Mr Reeve saw Dr Barison on 27 January 2023 who also produced a report dated 3 February 2023.¹⁰

[33] Hence, in the period after his employment ended, Mr Reeve consulted Mr Whiting twice (13 December 2022 and 11 January 2023) and Dr Barison (27 January 2023) and secured reports from both.

[34] Both Dr Barison and Mr Whiting gave evidence. I deal with issues arising in the body of this decision.

Claim

[35] From the time he gave notice, Mr Reeve felt aggrieved by events in the workplace that he says forced his resignation.

[36] Mr Reeve's evidence was that in the days following his employment ending and until 21 December 2022 he maintained a sense of unfairness about his exit from PKF and wanted to do something about it but did not feel well enough to take advice or file a claim due to depression triggered by the workplace events.

[37] In those days and weeks, and apart from seeing Dr Whiting, Mr Reeve spent some time at his mother's home and then returned to his home, and went to his sister's wedding (though left early). In this period Mr Reeve looked at web sites to obtain information about his rights but felt unable to consider the issue in detail. He had a general understanding of an unfair dismissal claim but was not aware if such a claim was available to him.

[38] Although in his evidence Mr Reeve was unclear on the specific date, on 21 December 2022 Mr Reeve telephoned legal advisers and received a return call from Twomey Dispute Lawyers. After speaking to the firm and completing a client engagement form, Mr Reeve instructed the firm to commence action on his behalf.

[39] Mr Reeve's evidence was that he was not aware of the 21-day time limit for filing claims until speaking to his solicitors on 21 December 2022.

[40] Over the next day, the firm took further instructions from Mr Reeve and drafted an unfair dismissal application. It was filed by his solicitors on 23 December 2022.

[41] Mr Reeve's application acknowledged that it was filed late. It sought an extension of time.

Submissions

Mr Reeve

[42] Mr Reeve's application claims that he was forced to resign as a consequence of unreasonable conduct by PKF. The unreasonable conduct is alleged to include workplace bullying and unethical conduct.

[43] The application claims that Mr Reeve was unable to file within the 21-day period because "he was incapacitated due to illness".¹¹

[44] Mr Reeve claims that he was suffering two psychological conditions:

- depression and anxiety related to a history of workplace bullying; and
- a previous diagnosis of Attention-Deficit/Hyperactivity Disorder (ADH), for which he was receiving ongoing treatment under the care of his psychiatrist and psychologist.

[45] Mr Reeve submits that this explanation for delay constitutes “exceptional circumstances” warranting an extension of time.

PKF

[46] PKF contend that no jurisdiction exists because Mr Reeve was not dismissed. It says that Mr Reeve resigned and was not forced to resign.

[47] On the out of time issue, PKF do not submit that no mental health illness existed but contend that Mr Reeve has not established that he was so incapacitated due to illness such that he could not file an unfair dismissal application or instruct his solicitors to do so inside the 21-day period. PKF submit that proof of such incapacity is not established to the required standard.

[48] PKF submit that Dr Barison’s opinion was formed only after seeing Mr Reeve a month after the application was made, and was heavily qualified.

[49] In relation to Mr Whiting, PKF submit that a clinical psychologist is not a medical practitioner. It says Mr Whiting’s report, even if relied upon, does not demonstrate that Mr Reeve did not have capacity to prepare and file an application within time.

[50] In any event, PKF submit that Mr Reeve’s prospects in litigation are poor given the jurisdictional issue.

Consideration

[51] Section 394(3) of the FW Act provides:

“394 Application for unfair dismissal remedy

...

(2) The application must be made:

- (a) within 21 days after the dismissal took effect; or
- (b) within such further period as the FWC allows under subsection (3).

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

- (a) the reason for the delay; and
- (b) whether the person first became aware of the dismissal after it had taken effect; and
- (c) any action taken by the person to dispute the dismissal; and
- (d) prejudice to the employer (including prejudice caused by the delay); and

- (e) the merits of the application; and
- (f) fairness as between the person and other persons in a similar position.”

[52] Being seven days out of time, Mr Reeve’s application can only proceed if he establishes that “exceptional circumstances” exist within the meaning of s 394(3).

