DECISION

Fair Work Act 2009
s.604—Appeal of decision

Rowan Hedger
v
The Trustee For Perrott Trust T/A Perrott Engineering Pty Ltd
(C2023/2247)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT MASSON
DEPUTY PRESIDENT O'NEILL

BRISBANE, 4 DECEMBER 2023

Appeal against decision [2023] FWC 802 of Deputy President Dobson at Brisbane on 3 April 2023 in matter number C2022/8557.

Overview

[1] Mr Rowan Hedger (Appellant) has lodged an appeal under s. 604 of the of the *Fair Work Act 2009* (the FW Act), for which permission is required, against a Decision[1] of Deputy President Dobson issued on 2 April 2023 (the Decision) in which the Deputy President dismissed the Appellant's application under s. 365 of the FW Act for the Fair Work Commission (Commission) to deal with a contravention of Part 3-1 of the FW Act involving his dismissal. The Deputy President dismissed the application on the basis that she found that it was made outside the time required in s. 366(1) and was not satisfied that there were exceptional circumstances justifying the grant of a further period for the application to be made.

[2] On 27 April 2023, Directions were issued requiring the filing of outlines of submissions concerning permission to appeal, the merits of the appeal and any application for permission to be represented at the hearing by a lawyer or paid agent. A Notice of Listing for a hearing before a Full Bench on 8 June 2023 was issued on 25 May 2023. The Appellant failed to file an appeal book or an outline of submissions as required by the Directions. On 15 May 2023, in accordance with the Directions, the Respondent filed submissions seeking to be represented by a lawyer in the appeal. The Respondent also corresponded with the Commission and the Appellant on 17 May 2023 advising that it had not received an appeal book or an outline of submissions from the Appellant as required by the Directions. Correspondence from the Commission was sent to the Appellant on 17 May 2023 informing him that he had not filed an appeal book nor submissions and requesting that he urgently advise when his material would be filed. The Appellant did not respond. Telephone contact was also made with the Appellant on 19 May 2023 and a voicemail was left requesting that the Appellant contact the Chambers of the President and advising that he had not complied with Directions in relation to his appeal.

[3] On 25 May 2023, the Respondent's legal representative corresponded with the Commission seeking that the appeal be listed for mention to deal with the Appellant's non-compliance with Directions. A notice of listing was issued for a mention/directions hearing which was conducted by the presiding Member on 29 May 2023. The Appellant did not confirm his attendance as required by the notice of listing, despite being sent a reminder email, and did not attend the hearing. At the commencement of the mention/directions hearing three attempts were made to contact the Appellant on the mobile telephone number he had provided to the Commission for purposes of contact. The Appellant did not answer those calls. After the mention/directions hearing commenced, two further attempts unsuccessful attempts to telephone the Appellant were made.

[4] On 31 May 2023, an email was sent to the Appellant from the Chambers of the presiding Member stating that despite the Appellant not complying with Directions of the Commission in relation to his appeal, that the appeal would remain listed for hearing on 8 June 2023 in relation to permission to appeal and merits, that the Commission had prepared an appeal book containing documents on its files for use in the appeal and that a copy of the appeal book was attached to the email. The email also informed the Appellant that if he wished to discontinue the appeal he should immediately inform the Commission. Further, the email informed the Appellant that if he failed to attend the hearing of his appeal, the matter may be heard and determined in his absence and a decision adverse to his interests issued, or alternatively the Appeal dismissed. A Notice of Listing confirming the details of the hearing and the requirements for attendance was issued.

[5] A hearing was conducted before the Full Bench on 8 June 2023 by Microsoft Teams. The Appellant did not attend the hearing and it proceeded in his absence. The Respondent sought permission under s. 596 of the FW Act to be legally represented. The Respondent's primary submission was that as the Appellant had not engaged with the Commission, the Full Bench should dismiss the appeal. However, in the alternative, the Respondent submitted that in terms of efficiency, the Full Bench should hear the appeal based on the Respondent's submissions.

[6] The Full Bench determined to hear the appeal in the absence of the Appellant. Having regard to the Appellant's failure to engage with the Commission and that it would enable the matter to be dealt with more efficiently in those circumstances, permission for the Respondent to be represented by a lawyer in the appeal was granted. The Respondent was represented by Mr T Spence of Counsel, instructed by Peters Bosel Lawyers.

