DECISION

Fair Work Act 2009
s.604—Appeal of decision

Spenser Clarke

v

Uniti Group Ltd
(C2023/2763)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT CLANCY

BRISBANE, 31 JULY 2023

Appeal against decision [2023] FWC 1011 and order PR761490 of Commissioner Schneider at Perth on 28 April 2023 in matter number C2022/8114.

Background

[1] Determining the date on which an employee's dismissal takes effect has significant implications for persons seeking an unfair dismissal remedy, and for those making an application for the Commission to deal with a dismissal related general protections dispute or an unlawful termination dispute. Clear and unambiguous communication from an employer to an employee about the date the employee's dismissal takes effect is paramount, as is a proper examination of the factual circumstances surrounding an employee's effective date of dismissal. After all, that an application under s. 365, s. 394 or s. 773 of the *Fair Work Act 2009* (Act) is made within the time prescribed following the day on which a dismissal took effect is a jurisdictional fact. As well as the denial of access to a cause of action in respect of a dismissal, this case highlights the potential impact on a party with existing mental health issues, when clear communication and a diligent factual examination about the effective date of dismissal are absent.

[2] The Appellant, Mr Spenser Clarke applies for permission to appeal, and if granted appeals a Decision[1] and Order[2] of Commissioner Schneider both made on 28 April 2023 dismissing the Appellant's application under s. 365 of the Act for the Commission to deal with a dispute in which the Appellant alleged that his dismissal by the Respondent, Uniti Group Ltd was in contravention of Part 3-1 of the Act. The application was dismissed because the Commissioner concluded that the application had been lodged outside of the time prescribed by s. 366(1)(a) and the Commissioner was not satisfied that there were exceptional circumstances which might enable the Commission to allow the application to be made within a further period as permitted by s. 366(1)(b).

Summary

[3] For the reasons which follow we consider that the Commissioner was in error in concluding that the application had been lodged outside of the time prescribed. The date the Appellant's dismissal by the Respondent took effect was 16 November 2022, and the application, having been made on 7 December 2022, was within time. Permission to appeal will be granted, the appeal will be upheld, the Decision and Order made by the Commissioner will be quashed and the Appellant's application will be remitted to the Regional Coordinator for Region One for allocation to another member of the Commission, to conduct a conciliation conference as required by s. 368 of the Act. Alternatively, even if we are wrong about this, we would nevertheless grant permission to appeal, uphold the appeal and quash the Decision and Order on the basis that the Commissioner erred:

- in failing to take into account relevant considerations, which we explain below; and
- in concluding that the Appellant took no action to dispute his dismissal which was an erroneous factual finding.

[4] In the result, the errors made mean that the discretion miscarried. On a rehearing, we would conclude that there are exceptional circumstances taking into account the matters in s. 366(2) and we would exercise our discretion to allow the Appellant's application under s. 365 to be made within a further period, that period being until the end of 7 December 2022.

Appeal grounds

[5] The Appellant's Notice of Appeal does not neatly nor clearly set out the grounds of appeal. Rather there is a general statement that there are "*numerous factors for which [he] wish[es] to appeal*" and that because of his health status he seeks an opportunity to add additional information at a later date. One matter about which the Appellant expressly complains in the Notice of Appeal is that the Commissioner should not have "*overruled*" the medical documentation issued by his treating physician. Attached to the Notice of Appeal is correspondence from the Appellant's treating physician, Dr Hogarth, notionally dated 18 December 2022, but which is plainly an update of the version of correspondence before the Commissioner from Dr Hogarth also dated 18 December 2022.[3] This is clear from the email correspondence accompanying the Notice of Appeal which sets out that the Appellant was enclosing "*an updated letter from [his] GP in relation to the 'issues' stated with the original, and in the hope that a further extension for [his] appeal may be allowed*". We take this to be an application for the admission of further evidence pursuant to s. 607(2) of the Act. This reading is consistent with the view adopted by the Respondent in its outline of submissions on appeal,[4] although it opposes the admission of the updated medical opinion of Dr Hogarth.