[53] An applicant for an extension of time has an onus to adduce evidence in support of matters which that applicant asserts constitute exceptional circumstances.¹²

[54] The test of “exceptional circumstances” establishes a “high hurdle” for an applicant.¹³ A decision whether to extend time under s 394(3) involves the exercise of a discretion.¹⁴

[55] I apply s 394(3) in the context of the Full Bench decision in *Nulty v Blue Star Group Pty Ltd*:

“[13] In summary, the expression “exceptional circumstances” has its ordinary meaning and requires consideration of all the circumstances. 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 singular occurrence, even though it can be a one 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.”¹⁵

[56] The principles of *Nulty* have been cited with approval by subsequent full benches of the Commission.¹⁶

[57] I now consider each of the factors in s 394(3).

Reason for the delay (s 394(3)(a))

[58] The reason for the delay in lodging an application is a factor that must be considered. The FW Act does not specify what reason or reasons for delay might fall in favour of granting an extension, although decisions of the Commission have referred to an acceptable or reasonable explanation.¹⁷ The absence of an explanation for any part of the delay will usually weigh against an applicant in such an assessment. Similarly, a credible explanation for the entirety of the delay will usually weigh in an applicant’s favour, though it is ultimately a question of degree and insight.¹⁸

[59] However, a reasonable explanation for the delay is not needed for the whole of the period of delay, or may in fact not be required at all, if the circumstances are otherwise exceptional.¹⁹ The period of the delay requiring explanation is the period commencing

immediately after the time for lodging an application has expired, ending on the day on which an application is ultimately lodged. That said, regard may be had to any circumstances from the date the dismissal took effect when assessing whether an explanation for the delay is acceptable or credible.²⁰

[60] Mr Reeve’s explanation for the delay is that his mental health illness, and in particular a depressive episode, precluded him from filing within time, and that it was not until after the statutory time limit expired that he was well enough to take advice and instruct solicitors to file the claim.

[61] The Commission’s approach to considering such matters was summarised by Deputy President Easton in *Bianca Mamo v ICLED Australia Pty Limited T/A Signs National Group*:²¹

“[24] It is not a requirement per se to provide medical evidence of exceptional circumstances arising from mental illness. However, the practical reality is that without proper and specific medical evidence it is very difficult for the Commission to make informed findings about an applicant’s capacity to complete and file their application within the statutory time limit.

[25] In summary the following principles apply:

(i) stress, shock, confusion and similar conditions are not exceptional circumstances in and of themselves (per *Shaw*);

(ii) a depressive illness might point towards exceptional circumstance if the illness had a material impact upon the applicant’s capacity to lodge the application within the statutory time limit (per *Roberts and Underwood*);

(iii) the evidence should positively demonstrate that the applicant’s depressive illness had an impact on their mental capacity so as to prevent the lodging of the application within the 21 day time frame (per *Underwood and Merhi*); and

(iv) an applicant’s self-assessment of their alleged psychological incapacity is unlikely to be sufficient (per *Underwood*).”

[62] Two issues arise in considering the reason for delay. Firstly, was Mr Reeve in fact suffering a mental health illness; and secondly, was Mr Reeve’s condition such that he could not reasonably take advice on his rights and instruct solicitors to file proceedings on his behalf within time or earlier than when he did.

[63] The evidence points to Mr Reeve having pre-existing mental health conditions (ADHD and Major Depressive Disorder). He had been referred by his general practitioner to a psychiatrist and psychologist eighteen months earlier and had been under their care and attention over that period.

[64] Did the illness have a material impact upon Mr Reeve’s capacity to lodge the application within the statutory time limit?