Procedural background

[7] Before considering the Deputy President's Decision, it is necessary to set out the factual and procedural background to the application which we have derived from material that was before the Deputy President and included in the file. That material was included in the appeal book prepared by the Commission for the purposes of the appeal and forwarded to the parties prior to the hearing of the appeal. Some of this material is not referred to in the Deputy President's decision or is referred to with some details omitted. At 8.08 pm on Monday 19 December 2022, the Appellant sent an email to the Commission attaching two documents: a PDF document titled "*Uunfair* (sic) *Dismissal.pdf*" and a word document titled "*Waiver Form..docx*". The subject of the email was "*Unfair Dismissal Lodgment*". The text of the email was as follows: *"Please find attached my General Protections Unfair Dismissal Form and Fee*

Waiver Form." The email included the Appellant's mobile telephone number.[2] The attached pdf document was a blank Form F2 Application for an unfair dismissal remedy. The second document was a completed Form F80 Waiver of application fee. The Form F80 can be used for a range of applications including unfair dismissal and general protections applications and does not indicate the type of application in respect of which a waiver is sought. The Appellant completed the Form F80 and inserted his email address and mobile telephone number.

[8] On Thursday 22 December 2022 at 5.35 pm the Commission's Client Services Team corresponded with the Appellant by email with the subject matter being "*Blank application – RE: Unfair Dismissal Lodgment*" in the following terms (salutations omitted):

> "The Fair Work Commission received the attached email from you on Monday, 19 December 2022.
>
> **There was not a completed application form attached to your email. The Unfair Dismissal application you attached is a blank version.**
>
> The Fair Work Commission can only start dealing with a case after we receive a completed application on an approved form (as per Rule 14 of the Fair Work Commission Rules 2013).
>
> To make an application to the Commission you need to complete the relevant form and lodge it by email, fax or by post.
>
> There are strict time limits for some application types. Some applications are dismissed if they aren't lodged within the time limits.
>
> You can contact us for help by return email or on 1300 799 675."[3]

[9] The Appellant responded to the email at 7.17 pm on 22 December 2022 as follows: (salutations omitted)

> "Sorry about that. I noticed what l had done wrong. I had saved both a Word Document and also a PDF of the form and accidentally attached the PDF.
> Have now attached the Word Document.
> Sorry for my mistake."[4]

[10] The attachment to the 22 December email sent by the Appellant was titled: "*Unfair Dismissal.docx*".[5] Attached to the email was a completed Form F8 – General protections application involving dismissal. On 3 January 2023, correspondence was sent to the Appellant from the Commission's Client Services Team advising that his general protections application had been received and would be checked to ensure that it was complete. Later, on 3 January 2023, correspondence was sent to the Appellant informing him that his general protections application was incomplete and that he needed to either file a Form 80 Application for fee waiver or pay the fee and that his case could not proceed until one of these steps was taken. On 8 January 2022, further correspondence was sent to the Appellant from the Commission stating that it seemed that his application was lodged late and informing him that the time limit could be extended if a Commission Member decides an extension is necessary and thinks there are exceptional circumstances. On 18 January 2023 after the Respondent had filed a Form F8 Response the Commission's Client Services Team informed the Appellant that the Respondent's legal name in the case would be changed to the name shown in the Form F8A Response and inviting the Appellant to advise if he objected to this course. The Appellant did not object.

[11] The matter proceeded to conference on 7 March 2023 with the agreement of the Respondent and when it was not resolved was allocated to the Deputy President to deal with the out of time issue. The Deputy President issued Directions listing the matter for a preliminary case management conference on 29 March 2023 and a determinative conference on 14 April 2023. The Appellant was also directed to file his material in support of a further period being granted to make his application, by 4.00 pm on 29 March 2023. The Appellant filed his material as directed.

[12] On 29 March 2023 correspondence was sent from the Chambers of the Deputy President to the parties noting that the blank form received by the Commission on 19 November was a Form F2 Application for an unfair dismissal remedy, rather than the Form F8 General protections application that was ultimately lodged. A copy of the covering email sent by the Appellant to the Commission on 19 December 2022 was also forwarded to the parties along with the attachments to the 19 December email – the blank Form F2 and the Form F80 Waiver of application fee. As we have noted, both the email of 19 November and the waiver form set out a mobile telephone number for the Appellant. On 30 March 2023, the Respondent's legal representative corresponded with the Chambers of the Deputy President stating that the Respondent's managers had reviewed the Appellant's material and "*have no knowledge of, and do not dispute, the factual claims made.*" The email also set out the Respondent's understanding that it would not be required to file any further written material and the matter would be determined on the papers. By email dated 30 March 2023 from the Deputy President's Chambers, the parties were informed that the Deputy President would determine the matter on the papers, the hearing was vacated, the Decision was reserved and would be published in due course.

The Decision under appeal

[13] The Deputy President's Decision commences with some of the procedural history including that permission for the Respondent to be represented by a lawyer was granted at the conference and that there was no objection by the Appellant. The Decision also states that as there were no contested facts on the out of time application, the Deputy President proceeded to hear and determine the matter on the papers.

