

[2023] FWC 802 [Note: An appeal pursuant to s.604 (C2023/2247) was lodged against this decision - refer to Full Bench decision dated 4 December 2023 [[\[2023\] FWC 231](#)] for result of appeal.]



## DECISION

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

**Rowan Hedger**

v

**The Trustee For Perrott Trust T/A Perrott Engineering Pty Ltd**  
(C2022/8557)

DEPUTY PRESIDENT DOBSON

BRISBANE, 3 APRIL 2023

*General protections dismissal dispute – application filed out of time – circumstances not exceptional – application dismissed*

[1] Mr Rowan Hedger (Applicant) made an application to the Fair Work Commission (Commission) under s.365 of the *Fair Work Act 2009* (Cth) (FW 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 the Trustee for Perrott Trust T/A Perrott Engineering Pty Ltd (Respondent) in contravention of Part 3-1 of the FW Act.

[2] In its form F8a filed on 16 January 2023, the Respondent objected to the application on the ground that the application is out of time.

[3] Before dealing with the dispute, I must be satisfied that the application was not made out of time, or in the alternative, whether there were exceptional circumstances so as to grant an extension pursuant to s.366(2) of the Act.

[4] On 7 March 2023, the matter was listed for a conciliation before a staff conciliator however the matter was unable to be resolved. On 20 March 2023, the matter was allocated to me.

[5] Directions were issued on 21 March 2023 for the filing of material in relation to the extension of time and the matter was listed for a preliminary conference by telephone before me on 29 March 2023. The Applicant appeared on his own behalf. The Respondent sought permission pursuant to s.596 of the Act to be represented by Mark Peters of Peters Bosel Lawyers. Mr Peters made verbal submissions pursuant to s.596 and the Applicant did not object to the Respondent being represented. I granted permission for the Respondent to be represented at the conference on the basis of s.596(2)(a) in that it would aid the Commission to deal with the matter more efficiently given the complexity of the matter.

[6] The matter was unable to be resolved and the Applicant filed his material following the conference.

[7] There being no contested facts on the out of time application, I proceeded to determine the matter on the papers.<sup>1</sup>

**When must an application for the Commission to deal with a dismissal dispute be made?**

[8] Section 366(1) of the FW 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.

[9] It is a matter of record that a blank form F2 – Application for Remedy from Unfair Dismissal was received from the Applicant’s email address on the evening of 19 December 2022. The Commission contacted the Applicant by email (as the Applicant had not provided his contact number) on 22 December 2022 informing that the application attached was a blank version of the F2 form. The Applicant then provided a completed Form F8 later that night on 22 December 2023.

**Consideration**

[10] Where an applicant lodges material that in substance can be considered to be an application for the Commission to deal with a dismissal dispute, the application will be made at that time, notwithstanding the incompleteness of that material<sup>2</sup> or any incorrect usage of one of the Commission’s forms.<sup>3</sup>

[11] I note in this case however, that I made enquiries of the Client Services Delivery Branch and obtained a copy of the form that was originally filed on 19 December by the Applicant. I noted that what was filed was a blank (to the extent that not one single field had been completed) form F2 – Unfair Dismissal Application. I also obtained a copy of the form that was filed on 22 December 2022 and note that this was a completed F8 General Protections involving a Dismissal Application. I note that section 585 of the Act requires that “*An application must be in accordance with the procedural rules (if any) relating to the applications of that kind.*” I find that the application filed on 19 December 2022 was an application that was not made in accordance with the Fair Work Commission’s procedural rules and the application that was filed in accordance with those procedural rules, was filed 3 days out of time. In accordance with a number of Full Bench decisions,<sup>4</sup> I note that non-compliance with s.585 does not automatically invalidate an application because s.586 of the Act confers discretionary procedural powers as to how to deal with such an application.

**“586 Correcting and amending applications and documents etc.**

The FWC may:

(a) allow a correction or amendment of any application, or other document relating to a matter before the FWC, on any terms that it considers appropriate; or

(b) waive an irregularity in the form or manner in which an application is made to the FWC.”

[12] In the present circumstances, given the application filed on 19 December 2022 was completely blank, I do not consider it appropriate to exercise my discretion under s586 to completely amend the entire form. No parties were named, no information was given at all and further it was an entirely different type of application to the one subsequently filed. I find that the application filed on 19 December 2022 was a completely defective form F2 application for an unfair dismissal remedy and that the application made on 22 December 2022 was a new application, a different application, an F8 general protections application involving dismissal, made validly, but made 3 days out of time.

***When did the dismissal take effect?***

[13] It is not in dispute, and I so find, that the dismissal took effect on 28 November 2022.

