



# DECISION

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

## **Applicant A**

**v**

## **Respondent**

(C2022/5303)

COMMISSIONER SCHNEIDER

PERTH, 21 APRIL 2023

### *Application to deal with contraventions involving dismissal*

[1] The Applicant has made an application to the Fair Work Commission (the Commission) under section 365 of the *Fair Work Act 2009* (Cth) (the Act) for the Commission to deal with a dismissal dispute.

[2] The dispute arises out of the Applicant's allegations that they were dismissed from their employment with the Respondent in contravention of Part 3-1 of the Act.

[3] The Respondent objects to the application on the grounds that the application has been lodged outside of the relevant 21-day time period as required under section 366(1) of the Act.

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

[5] The matter is subject to a confidentiality order.<sup>1</sup> Accordingly, any information that could potentially disclose the identity of the parties has been anonymized in this decision.

### **Relevant law**

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

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

[7] As the Full Bench has stated, "*the 21 day period prescribed... does not include the day on which the dismissal took effect.*"<sup>2</sup>

[8] The Full Bench further stated, "*if the final day of the 21 day period falls on a weekend or public holiday, the prescribed time will be extended until the next business day.*"<sup>3</sup>

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

- (a) the reason for the delay; and
- (b) any action taken by the Applicant to dispute the dismissal; and
- (c) prejudice to the employer (including prejudice caused by the delay); and
- (d) the merits of the application; and
- (e) fairness as between the Applicant and other persons in a similar position.

[10] Each of the above matters must be considered in assessing whether there are exceptional circumstances.<sup>4</sup>

[11] Briefly, exceptional circumstances are circumstances that are out of the ordinary course, unusual, special, or uncommon. The circumstances themselves do not need to be unique nor unprecedented, nor even very rare.<sup>5</sup>

[12] 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>6</sup>

[13] 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>7</sup>

[14] 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>8</sup>

[15] The determination of whether exceptional circumstances exist requires the consideration and assessment of all relevant circumstances.<sup>9</sup>

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

### **Consideration**

[17] The dismissal of the Applicant took effect on 18 January 2022. The final day of the 21-day period was therefore 8 February 2022 and ended at midnight on that day. The application was made on 26 July 2022. The application was made 167 days late.

[18] The parties do not dispute that the application was lodged out of the 21-day time period. It is therefore necessary for the Commission, prior to dealing with the dispute further, to determine if there are exceptional circumstances giving rise to an extension of time.

[19] Accordingly, the Commission must consider whether exceptional circumstances exist and, if there are exceptional circumstances, if discretion should be exercised to allow an extension of the 21-day period.

***Reason for the delay***

[20] For the application to have been made within 21 days after the dismissal took effect, it needed to have been made by midnight on 8 February 2022. The delay is the period commencing immediately after that time until 26 July 2022, although circumstances arising prior to that delay may be relevant to the reason for the delay.<sup>10</sup>

[21] The Applicant submits that the period of delay coincides with them experiencing significant mental health issues.

[22] The severity of the Applicant's mental health issues resulted in government services intervening and involuntary hospitalisation for an extended period of time.

[23] The Applicant provided a timeline of the impact their mental health battle had on their employment and filing this application.

- September 2021 – The Applicant ceased taking their prescription psychiatric medication. The Applicant informed their employer of this around the same time.
- October 2021 – The Applicant began experiencing the onset of symptoms. Both the Applicant and Respondent were not aware of this onset. The Applicant's lack of awareness around their symptoms can be attributed to the nature of the condition itself.
- November 2021 and December 2021 – Fellow employees of the Applicant noticed behaviors reflective of declining mental health. The Applicant's coworkers raise concerns over the Applicant's fitness for work. The Respondent instructed the Applicant to attend a medical assessment. The Applicant, unaware of their mental health condition, refused to engage with Respondent in completing a medical assessment.
- January 2022 – The Applicant's mental health condition and associated symptoms worsen.
- 18 January 2022 – The Applicant is dismissed from employment with the Respondent.
- March 2022 – The Applicant's family grow increasingly concerned over the Applicant's mental health, physical health, safety, and welfare. The Applicant's family attempt to prompt treatment. The Applicant refuses treatment.

- May 2022 – The Applicant’s family again contact local mental health services. The Applicant continues to refuse treatment.
- June 2022 – The Applicant’s mental health condition continues to worsen. The police attend the Applicant’s residence several times. Following further intervention from the police, an ambulance is called, and the Applicant is confined for psychiatric treatment.
- 17 June 2022 – The Applicant is formally diagnosed. Medical professionals, during the involuntary hospitalisation, confirm that the Applicant has Schizophrenia.
- July 2022 – The Applicant is discharged from the psychiatric treatment facility. The Applicant has a family member living with them and is subject to an involuntary community treatment order.
- 26 July 2022 – The Applicant submits this application to the Commission.

[24] In relation to the reason for the delay, the Respondent submitted the below:

- The Applicant had previously made an unfair dismissal application and, subsequently, an appeal during the period in which the condition was at its height.
- The Respondent submitted that the Applicant’s decision to make this application, following their unsuccessful unfair dismissal application, contradicts the Applicant’s reasons and leads against a finding of exceptional circumstances.