[14] The 21-day period for the Appellant to file a general protections application in relation to his dismissal expired at midnight on 19 December 2022. The Deputy President's Decision set out the following matters said to be undisputed. On the evening of 19 December 2022, a blank Form F2 Application for an unfair dismissal remedy was received from the Appellant's email address. The Deputy President observed that the Commission subsequently contacted the Appellant by email as he did not provide a contact telephone number. As we have noted, this observation is incorrect, and both the email and the attached Form 80 sent by the Appellant and forwarded to the parties from the Deputy President's Chambers, set out the Appellant's mobile telephone number. The Deputy President also noted that on 22 December 2022 Commission staff contacted the Appellant by email informing him that he had filed a blank Form F2 and that later on the evening of 22 December 2022, the Appellant filed a completed Form F8.

[15] The Deputy President noted that where an applicant lodges material that in substance, can be considered an application for the Commission to deal with a dismissal dispute, the application will be made at that time, notwithstanding the incompleteness of the material[6] or the incorrect use of one of the Commission's forms[7]. The Deputy President also stated that she

had made enquiries of the Commission's Client Services Branch and obtained a copy of the Form that was originally filed on 19 December. The Deputy President noted that "*what was filed was a blank (to the extent that not one single field had been completed) Form F2 – Unfair Dismissal Application*"[8]. Further, the Deputy President stated that she had obtained a copy of the form filed on 22 December 2022 and this was a completed Form F8 General protections application.

[16] After observing that s. 585 of the FW Act requires that: "*An application must be in accordance with the procedural rules (if any) relating to the applications of that kind*" the Deputy President found that the application filed on 19 December 2022 was not made in accordance with the requirement in s. 585 and that it was filed three days outside the required time. After observing that non-compliance with s. 585 of the FW Act does not automatically invalidate an application because s. 586 confers discretionary procedural powers as to how to deal with such an application, the Deputy President determined that because the application filed on 19 December 2022 was completely blank it was not appropriate to exercise discretion to amend the entire form on the basis that it was an entirely different kind of application to the one subsequently filed, and that the application made on 22 December was a new and different application, made validly, but made three days out of time.

[17] The Deputy President found that the dismissal took effect on 28 November 2022, the application was not made with 21 days of that date and that the period of the delay was between midnight on 19 December when the 21-day period expired and 22 December 2022 when the application was made. The Deputy President then turned to consider the matters in s. 366(2) of the FW Act relevant to whether there are exceptional circumstances such that a further period to make the application should be granted. The Appellant's written submissions which were before the Deputy President in relation to that question are extracted at paragraph [24] of the Decision and can be summarised as follows. Following his dismissal on 28 November 2022, the Appellant stated that he sought advice from the Commission's website in relation to unfair dismissal but everything he found stated that he was "*not eligible due to not being employed for a period of 6 months*". The Appellant continued searching the Commission's website and speaking to friends in relation to his belief that he had been unfairly dismissed.

[18] On 19 December 2022, the Appellant had an appointment with APM Employment Services at Gordonvale in North Queensland (a provider of national job seeker programs including helping people with injuries and disabilities to return to work). The Appellant stated that he told the person with whom he had the appointment that he had been admitted to hospital due to a heart condition and was dismissed on returning to work and informing the General Manager of the Respondent that he needed more time off. The Appellant also told that person that he was excluded from making an unfair dismissal application because he had not been employed for six months at the time he was dismissed. In response to a suggestion that he contact the Commission by phone and explain his situation, the Appellant said that he went "*immediately to my home*" and rang the Commission.

[19] The Appellant said that during this telephone call he was advised about the "*general protections clause*" and given directions on where to locate it on the Commission's website. The Appellant said that he located, downloaded and saved "*the form*" to his PC under the title of "*Unfair Dismissal*". The Appellant then found that he was unable to populate the form because it was in PDF format and stated that he went back onto the website and downloaded the Word Document version and also saved it as "*Unfair Dismissal*". The Appellant said that "*as it is 2 different forms it allowed me to save both with the same title*". The Appellant said

that he filled out the form, opened an email and attached the document titled "*Unfair Dismissal*" and sent the email to the Commission within the 21-day time period.

[20] The Appellant also stated that "*at 5.35 pm I received an email from Rachelle at FWC Client Services advising me that she had received a blank copy of the claim*". On looking at his sent mail the Appellant said he realised that he had sent the PDF version and attached the "*correct Word Document version*", typed a note of apology and sent this. While not clear from the Appellant's written submissions, it is acknowledged in the grounds of appeal that the email he received "*at 5.35 pm*" was received on 22 December 2022 and the completed Form F8 was also sent to the Commission on that date. Reference was also made by the Appellant to the fact that he had a heart issue and was unemployed and that these matters were distressing and stressful as he is a single parent who was facing Christmas with no income as reasons for the delay in making his application.