***Was the application made within 21 days after the dismissal took effect?***

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

[15] The application having not been made within 21 days of the date on which the dismissal took effect, I need to consider whether to allow a further period for the application to be made.

***Was the application made within such further period as the Commission allows?***

[16] Under section 366(2) of the FW Act, the Commission may allow a further period for a dismissal dispute application to be made if the Commission is satisfied that there are exceptional circumstances, 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.

[17] Each of the above matters must be considered in assessing whether there are exceptional circumstances.<sup>6</sup>

[18] I set out my consideration of each matter below.

### *Reason for the delay*

[19] For the application to have been made within 21 days after the dismissal took effect, it needed to have been made by midnight on 19 December 2022. The delay is the period commencing immediately after that time until 22 December 2022, although circumstances arising prior to that delay may be relevant to the reason for the delay.<sup>7</sup>

[20] 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>8</sup>

[21] 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>9</sup>

### *Submissions and evidence*

[22] The Applicant submitted that the delay was for the following reason:

- That he accidentally filed a blank copy of the application and when the Fair Work Commission alerted him to this 3 days later he immediately filed a completed application form that day.

[23] In relation to the reason for the delay, the Respondent submitted that they have no knowledge of and do not dispute the factual claims made.

[24] The Applicant's evidence was that:

“After my dismissal from Perrott Engineering on the 28.11.2022 I went into the FWC Website seeking advice in regards to Unfair Dismissal. Everything I could find stated that I was not eligible due to not being employed for a period of 6 months. Despite many attempts after discussions with friends in regards to my dismissal and their advice believing I had been unfairly dismissed and continued search (sic) of the website there did not appear to be a solution or exemption to the 6 month clause.

On the 19.12.2022 I had my first appointment with Alana Cuthbertson from APM Employment Services at Gordonvale. As part of the criteria Alana discussed the reasonings behind my dismissal from Perrott Engineering. When I explained the circumstances of me being admitted to hospital due to a heart condition and then on return to work my discussion with the General Manager in regards to needing time off for follow up specialist appointments during work hours and the General Managers return comment in regards to affecting the work loads, and then within a half hour I was unemployed. Alana also suggested under those grounds I should claim for Unfair Dismissal. I explained the FWC clause for Unfair Dismissal was “must be employed for a period of 6mts or more”. Alana then suggested that that did not seem correct and suggested I contact the FWC by phone and explain my situation. On leaving the APM office I went immediately to my home and rang FWC. I then explained my situation and was advised of the General Protections clause and was given directions on where to locate it within the website. I located and downloaded and saved the form to my PC under the title of Unfair Dismissal. I then attempted to fill out

the form but it was not allowing me to populate anything, it was then that I realised that I had downloaded a PDF Version. Went back into the website and downloaded the Word Document version and also saved it as Unfair Dismissal (as it is 2 different forms it allowed me to save both with same title) I then proceeded to fill out the form. On completion of this I open up a new email and addressed to the FWC and attached the document titled Unfair Dismissal. This was then sent to the commission on the same day 19.12.2022 within the required 21 days. At 5.35pm Queensland time I received an email from Rachelle at FWC Client Services advising me that she had received a blank copy of the Claim. I went back into my sent mail and automatically seen it was the PDF version. I automatically attached the correct Word Document version and typed a note of apology and then resent this.

Whilst I accept responsibility for not originally sending the correct version, at the time of submitting my claim I was rushing to have it completed knowing this was my final day for submission, this was a genuine mistake on my behalf, however there is quite a lot of genuine mistakes in the response from the General Manager as discussed by their Solicitor at the last phone meeting. We are all humans and unfortunately need to accept that mistakes do happen. I would like it to be taken into consideration that on receipt of the notification of the FWC receiving a blank form, the correct version was automatically sent, I would also like it to be taken into consideration with my heart issue and being unemployed this was quite a distressing and stressful time for myself as a single parent leading into Christmas with no income.”

[25] The Respondent did not contest this submission on the basis it had no knowledge of these allegations of facts.

### *Findings*

[26] Having regard to the above, I find that the reasons for the delay were an ignorance of the timeframe in which the application was required to be filed and a lack of understanding of what type of claim the applicant may or may not have been able to make.

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

[27] It is not in dispute, and I so find, that the Applicant did not take any actions to dispute their dismissal prior to making the application on 19 December 2022.

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

[28] It is not in dispute, and I so find that, in the circumstances, there would be no prejudice to the Respondent if an extension of time were to be granted.