[6] Taking the Appellant's Notice of Appeal and his written submissions on appeal together, the appeal grounds (or contentions of error) advanced by the Appellant may be distilled to the following:

- *First*, the Commissioner erred in concluding that the date on which the dismissal took effect was 10 November 2022, rather than on 16 or 17 November 2022.

- *Second*, the Commissioner erred in his assessment of the medical evidence and the impact the Appellant's mental illness had on his capacity to make the application within the time prescribed.

- *Third*, the Commissioner erred in concluding that the Appellant did not take any action to dispute his dismissal.

- *Fourth*, the Commissioner erred in concluding that it was not possible to make an assessment of the merits of the application in his overall assessment as to whether there were exceptional circumstances.

- *Fifth*, the Commissioner erred in not concluding that it would be unfair not to accept the application within a further period having regard to fairness as between the Appellant and other persons in a like position.

- *Sixth*, the Appellant appears to suggest that the Commissioner did not properly consider or weigh the mandatory considerations in s. 366(2) in assessing whether there were exceptional circumstances.

- *Seventh*, the Appellant's submissions contend in effect that by reason of the Commissioner's professional background before his appointment to the Commission, the Commissioner ought not to have determined the matter because there was a reasonable apprehension of bias, and the Commissioner had a conflict of interest. We will deal with each of these matters below.

Permission to appeal

[7] We are persuaded that the Appellant has established an arguable case of appealable error justifying the grant of permission to appeal and we consider that as the Decision and Order manifest an injustice that it is in the public interest for permission to appeal to be granted, and we do so.

Consideration

Date the dismissal took effect

[8] Before determining whether a further period to make an application under s. 365 of the Act should be allowed, it will be necessary to consider whether the application was made within the time prescribed. This necessarily involves identifying the date on which a dismissal took effect because the time within which an application under s. 365 may be made is "*within 21 days after the dismissal took effect*". The Commissioner concluded, without any evident reasons or analysis, and without reference to the letter of termination, that "*[t]he dismissal of the [Appellant] took effect on 10 November 2022*".[5] The Commissioner considered that the "*final day of the 21-day period was therefore 1 December 2022 and ended at midnight on that day*"[6] and as the Appellant's application was made on 7 December 2022, the "*application was made six days late*".[7]

[9] Although not expressly stated in the Decision, it may be inferred that the Commissioner's conclusions above are based on the following exchange which occurred during the first instance hearing below. We note that the Respondent also contended on appeal, that the date the dismissal took effect was an "*agreed fact*".[8] In the exchange, the Commissioner is recorded as saying to the parties:

> "**Commissioner**: I would just like to confirm a couple of things before we get into it . . . that I note I think in the material is agreed by the parties, the Applicant's date of termination of employment was the 10th of November 2022. Mr Clarke are you comfortable with that date?
> **Clarke**: Yes yes I am although adverse action did begin the day before or the evening before as per the termination of probation which I did sort of notice after the application . . .
> **Commissioner**: Yep but the date that your employment ceased was the 10th of November you're comfortable with that?
> **Clarke**: Yes.
> **Commissioner**: For that date to be recorded.
> **Clarke**: Yes.
> **Commissioner**: Thank you.
> **Clarke**: Yes that's correct yes . . .
> **Commissioner**: Mr Hambas, I assume that's comfortable with the Respondent.
> **Hambas**: (solicitor for the Respondent appearing with permission): Yes.
> **Commissioner**: And the date the application was made was the 7th of December 2022. Therefore the application was made six days late . . ."[9]

[10] We will return to the significance of the exchange above later in this decision but first it is necessary to set out some background factual matters by reference to the material that was before the Commissioner. The Appellant had only been employed by the Respondent for a short period before his dismissal. He began his employment with the Respondent on 17 October 2022.[10] The Appellant has a history of mental illness which includes anxiety and depression.[11] For the period 1 December 2022 to 28 February 2023, the Appellant was certified as being unfit for work and study because of an exacerbation of his mental illness.[12] In the opinion of the Appellant's treating physician, the mental health issues from which the Appellant suffers are exacerbated when he is subject to a provoking situation, and his condition may impair his ability to respond to written notifications and cause him to fail to act within standard time frames.[13]