[65] Dr Barison’s evidence supports this proposition though not unequivocally. Dr Barison confirmed Mr Reeve’s pre-existing treatment for ADHD and depression and the fact that earlier

episodes of depression had been triggered by interpersonal stress from past work environments. He said that depression of that type typically led to impaired mood and motivation. However, Dr Barison's evidence was qualified:

- Mr Reeve did not consult Dr Barison until two months after his employment ceased and one month after he filed this claim. Dr Barison's opinion was not formed from direct examination of Mr Reeve at the time of the alleged impairment but based on a combination of his professional opinion, his knowledge of Mr Reeve's medical condition, what Mr Reeve had subsequently told him about his state of health during December 2022 and by reading Mr Whiting's report;
- Dr Barison's evidence was that Mr Reeve's depression was a fluctuating condition. Given the fluctuation, it was, in Dr Barison's opinion, "more likely than not" that Mr Reeve suffered depressive episodes in November and December 2022. However, having not diagnosed Mr Reeve at that time, Dr Barison could not conclusively say that Mr Reeve was in fact impaired in a particular period during December 2022;
- Dr Barison's evidence was that Mr Reeve's condition likely started to improve after he saw Mr Whiting on 13 December 2022. Hence Mr Reeve's condition was both fluctuating and improving from mid-December 2022. According to Dr Barison, it improved "substantially" in January 2023. His evidence was that the likely depressive episode had resolved by 27 January 2023; and
- Dr Barison's evidence was that Mr Reeve's condition was broadly similar in the period prior to 21 December 2022 (when Mr Reeve says he was impaired such that he could not seek advice or give instructions) as it was in the two days 21 to 23 December (when Mr Reeve says he was well enough to seek advice and give instructions) though it was "possible" that Mr Reeve was unable to seek advice until that latter period.

[66] Mr Whiting's evidence was that Mr Reeve was suffering a level of "emotional distress" at the time he saw him on 13 December 2022 consistent with depression and that was impacting "his motivation and ability to process what he needed to do to respond to his situation".²² Mr Whiting believed it to be an ongoing rather than fluctuating condition, and advised Mr Reeve of techniques and treatments which he considered could lead to improvement over time. Mr Whiting did not consider that Mr Reeve's absence from the workplace in the weeks preceding 13 December 2022 was likely to have improved his depression; rather he considered that a lack of social engagement may have entrenched it.

[67] However Mr Whiting's evidence also came with some qualifications. His report is not expressed in unequivocal terms. His opinion was that "I don't think" Mr Reeve was able to focus on practicalities such as lodging his application or locating the required information, rather than that Mr Reeve was, in his opinion, unable to do so. Mr Whiting was unable to comment on why Mr Reeve appeared unable to advance his interests or organise his thoughts due to depression in the weeks after he left the workplace notwithstanding Mr Reeve being able to undertake some work in the four weeks prior whilst suffering the same condition.

[68] I do not discount the report of Mr Whiting on the ground that he is a clinical psychologist and not a medical practitioner, as PKF urges. The FW Act does not require evidence of a

medical practitioner in order to establish a health condition that may give rise to an acceptable reason for delay. The relevant finding of fact can be made by reference to evidence including that of an accredited health professional who may not be a medical practitioner provided the evidence has a proper scientific basis and the practitioner is appropriately and professionally qualified to express the opinions formed. The relevant issue is not whether the treating professional is a medical practitioner but whether the evidence establishes, based on proper science, the fact of incapacity or impairment such that it reasonably explains the delay in filing. Mr Whiting is a practising clinical psychologist of seven years standing and holds a Master in Psychology amongst other qualifications.

[69] I take into account Mr Whiting’s report and give it a measure of weight, subject to the reservations below. I do so in conjunction with the evidence of Dr Barison noting its limitations.

[70] Of particular probative value is that fact that Mr Whiting saw Mr Reeve three days prior to the 21-day statutory time limit expiring and that in his professional assessment Mr Reeve presented with “a lack of motivation, indecisiveness and reduced organisation”.²³

[71] Given Mr Reeve’s past ADHD and ongoing treatment for depression was said by Dr Barison to have arisen from past workplace events, I am satisfied that the evidence establishes that in the wake of his resignation Mr Reeve was depressed and anxious and that this condition fluctuated during December 2022 whilst starting to gradually improve.

[72] I also take into account that Mr Reeve’s stress and depression appear, according to Mr Whiting, to have been manifest at the time of his resignation (“emotionally this was a very difficult time for him”). However, Mr Reeve managed to work in the business for a month after resigning and also search out new employment opportunities.