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

[29] The competing contentions of the parties in relation to the merits of the application are set out in the filed materials being the Form F8 and the Form F8A The Applicant submitted on his Form F8 that the Respondent in terminating his employment was in breach of ss351 & 352 of the Act. The Applicant stated that immediately following a health incident that his employment was terminated.

[30] The Respondent on its Form F8A submitted that the Applicant’s employment had been terminated as a result of performance issues and that the decision to terminate had been made prior to any notification of the Applicant’s medical appointments.

[31] 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 s.366(2)(d)”.<sup>10</sup>

[32] 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.

[33] In the circumstances, I find that it is not possible to make an assessment of the merits of the application and I therefore find this to be a neutral consideration.

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

[34] Neither party brought to my attention any relevant matter concerning this consideration and I am unaware of any relevant matter. In relation to this factor, I therefore find that there is nothing for me to weigh in my assessment of whether there are exceptional circumstances. I therefore find this to be a neutral consideration.

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

[35] 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.

[36] 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>11</sup> 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>12</sup>

[37] The stress that accompanies a dismissal will not, without more, favour a finding of exceptional circumstances. Where there is medical evidence that stress or some other condition affected an applicant in such a way as to cause, contribute or explain the delay, such evidence may, depending on all the circumstances, weigh in favour of the Commission being satisfied that exceptional circumstances exist.<sup>13</sup>

[38] Each case turns on its own facts. There are no categories of illness or disability that will automatically result in the Commission being satisfied that exceptional circumstances exist.<sup>14</sup>

[39] Evidence of hardship and misfortune will not, in and of itself, necessarily weigh in favour of a finding of exceptional circumstances. Of significance is evidence that establishes that, as a result of such hardship and misfortune, the Applicant was prevented from or seriously impeded in lodging their application.<sup>15</sup> The Applicant has not provided such evidence in support of his application for an extension of time.

[40] I note that mere ignorance of the statutory time limit is not an exceptional circumstance.<sup>16</sup>

[41] I further note that a lack of prejudice to the employer does not necessarily weigh in favour of concluding that exceptional circumstances exist.<sup>17</sup>

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

### Conclusion

[43] Not being satisfied that there are exceptional circumstances, there is no basis to allow an extension of time. The Applicant's application for the Commission to deal with a dismissal dispute is therefore dismissed.



DEPUTY PRESIDENT

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<sup>1</sup> Fair Work Act 2009 (Cth) s.397.

<sup>2</sup> See, eg, *Arch v Insurance Australia Group Services Pty Ltd* [2020] FWCFCB 601, [32].

<sup>3</sup> See, eg, *Hambridge v Spotless Facilities Services Pty Ltd* [2017] FWCFCB 2811, [27].

<sup>4</sup> *Mihajlovic v Lifeline Macarthur* [2014] FWCFCB 1070; 241 IR 142 at [42]; *Hambridge v Spotless Facilities Services Pty Ltd* [2017] FWCFCB 2811; 271 IR 360 at [27]-[31]; *CFMMEU v Griffiths Cranes Pty Ltd* [2019] FWCFCB 1717 at [41]-[49].

<sup>5</sup> *Singh v Trimatic Management Services Pty Ltd* [2020] FWCFCB 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>6</sup> *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFCB 901, [39].

<sup>7</sup> *Shaw v Australia and New Zealand Banking Group Ltd* [2015] FWCFCB 287, [12] (Watson VP and Smith DP).

<sup>8</sup> *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFCB 901, [39].

<sup>9</sup> *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFCB 901, [40].

<sup>10</sup> *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [36].

<sup>11</sup> *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [13].

<sup>12</sup> *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [13].

<sup>13</sup> *Becke v Edenvale Manor Aged Care* [2014] FWCFCB 6809, [9].

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<sup>14</sup> *Ellikuttige v Moonee Valley Racing Club Inc* [\[2018\] FWCFCB 4988](#), [31]; *Weir v Hydro-Chem Pty Ltd* [\[2017\] FWCFCB 758](#), [37].

<sup>15</sup> *Ellikuttige v Moonee Valley Racing Club Inc* [\[2018\] FWCFCB 4988](#), [31]; *Miller v Allianz Insurance Australia Ltd* [\[2016\] FWCFCB 5472](#), [22].

<sup>16</sup> *Nulty v Blue Star Group Pty Ltd* [\[2011\] FWAFB 975](#), [14]; *Miller v Allianz Insurance Australia Ltd* [\[2016\] FWCFCB 5472](#), [23].

<sup>17</sup> *Miller v DPV Health Ltd (Hume)* [\[2019\] FWCFCB 6890](#), [21].