[11] During his brief period of employment, the Appellant says that he was ill on several separate occasions and did not attend for work. He alleges he was dismissed because of a temporary absence from work due to his illness, or alternatively because he exercised a workplace right in taking sick leave.[14] The Appellant alleges that he was told that he was dismissed "*because of [his] sickness*" and that he was considered to be unreliable.[15]

[12] The Appellant was given a letter advising of his termination of employment on 10 November 2022, the text of which relevantly provides:

> "The Company confirm that we have decided not to continue your probationary period. As a result, your employment with Uniti Group will end 16 November 2022 (which includes one week's notice). However, as you will not be required to work your notice period, your last day is today, 10 November 2022.
>
> You will be entitled to any accrued entitlements and any outstanding pay up to and including your last day of employment. You will receive payment in lieu of the notice period.
>
> Once all Uniti Group equipment has been returned your final payment will be paid in the next pay run."

[13] On 22 November 2022, the Appellant sent an email to Jesse Welsh of the Respondent which relevantly advised:

> "...
> As a result of the action you took on 9 November 2022, which was formally acknowledged on 10 November 2022 as stated within the UNSUCCESSFUL PROBATION letter, I am advising you of my intent to file a complaint with the Fair Work Commission, for wrongful dismissal under the General Protections, against you and Uniti Wireless.
>
> . . . The fact that I was terminated for time off sick, and there was NO attempts to work out how this might be remedied first, is also a breach of the Fair Work Act, unless you are claiming that I was unable to perform the inherent duties of my role, and such a claim requires evidence and a fair process before taking action upon it. The action you took without formal (and documented) discussions with me, a request for, or as a result of, medical information may also constitute discrimination.
> . . .
>
> I am a person of strong convictions, and will 'fall on my sword' if I am in the wrong, however I will happily 'take up the sword' to defend my rights. The fact that I have been treated in such a manner, when I arrived early for my shifts, left late, and did not take any breaks, apart from 30 mins lunch, is a poor reflection upon you, and Uniti, and that you are UNFORGIVING, and effectively have a ZERO TOLERANCE abscence (sic) policy. It is enough of a 'punishment' to lose income for days off when unwell, without the threats to, or actual termination of employment!
>
> . . .
>
> Should you wish to respond to this matter, you may do so. I will forward my submission to the Fair Commission within the next 2 days, dependent upon my ability to do so."[16]
> [Capitalised emphasis in original]

[14] There was no evident response nor even an acknowledgement of the Appellant's email of 22 November 2022. As earlier noted, the Appellant made his general protections dismissal related dispute application on 7 December 2022, and on 12 December 2022, the Appellant sent a further email to the Respondent noting that he had not received any response to his earlier email, advising, inter alia, that he had made an application to the Commission, and he concluded his 12 December 2022 email correspondence with the following:

> "Anyway this is my last communication prior to any action by the Fair Work Commission. I did provide an opportunity for you to discuss this matter prior to formal action, but it seems to have been simply ignored."[17]

[15] Returning then to the issue of the date on which the dismissal took effect, the Respondent contends that the termination letter is not subject to any ambiguity.[18] This submission is thoroughly misconceived. The termination letter plainly contains mixed messages. First, the termination letter states that "*[as] a result, your employment will end 16 November 2022 (which includes one week's notice)*". By itself this sentence clearly specifies the date on which the employment will end. Next, the letter states "*[h]owever, as you will not be required to work your notice period, your last day is today, 10 November 2022*". This sentence may be conveying two different messages. It may be that it is conveying to the Appellant that he is not required to attend for work during the notice period, such that his last day of work will be 10 November 2022, but his last day of employment will be 16 November 2022. Such a reading is consistent with the earlier statement that the employment will end on 16 November 2022. Alternatively, it may be conveying, clumsily, that the employer intends to pay the employee a payment in lieu of notice which in the result would mean that the last day

of work and employment will be 10 November 2022. Such a reading would require the earlier reference to the date on which the employment would end to be ignored.