[73] Nonetheless, Mr Reeve’s conduct during the month of his notice period and in the weeks following had some erratic aspects consistent with a fluctuating depressive condition. This included concealment of his feelings from Mr Butler but expression of those same feelings to Ms Ujdur and, in December 2022, attending but leaving his sister’s wedding early.

[74] Whilst it is not clearly apparent how Mr Reeve could take advice from a health professional but not a legal professional over this period, the evidence of Dr Barison and Mr Whiting explains in part that Mr Reeve’s condition may have had this effect.

[75] Overall, the evidence points somewhat to a conclusion that Mr Reeve’s mental health condition acted as an impairment to the taking of advice and the filing of a claim in the period following the alleged dismissal.

[76] Further, I do not find any undue delay by Mr Reeve or his legal representatives in the period between 21 and 23 December 2022. Instructions needed to be taken, advice given and considered, a decision made on whether to proceed and a claim drafted and lodged.

[77] Considered overall, the explanation for the delay weighs somewhat in favour of a finding of exceptional circumstances.

Awareness of the dismissal taking effect (s 394(3)(b))

[78] Mr Reeve was aware from 31 October 2022, when he resigned, that his employment would end on or about 25 November 2022.

[79] That Mr Reeve was well aware of his employment ending and of the reasons for his resignation makes this a neutral consideration.

Action taken to dispute dismissal (s 394(3)(c))

[80] Mr Reeve felt, at the time of giving notice and whilst working out his notice period, that he had been treated unfairly.

[81] Although in the period following his employment ending he was suffering depression and anxiety and being treated for the condition, he was able to discuss the matter at least with his health practitioner though felt unable to speak to a solicitor until 21 December 2022.

[82] Mr Reeve concealed some of his true feelings from Mr Butler but not Ms Ujdur. That he expressed to Ms Ujdur a level of unhappiness (and was also able to articulate that in email correspondence) points somewhat to a capacity to advance his interests prior to leaving the workplace and to do so despite his depressive illness. However Mr Reeve did not take action to allege dismissal or dispute his dismissal until after the time period had passed.

[83] This is a neutral consideration.

Prejudice to the employer (s 394(3)(d))

[84] As a general principle, an employer is entitled to arrange its affairs and organise its resources on the basis that claims can no longer be made beyond the lodgement period, except in exceptional circumstances.²⁴

[85] PKF submit that it would incur prejudice including by having to defend a late claim.

[86] A claim would have to be responded to, involving time and cost. However, that prejudice, whilst real, is not unique.

[87] This notwithstanding, the absence of prejudice would not itself be a reason to grant an extension.²⁵

[88] This is a neutral consideration.

Merits of the application (s 394(3)(e))

[89] A hearing on merit would concern a further jurisdictional question, whether Mr Reeve was forced to resign within the meaning of the FW Act such that his resignation was a dismissal.

[90] Only if Mr Reeve was dismissed, would the Commission then consider whether the overall circumstances were unfair.

[91] Whilst Mr Reeve's contention of a forced resignation and general unfairness on account of alleged workplace bullying and alleged unethical conduct is not, in the abstract, unarguable, he carries the not insubstantial burden of establishing that in objective terms his resignation was forced. That said, this matter will be uniquely decided by the evidence of what occurred between Mr Reeve and company managers and executives in the period leading up to his notice of resignation. Given this, it is not possible to express a provisional view on whether the case will fall within jurisdiction or has merit.

[92] For the purposes of considering the extension of time issue, this is a neutral consideration.

Fairness between persons in similar position (s 394(f))

[93] It is not submitted that the application for an extension of time gives rise to issues of fairness between Mr Reeve and persons in similar positions.

[94] This is not a relevant factor.

Conclusion

[95] The period of delay being seven days, in the context of a statutory twenty-one day time frame, is not short or immaterial.

[96] The explanation for delay weighs somewhat in favour of a finding of exceptional circumstances.

[97] All other relevant factors are neutral considerations.

[98] Considered overall, and noting that the standard of proof is the balance of probabilities, I am satisfied that the circumstances are exceptional.