[25] The Applicant provided copies of three medical documents which confirmed that they were diagnosed with Schizophrenia on 17 June 2022 and were receiving treatment for their condition until 18 July 2022. The documents confirmed the Applicant would require on-going monitoring until November 2022 to ensure compliance with the Mental Health Orders:

- The Applicant provided a copy of a Centrelink medical certificate dated 13 July 2022.
- The Applicant provided a copy of their discharge summary, dated 18 July 2022, which confirmed they were admitted on 17 June 2022.
- The Applicant provided a copy of a Mental Health Tribunal treatment order, dated 21 July 2022.

### *Findings*

[26] Having regard to the above, I am inclined to find that the reasons for delay weigh in favor of a finding that there are *exceptional circumstances*.

[27] From the submissions of both the Applicant and the Respondent, it is clear that the Applicant’s mental health started to decline in November 2021, and, by January 2022, the Respondent made the decision to terminate the Applicant’s employment.

[28] The Respondent's reason for terminating the Applicant's employment was the Applicant's failure to "*follow a lawful and reasonable directive to attend a required medical assessment*". The reason for the Respondent seeking this medical assessment arose out of the concerns regarding the Applicant's behavior due to their worsening symptoms.

[29] It is therefore reasonable to conclude that the Applicant's mental health condition continued to worsen from the period of their termination until the time they were deemed acceptable for release from hospital.

[30] I am satisfied that the Applicant was dealing with a serious mental health condition which meant that, in all probability, they were medically unfit for work during the entire period from the termination until being discharged on 18 July 2022.

[31] I am also satisfied that, due to the nature of the condition, the Applicant experienced significant difficulties recognizing their own worsening condition.

[32] It is reasonable to conclude that the Applicant was having significant issues maintaining their grip on reality and, accordingly, was not in a mental state to adequately address their termination.

[33] I do not accept the Respondent's submission that, because the Applicant lodged two other matters before this current application, the Applicant's attempts to remedy the termination lead to a finding that they were capable of lodging within time or that they only lodged this application due to the failure of the previous applications.

[34] It is understandable that the lodging of the previous applications may, in many cases, make it appear as though an applicant was capable of lodging a subsequent application within time. However, that is clearly not the circumstances of this matter. It is abundantly clear that the Applicant was unable to function, in even the most minimally satisfactory way, to support their vital life needs let alone initiate legal proceedings.

[35] Rather, it is reasonable to conclude that the Applicant was aggrieved by their termination and attempted to address the termination but was so far from any ability to do that in the ways required by the Commission due to the fact that they were experiencing severe Schizophrenic symptoms.

[36] I am satisfied that, for almost all of the delay, the Applicant was not even remotely close to being in a mental state where they could have satisfactorily complied with the lodgment requirements.

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

[37] The Applicant submits they did take action to dispute the dismissal.

[38] The Applicant did not attend their show cause meeting on 18 January 2022.

[39] The Applicant, following their dismissal on 18 January 2022, contacted the Respondent seeking further information to explain why they had been dismissed.

[40] Following the termination, on 18 January 2022, the Applicant emailed the Respondent on 24 January 2022, and stated the below:

“I find it strange that this decision has been made whilst you are fully aware that I had contracted COVID and was isolating”.

[41] The Applicant sent a further email to the Respondent, on 3 February 2022, stating the below:

“As discussed I would like to arrange a meeting to talk through the termination letter details and circumstances surrounding the decision considering I was in isolation”

[42] The Applicant sent a third email on 14 February 2022, which stated the below:

“Is there any update?”

[43] In addition to the above, the Applicant filed the below applications with the Commission during the period of delay. To ensure the privacy of the Applicant, I have removed any reference to the case numbers in question. However, the parties are aware of the matters outlined below:

- Unfair dismissal application.
- Appeal against the Decision issued in the Unfair Dismissal application.

[44] The Respondent’s evidence was that the Applicant was aware of the termination on 18 January 2022. The Applicant had the full benefit of the 21-time frame in order to file this application.

[45] The Respondent also noted that the Applicant had filed both previous applications out of time.

### *Findings*

[46] I am satisfied that the Applicant took action to dispute the dismissal. However, the Applicant’s attempts to dispute the dismissal were minimal and misguided due to their personal circumstances.

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

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

[48] The Respondent submits that the Applicant lodged the General Protections Claim due to the Unfair Dismissal, and Appeal related to that application, being unsuccessful.

[49] The Respondent notes that the Applicant continually asserts the Commission did not fairly hear the Unfair Dismissal or Appeal or consider the medical circumstances. The Commission made the decision to dismiss both matters based on the facts before them.

[50] The Respondent asserts that the Applicants use of this application to address an Unfair Dismissal place it at prejudice with a higher burden of proof and threshold of damages.

[51] The Applicant did not make any submissions in relation to this factor.