[16] Finally, the termination letter advises the Appellant that he "*will be entitled to any accrued entitlements and any outstanding pay up to and including [his] last day of employment*" and that "*[he] will receive payment in lieu of the notice period*". The reference to the Appellant receiving "*payment in lieu of the notice period*" is itself ambiguous since the Appellant was entitled to one week's notice, which if given on 10 November 2022 would mean that the employment would end on 17 November 2022. The reference to payment in lieu of notice might therefore be a reference only to the payment for the additional day between 16 November 2022, the day on which the letter advises that the employment will end, and the expiration of the notice period being 17 November 2022.

[17] It is uncontroversial that any payment in lieu of notice had not been made to the Appellant by the time the Respondent contends the dismissal took effect (10 November 2022) as would have been required by s. 117(2)(b) of the Act. Indeed, the so-called payment in lieu of notice, and payment of accrued entitlements (together described in the termination letter as "*your final payment*") is expressed as conditional – once unspecified equipment is returned. And only then will payment be made "*in the next pay run*". Section 117(2)(b) prohibits the termination of an employee's employment unless "*the employer <u>has paid</u> to the employee . . . payment in lieu of notice of at least the amount the employer would have been liable to pay the employee . . . at the full rate of pay for the hours the employee would have worked until the end of the minimum period of notice*". Thus, payment in lieu of notice must be made before or at least at the time the employer effects the dismissal as is clear from the words underlined above.

[18] It must be accepted that a dismissal, which is principally concerned with the ending of the employment relationship governed by a contract of employment, may be effective even though notice of termination (or payment in lieu) does not comply with s. 117 of the Act[19] or the dismissal of the employee was otherwise in breach of the employment contract.[20] The employment contract and the employment relationship are related but distinct.[21] And so a notice, whether oral or in writing, of dismissal which is ineffective to terminate the employment contract may nonetheless be effective to terminate the employment relationship.[22] Thus, the wrongful dismissal of an employee (because of inadequate notice or some other contractual breach) by an employer, or a unilateral resignation by an employee other than in accordance with the terms of the contract, will generally be effective to bring the employment relationship to an end, but the contract of employment is not automatically thereby discharged.[23]

[19] The Commission and its predecessor have, under the Act and the *Workplace Relations Act 1996*, approached the question of when a dismissal takes effect in a manner consistent with the common law principles relating to notice and the termination of an employment contract.[24] At common law, an effective notice of termination of a contract of employment must specify a time when termination is to take effect, or that time must be ascertainable.[25]

[20] We consider that although the termination letter suggested to the Appellant that the last day on which he was required to work was 10 November 2022, the only date that is clearly communicated by the termination letter as the date on which the employment will end is 16 November 2022. The reference to payment in lieu of notice and its consequences when read with the whole of the letter is ambiguous as we have earlier noted. Indeed, the phrase

"*pay(ment) in lieu of notice*" is inherently ambiguous. As Waite J, in *Leech v Preston Borough Council*[26] observed, the phrase is used in two quite different senses:

> ". . .The first, which is the grammatically correct one, is when it is used to describe the payment to an employee whom it is proposed to dismiss summarily of a lump sum representing compensation for the wages or salary which he would have received if he had been given the notice to which he is entitled by law. The second, which is the colloquial and grammatically inaccurate one, is when the term is used as a convenient shorthand way of telling an employee that he is being given the full period of notice to which he is entitled by law but is at the same time excused any duty (and refused any right) that he would otherwise have under his employment contract to attend at the workplace during the notice period."[27]

[21] In the first case, the employee's employment terminates upon the date of payment of the lump sum. In the second case, the employment extends until the expiration of the period for which the payment was made.[28] Whether a payment in lieu of notice immediately terminates the employment is always one of fact. Here we have the assistance of the letter itself, which told the Appellant that his "*employment will end 16 November 2022*" including "*one week's notice*", however he would not be required to work the notice period and his last day of work would be 10 November 2022. These statements give voice to the meaning and intended effect of the subsequent reference to the Appellant receiving "*payment in lieu of the notice period*". This is a case where the reference to payment in lieu of notice fell squarely within the second category discussed in *Leech*, with the consequence that the employment came to an end on 16 November 2022, just as the termination letter specified.