[99] Mr Reeve had a pre-existing and diagnosed mental health condition that was the subject of treatment by health professionals. The evidence called by Mr Reeve establishes that his resignation and loss of employment likely compounded an existing depressive state.

[100] The evidence also establishes that Mr Reeve's conduct in the period following his employment ending, including not contacting a solicitor until 21 December 2022 despite feeling a sense of injustice about what had led to his resignation was consistent with a fluctuating mental health condition which had manifest as a depressive episode with a verifiable impact on his mood and motivation.

[101] Whilst the professional evidence in this matter is not unequivocal, on the balance of probabilities it does positively demonstrate that Mr Reeve's depressive illness more than likely had a material impact on his capacity to file the application within time.

[102] Mr Reeve's feelings of stress and anxiety causing the delay were not simply the product of subjective self-assessment. An established and diagnosed mental health condition existed and was under active treatment. It was said by Mr Reeve's treating health professionals to have likely manifest as a depressive episode relevantly impacting his capacity until advice on legal rights was sought. That is an unusual circumstance established by the evidence and attested to

by independent treating health professionals. It is sufficient to constitute an exceptional circumstance.

Conclusion

[103] There being exceptional circumstances, the time for lodging application U2022/12234 is extended such that it is able to be further heard and determined. The application will be remitted to the regional co-ordinator for further allocation.

[104] An order²⁶ to this effect is issued in conjunction with publication of this decision.



DEPUTY PRESIDENT

Appearances:

Ms J Daniels, *with permission*, on behalf of Mr Oliver Reeve

Ms A Thompson, *with permission*, on behalf of PKF (Gold Coast) HR Services Pty Ltd

Hearing details:

2022
Adelaide (by video)
10, 13, 23 February

Printed by authority of the Commonwealth Government Printer

<PR751236>

¹ Email 'Chambers-Anderson DP' 9 February 2023 3.51pm

² PKF2

³ MDB1 – MDB5; MDB6 – NDB12; PKF5

⁴ MDB6

⁵ Audio recording of Hearing, 10 February 2023, 52:26-52:52; 59:00-59:36

⁶ PKS5

⁷ PKF6 paragraph 12

⁸ PKF6 paragraph 16

⁹ OR2

¹⁰ OR1

¹¹ F2 Annexure A paragraph 10

¹² *Smith v Canning Division of General Practice* [2009] AIRC 959

¹³ *Lombardo v Commonwealth of Australia as represented by the Department of Education, Employment and Workplace Relations* [2014] FWCFB 2288 at [21]

¹⁴ *Halls v AR & MA McCardle & Sons Pty Ltd and Ors* [2014] FCCA 316

¹⁵ [2011] FWAFB 975 “Nulty” at [13]. See also *Cheval Properties Pty Ltd t/as Penrith Hotel Motel v Smithers* [2010] FWAFB 7251 at [5]

¹⁶ *John Mamur v Coles Group Supply Chain Pty Ltd* [2020] FWCFB 4954 at [7] and [19]; *Dennis Obel v Central Desert Regional Council* [2021] FWCFB 167 at [6]

¹⁷ *Manoj Ellikuttige v Moonee Valley Racing Club Inc* [2018] FWCFB 4988 at [30] and [36]

¹⁸ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* [2018] FWCFB 901 at [35]-[45]

¹⁹ *Stogiannidis* (Ibid); *Elliott v LEAP Legal Software Pty Ltd t/a LEAP Legal Software* [2018] FWCFB 3288

²⁰ *Shaw v Australia and New Zealand Banking Group Limited* [2015] FWCFB 287 at [12]; *Ozsoy v Monstamac Industries Pty Ltd* [2014] FWCFB 2149 at [31] – [33]; *Perry v Rio Tinto Shipping Pty Ltd T/A Rio Tinto Marine* [2016] FWCFB 6963; *Czoy v Monstamac Industries Pty Ltd* [2014] FWCFB 2149

²¹ [2021] FWC 3903

²² OR2 Report 16 January 2023 page 1

²³ Audio recording of Hearing, 23 February 2023, 20:17-20:27

²⁴ *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25

²⁵ *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 at 299-300

²⁶ [PR751237](#)