[52] Having regard to the matters referred to above, I find that the following prejudice would be suffered by the Respondent if an extension of time were granted for the lodgment of the application:

- The Respondent has now been party to two separate applications and an appeal by the Applicant in relation to their dismissal from the Respondent.
- There is a fair and reasonable argument from the Respondent, that significant internal resources and time have been misused due to the Applicant's conduct in earlier proceedings before the Commission.

[53] However, I note, the Applicant's previous difficult conduct appears to be attributable to their condition. And, as noted earlier, the Applicant's condition prevented them from adequately engaging in legal proceedings.

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

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

[55] The Respondent submits that the application is without merit because:

- A comprehensive and procedurally fair process was undertaken by the Respondent in relation to the Applicant's employment and the lawful and reasonable direction of the Respondent for the Applicant to attend a medical assessment between November 2021 and January 2022.
- The Applicant was provided with a period of 25 days (on full payment) in order to attend the required medical assessment. The Respondent is required to ensure the Applicant is medically fit for work in order for the Respondent to comply with their obligations under the relevant legal instruments for their industry.
- The requirement for the Applicant to attend the medical assessment as directed, was a lawful and reasonable direction when taking into account the Applicant's behavior and the obligations on the Respondent to ensure the Applicant was medically fit for work. The Respondent asserts this is not any adverse action, rather it is the Respondent ensuring compliance with the relevant regulations.

- The Applicant was given a lawful and reasonable direction, which the Applicant repeatedly refused to comply with. The Respondent confirmed that the Applicant had made it clear that they had no intention of complying with the medical assessment direction as required and therefore the Respondent had a valid reason for terminating the Applicant's employment.

[56] The Applicant contends that the Respondent did not deal appropriately with their worsening mental health condition and instead used it as opportunity to terminate employment.

[57] Having examined the materials, it is evident to me that the merits of the application turn on contested points of fact. It is well established that "*it will not be appropriate for the Tribunal to resolve contested issues of fact going to the ultimate merits for the purposes of taking account of the matter in section 366(2)(d)*".<sup>13</sup>

[58] 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.

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

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

[60] The Respondent raised the issue of fairness as between the Applicant and other persons in a similar position.

[61] The Applicant did not make any submission on this factor.

[62] The Respondent submitted that the Applicant's circumstances are not exceptional and provided a reference to *Skinner v The Hospitals Contribution Fund of Australia Ltd T/A HCF (Skinner)* in support of their position that the Applicant's inability to file within the 21-day timeframe required due to their medical issues was not exceptional and as such this application should be dismissed.<sup>11</sup>

[63] Having regard to the matters referred to above, I find that:

- The Applicant's circumstances and the diagnosis of schizophrenia are different to the circumstances outlined in *Skinner*. The Applicant was not aware of their mental health condition and its impact until well over 100 days after the 21-day period.

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

[64] 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.

[65] 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>12</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>13</sup>

[66] The Applicant suffered from a significant mental health condition which was not treated until approximately 5 months after the termination had taken place.

[67] From the evidence and the timeline provided of the Applicant's circumstances, it is reasonable to conclude that the Applicant was suffering from the mental health condition for approximately 7 weeks prior to their employment being terminated with the Respondent.

[68] It is therefore a reasonable conclusion that the Applicant was not able to provide any explanation for their behavior during the show cause process and, in the period immediately following the termination, when they could have filed an application in time.

[69] I therefore find that the Applicant did not have the benefit of being medically fit for the entire of the period from the termination until completing treatment in a mental health facility.

[70] I find that it is reasonable, and entirely defensible, that the Applicant was unable to file their application until such time as their mental health condition was stabilized.

[71] Having regard to all of the matters listed at section 366(2) of the Act, I am satisfied that there are exceptional circumstances.

[72] Being satisfied that there are exceptional circumstances, the Commission may consider whether to allow a further period for the application to be made.

[73] Having regard to those exceptional circumstances and the requirement for the Commission to exercise its powers in a manner that is fair and just, the Commission is satisfied that it is appropriate to extend the period for the application to be made to 26 July 2022.

## **Conclusion**

[74] Accordingly, the application may now proceed as an extension has been granted. My Chambers will contact the parties regarding the future of the application.



COMMISSIONER

<PR761296>

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<sup>1</sup> [\[PR745687\]](#).

<sup>2</sup> [\[2020\] FWC FB 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>3</sup> [\[2020\] FWC FB 553](#), [10]. See also *Acts Interpretation Act 1901* (Cth) s 36(1) as in force on 25 June 2009; *Fair Work Act 2009* (Cth) s 40A; [\[2015\] FWC FB 1877](#).

<sup>4</sup> [\[2018\] FWC FB 901](#), [39].

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

<sup>6</sup> [\[2011\] FWA FB 975](#), at [13].

<sup>7</sup> [\[2018\] FWC FB 901](#), [39].

<sup>8</sup> [\[2018\] FWC FB 901](#), [40].

<sup>9</sup> [\[2018\] FWC FB 901](#), [17].

<sup>10</sup> [\[2015\] FWC FB 287](#), [12].

<sup>11</sup> [\[2020\] FWC FB 6882](#).

<sup>12</sup> [\[2011\] FWA FB 975](#), [13].

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