[22] For these reasons we consider that the Commissioner erred in concluding that the Appellant's dismissal took effect on 10 November 2022.

[23] In the circumstances it was unnecessary for the Appellant to be allowed a further period within which to make the application under s. 365, since that application, having been made on 7 December 2022, was made within the time prescribed. It follows that the appeal should be upheld on the first ground we have earlier identified, the Decision and the consequential Order quashed, and the application remitted to the Regional Coordinator for Region One for allocation to another member of the Commission to conduct a conciliation conference.

[24] Although it is strictly not necessary to do so, we will nevertheless consider the other appeal grounds in the alternative.

[25] However, before we move to explain the alternative basis upon which we would uphold the appeal we need to say a few things about the fact that the Commissioner appeared to proceed to determine the day the Appellant's dismissal took effect on the basis of the concession obtained by the Commissioner from the Appellant at the beginning of the hearing. It is not uncommon for the Commission to proceed to determine factual matters on the basis of agreed or uncontested facts. But as circumstances dictate, from time to time it will be necessary to look behind concessions made in order to avoid an injustice. Here the circumstances ought to have raised alarm bells writ large.

[26] *First*, the materials disclose that the Appellant has a history of mental illness. Indeed, his mental illness and its impact on his capacity to meet timelines is the central reason advanced by the Appellant as explaining the purported delay in lodging his application.

[27] *Second*, although the Appellant's application specifies 10 November 2022 as the date on which his dismissal took effect, it was plain from the covering email accompanying the application, that the Appellant did not concede that his application was late, and that he maintained he "*got the date wrong for the dismissal*". The first paragraph of the Appellant's covering email dated 7 December 2022 to the Commission's Registry enclosing his application states the following:

> "Please find enclosed my 'late' application, however I have just noted that I got the date wrong for the dismissal, which adds one day, and the 'ofifcial' (sic) date of the termination is dated 17/11/22, which includes the week paid in lieu, so I don't know if that actually means I am within time, or not!"
> [Underlining added]

[28] The Appellant did not otherwise engage with the date on which his dismissal took effect in his written submissions[29] filed in advance of the hearing. The Respondent's Outline of Submissions filed in the proceeding below, merely asserts that "*on 10 November 2022, the respondent terminated the [Appellant's] employment*" without engaging with the terms of the letter of termination.[30] The parties' submissions were filed pursuant to Directions made by the Commissioner which proceeded upon the basis that an extension of time was necessary, there having been no response to the Appellant's question in his 7 December 2022 email underlined above.

[29] In these circumstances, we do not understand how the Commissioner could open the hearing by stating: "*I think in the material is agreed by the parties the [Appellant's] date of termination of employment was the 10th of November 2022*", unless the only documents to which the Commissioner had regard before making that statement were the application, the employer response and the first paragraph of the Respondent's submissions.

[30] *Third*, the Appellant was not represented, and the Respondent was permitted to be represented by a lawyer. We make no criticism that permission was given to the Respondent for it to be represented by a lawyer, but the imbalance in representation is another factor which must be weighed in assessing whether it is prudent to proceed upon the basis of an apparent concession, particularly one made when the person conceding is suffering mental illness and has plainly previously questioned whether an extension of time was necessary at all.

Second to sixth grounds of appeal

[31] If we are wrong in our conclusion about the date on which the Appellant's dismissal took effect, we set out below the alternative basis on which we would uphold the appeal.

[32] At [16] to [36] of the Decision, the Commissioner discussed the Appellant's mental health as an explanation for the delay. At [37], the Commissioner finds that the nature of the Appellant's mental health condition meant that it was understandable that the Appellant may have experienced additional issues in preparing his application. Although not clearly expressing that this was an acceptable explanation for the delay or at least part of the delay, we infer that the Commissioner did so and that this factor was weighed in the Appellant's favour. This is sufficient to dispose of the Appellant's second ground of appeal. It is not made out.

[33] That which is not addressed in the Commissioner's analysis of the reason for the delay is the ambiguity in the letter of termination. As the Appellant explained in his covering email

of 7 December 2022, he was not sure whether he required an extension of time. Even if the termination letter was effective to bring the employment to an end on 10 November 2022, the terms of the letter as to the date on which the employment termination took effect are, for the reasons earlier explained, ambiguous. The ambiguity itself is a matter that might explain or be a reason for the delay when examined in the context of an Appellant who has ongoing mental health issues and has expressed confusion about the date on which his employment came to an end. This was a relevant matter that ought to have been taken into account in assessing the reason for the delay. The terms of the termination letter and its impact on the date on which the application was made are not discussed. The ambiguous termination letter was a matter to be weighed in the Appellant's favour as explaining at least part of the period of delay.

[34] At [44] of the Decision, the Commissioner concludes that the Appellant did not take any action to dispute his dismissal. This appears to be founded on the erroneous notion (discussed at [42]-[43] of the Decision) that action taken to dispute the dismissal required the Appellant to have engaged with some internal review or other process about his dismissal. Why this must be so is not explained.

[35] One reason why action taken by a person to dispute the dismissal is relevant, is that if the person disputes a dismissal with their employer or brings the dispute to the employer's attention, the employer is on notice that there is a controversy about the dismissal. In such circumstances this fact might weigh in the person's favour. Conversely the failure to dispute the dismissal or to bring that dispute to the employer's attention might weigh the other way. There need not be any formal engagement with an internal process. Here, the Appellant's correspondence to the Respondent of 22 November 2022, aspects of which we have earlier reproduced, is disputing his dismissal. The Appellant is bringing to the attention of the Respondent that he disputes his dismissal. This is self-evidently action to dispute the dismissal. No account is taken of this in the Decision. The Commissioner's finding that the Appellant did not take any action to dispute his dismissal is factually wrong. By making an erroneous factual finding the Commissioner also failed to take into account a relevant mandatory consideration - he failed to take into account any action taken by the Appellant to dispute his dismissal.

[36] At [55] of the Decision, the Commissioner concludes that it was not possible to assess the merits of the application. At [54], the Commissioner concludes that "*the [Appellant] has an apparent case, to which the respondent has an apparent defence*". How the Commissioner concluded that the Respondent has an apparent defence is not made clear, as apart from a denial of the alleged contravention set out in the submissions filed by the Respondent and a statement in the employer response that the Respondent did not take adverse action against the Appellant for any reason proscribed, there is no defence particularised, apparent or otherwise. That which is apparent is that there is no contest that adverse action in the form of dismissal was taken by the Respondent against the Appellant, and that the Appellant has alleged that the adverse action was taken because of a proscribed reason, and he has identified the proscribed reason. Moreover, the Respondent quite properly accepted that the application discloses a valid cause of action.[31] As a minimum, the materials before the Commissioner established that in any contested hearing, the Appellant will likely sufficiently establish the basis upon which the Respondent will be presumed to have taken the adverse action for the reason alleged, and the Respondent will be put to the proof of showing otherwise and if it fails to do so, the Appellant will succeed. Far from it being "not possible to make an assessment of the merits of the application", the assessment properly considered is at a minimum that the Appellant has an

arguable case. That he does so will invariably weigh in his favour. The Commissioner's conclusion as to the merits assessment was plainly erroneous. The Commissioner thereby failed to take into account a relevant mandatory consideration, namely the merits of the application.

[37] At [51] of the decision, the Commissioner correctly concluded that the Respondent would not suffer any material prejudice if an extension of time was granted. But the Commissioner does not disclose how that finding is then weighed in the balance.

[38] As to the consideration of fairness between the Appellant and other persons in a like position, the Commissioner concluded at [58] of the decision, that "*whilst the [Appellant] is impacted by the issues [a]ffecting his mental health, these circumstances are not unique, unusual, or exceptional in nature*" and that "*granting the [Appellant an] extension, solely in reliance on the [Appellant's] reasons, would be unfair to other applicants who have advanced similar submissions or were in similar circumstances and whose applications were not granted an extension of time.*" The notion that relevant circumstances need be "*unique*" is erroneous and contrary to authority. As has been made clear by the Federal Court and in countless decisions of the Commission, circumstances may be exceptional though not unique, nor unprecedented, nor even very rare.[32]

[39] The s. 366(2)(e) fairness consideration required a comparison between the Appellant and other persons in a like position. This required the Commissioner to identify the comparator. No other person was identified nor are the circumstances pertaining to any other person(s) in connection with an application to the Commission set out. Without that, one cannot identify whether the comparator is or was in a like position to the Appellant. A general reference to other applicants who have advanced similar submissions or are in similar circumstances and whose applications were not granted without the comparators or their circumstances articulated is respectfully erroneous and an approach that visited unfairness on the Appellant based on general impressions about results in other cases that facts of which are unarticulated.

[40] For the reasons set out above, the errors we have identified mean that the discretion miscarried. The errors identified make good the third, fourth, fifth and sixth appeal grounds earlier set out. Therefore, were it necessary to do so, we would uphold the appeal on these grounds and quash the Decision and Order.

Seventh ground of appeal

[41] For completeness, we should indicate that we reject the seventh appeal ground earlier identified. Members of the Commission have all had variable and relevant professional lives before appointment. Amongst other matters, it is this experience that renders a person suitable for appointment as a member of the Commission. Absent some indication that a member was, during their pre-appointment professional life, involved in a matter (or a matter related to a matter) before the Commission or has had some close association with a party or witness before the Commission, the mere fact that the members pre-appointment professional life involved representing one or other of the interests of employers or employees does not rise to the level of a reasonable apprehension of bias.

Rehearing

[42] On a rehearing, we would firstly admit into evidence the updated medical certificate provided by the Appellant's treating physician. From that certificate it may be discerned that the Appellant's mental health condition impaired his capacity to make his application within time. Moreover, we are persuaded on the evidence that the Appellant's mental health condition impaired his capacity to such a degree as to satisfactorily explain the period of the delay. For the reasons earlier given, we also consider that the ambiguity in the termination of employment letter given to the Appellant on 10 November 2022 contributed to the delay. Taken together, we consider the delay in lodging the application has been fully and satisfactorily explained. That there is a satisfactory explanation for the delay is a matter that weighs in the Appellant's favour.

[43] Next is the question of whether the Appellant took any steps to dispute the dismissal. For the reasons we have earlier given, we consider that the Appellant took steps to dispute his dismissal when he sent his correspondence to the Respondent on 22 November 2022. That he took that step is a matter that weighs in the Appellant's favour.

[44] We accept, as the Commissioner did, that there is no prejudice to the Respondent either generally or by reason of the delay. In the circumstances, though the absence of prejudice is not a significantly weighty factor, it is a factor that nonetheless weighs in favour of the Appellant.

[45] For the Reasons we have earlier given, we consider the application to be arguable and certainly not without merit. In the circumstances this matter also weighs, albeit not significantly, in the Appellant's favour.

[46] Neither party made any submission as to the fairness consideration which properly engages with that which must be assessed, namely the position of the Appellant compared to the position of another person in a like position. No relevant comparator is evident and so we consider that this consideration weighs neutrally in the circumstances of this case.

[47] The issue requiring determination is whether taking into account the matters above, there are exceptional circumstances. "*Exceptional circumstances*" is not defined in the Act, but it is well established that the expression describes circumstances that are out of the ordinary or unusual or special or uncommon. As we have earlier pointed out, circumstances need not be unique, or unprecedented, or even very rare. Exceptional circumstances might amount to a single event which is exceptional, or a combination of factors which, individually, are unexceptional but which, when combined or viewed together, persuade the Commission that the circumstances are exceptional. Save for the final matter which weighs neutrally, each of the other matters which we are required to take into account, weigh in the Appellant's favour and, in our view, taken together amount to exceptional circumstances.

[48] We also consider that we should exercise our discretion to allow the Appellant a further period to lodge his application under s. 365 of the Act. We would allow the application to be made by 7 December 2022.

Conclusion

[49] For the reasons given, we consider that permission to appeal should be granted, and the appeal upheld on the principal basis set out at [8]-[30], alternatively on the basis set out at [31]-[40]. The Decision and Order made by the Commissioner should be quashed. On a rehearing, should that be necessary, we are satisfied for the reasons set out at [42]-[48] that there are exceptional circumstances, and we exercise our discretion to allow the Appellant a further period within which to make his application and we allow the application to be made by 7 December 2022. The application will be remitted to the Regional Coordinator for Region One for allocation to another member of the Commission, to conduct a conciliation conference.

Order

[50] We order as follows:

1. Permission to appeal is granted;
2. The appeal is upheld;
3. The Decision in *Clarke v Uniti Group Ltd (Uniti Wireless)* [2023] FWC 1011 and the Order in *Clarke v Uniti Group Ltd (Uniti Wireless)* PR761490 are quashed;
4. If necessary, we allow pursuant to s. 366(2) of the Act, the application in C2022/8114 to be made by 7 December 2022;
5. The application be remitted to the Regional Coordinator for Region One for allocation to another member of the Commission to conduct a conciliation conference in accordance with s. 368 of the Act.

VICE PRESIDENT

Appearances:

S Clarke, Appellant.
A Hambas for the Respondent.

Hearing details:

2023
Melbourne (via Microsoft Teams):
19 July

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[1] [2023] FWC 1011.

[2] PR761490.

[3] Appeal Book (AB) 66.

[4] Respondent's Outline of Submissions dated 13 July 2023 at [4.10]– [4.14].

[5] *Clarke v Uniti Group Ltd (Uniti Wireless)* [2023] FWC 1011 at [15].

[6] Ibid.

[7] Ibid.

[8] Respondent's Outline of Submissions dated 13 July 2023 at [4.16].

[9] Microsoft Teams Recording of the hearing before the Commissioner on 19 April 2023 at 2 minutes and 7 second to 3 minutes and 11 seconds.

[10] AB8.

[11] AB64 – AB66; *Clarke v Uniti Group Ltd (Uniti Wireless)* [2023] FWC 1011 at [21]-[22].

[12] AB65.

[13] AB66.

[14] AB12-AB13.

[15] AB12.

[16] AB59

[17] AB58

[18] Respondent's outline of submissions dated 13 July 2023 at [4.18]

[19] *Metropolitan Fire and Emergency Services Board v Duggan* [2017] FWCFB 4878 at [32].

[20] Ibid; see also *Byrne v Australian Airlines Limited* (1995) 185 CLR 410.

[21] *Visscher v Giudice* (2009) 239 CLR 361 at [53].

[22] *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 454, 468; *Byrne v Australian Airlines Limited* (1995) 185 CLR 410 at 426.

[23] See *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 per Latham CJ at 451, and per Dixon J at 466 & 469: *Byrne v Australian Airlines Limited* (1995) 185 CLR 410 at 427, 428 per Brennan CJ, Dawson and Toohey JJ; *Visscher v Giudice* (2009) 239 CLR 361 at [53]; *Purcell v Tellett Prebon* (Australia) Pty Ltd [2010] NSWCA 150 at [19]-[20]; *D'Souza v Halas* [2014] FWC 5864 at [32]-[34]; *Metropolitan Fire and Emergency Services Board v Duggan* [2017] FWCFB 4878 at [22].

[24] See *Ayub v NSW Trains* [2016] FWCFB 5500 at [24]-[26]; *Metropolitan Fire and Emergency Services Board v Duggan* [2017] FWCFB 4878 at *Metropolitan Fire and Emergency Services Board v Duggan* [2017] FWCFB 4878 at [41].

[25] *Ayub v NSW Trains* [2016] FWCFB 5500 at [17]; *Fardell v Coates Hite Operations Pty Ltd* (2010) 201 IR 64 at [82].

[26] [1985] ICR 192.

[27] Ibid at 196.

[28] See *Siagian v Sanel Pty Limited* (1994) 54 IR 185 at 203.

[29] AB61-AB63.

[30] AB67.

[31] AB71 at [3.27].

[32] *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [25]; *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, (2011) 203 IR 1 at [13].