[21] Having regard to the submissions and evidence the Deputy President found the reasons for the delay were ignorance of the timeframe in which the application was required to be made and a lack of understanding of what type of claim the Appellant may or may not have been able to make. The Deputy President also found that the Appellant did not take action to dispute his dismissal and that there would be no prejudice to the Respondent if an extension of time was granted. With respect to the merits of the application, the Deputy President concluded it was not possible to make any firm or detailed assessment and that the Appellant had an apparent case, to which the Respondent had an apparent defence. As such, the Deputy President treated the merits of the application as a neutral consideration. Further, the Deputy President was unable to assess whether fairness as between the Appellant and other persons in a similar position was an exceptional circumstance as no relevant matters were brought to her attention. This consideration was also treated as neutral.

[22] Taking into account each of the matters in s. 366(2), the Deputy President dismissed the application as she was not satisfied that exceptional circumstances existed justifying a further period being granted. The Deputy President noted that mere ignorance of the statutory time limit is not an exceptional circumstance and a lack of prejudice to the employer does not necessarily weigh in favour of concluding that exceptional circumstances exist.

The Appeal and the grounds of appeal

[23] On 24 April 2023, the Appellant lodged a Form F7 Notice of Appeal against the Decision. The grounds of appeal are set out in the Appellant's Notice of Appeal as follows:

> "1. Due to a genuine mistake on my behalf l had attached a blank form in my original email, however this had been lodged within the correct timeframe (19/12/2022). I was advised 2 days later (22/12/2022) by Rachelle from the Fair Work Commission Client Services that I had incorrectly lodged a blank form. When looking at the sent email I immediately realized that I had attached a PDF Form, not the correct Word Document. I then attached the correct completed form and re sent to The Fair Work Commission. As originally explained due to my health problems, being a single parent who had just been terminated so close to Christmas this was quite a traumatic and stressful time for me and genuinely accidentally attached the incorrect form.

2. Given that the response from Client Services took 2 days to inform me of the incorrect form, thus putting my claim outside of the lodgement date, if informed earlier I could of (sic) sent the correct form.

3. At both attempts at Mediation with the Respondents their main defence case has always reverted back to the late lodging of my claim. Not the actual issue of my dismissal."

Submissions

[24] As the Appellant did not attend the Hearing nor respond to Directions, his submissions on permission to appeal and merits are limited to those in his Notice of Appeal. The Appellant submits that it is in the public interest for the Commission to grant permission for the appeal on the basis that his case "*has not been looked into in full*". In the Appellant's view, there are many issues that he disputed in the Respondent's initial response that have not been discussed.

[25] In oral submissions at the hearing of the appeal, the Respondent submitted that:

- the matter does not relate to a matter of general importance and there is no diversity of opinion at first instance, and as such, there is no guidance required from the appeal Full Bench;

- the result is not counterintuitive and when the legal principles applied by the Deputy President are looked at with the facts, there is no disharmony compared with recent decisions;

- the Deputy President's conclusion at paragraph [26] of the Decision was open to her based on the limited materials filed by the Appellant and extracted at paragraph [24] of the Decision;

- the Decision adequately steps out the matters considered, relevant authorities and the reasoning the Deputy President applies in terms of the Appellant's application, ultimately concluding that the extension of time will not be granted as the Appellant has not demonstrated extenuating circumstances; and

- the grounds of appeal seek to relitigate the matter and do not raise any legal error or appealable errors. In any event, there was no such error in the Deputy President's decision.

[26] The Respondent also submitted that the Appellant's filing of a blank Form F2 – unfair dismissal application and subsequent refiling of a completely different Form F8 – general protections application demonstrates the Appellant's ignorance in terms of the timeframe and in relation to the remedy he was seeking. It is the Respondent's submission that this does not constitute an exceptional circumstance under the Act.

Permission to appeal

[27] An appeal under s. 604 of the FW Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[9] There is no right to appeal and an appeal may only be made with the

permission of the Commission. By virtue of s. 604(2), without limiting when the Commission may grant permission, the Commission must grant permission if satisfied that it is in the public interest to do so.

[28] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of appealable error.[10] However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[11] Some of the grounds justifying the grant of permission to appeal include that the decision is attended with sufficient doubt to warrant its reconsideration; and that substantial injustice may result if leave is refused.

[29] The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[12] A Full Bench of the Commission, in *GlaxoSmithKline Australia Pty Ltd v Makin*, identified some of the considerations that may attract the public interest:

> "… the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters."[13]

[30] In relation to extensions of time to lodge applications under s. 366(2) of the FW Act, the test of "*exceptional circumstances*" establishes a "*high hurdle*" for an applicant. However, a decision as to whether to extend time under s. 366(2) involves the exercise of a broad discretion.[14] It will therefore be necessary in an application for permission to appeal against a decision made under s. 366(2), to demonstrate that there is an arguable case that there was appealable error in the exercise of the discretion. This will require the identification of error of the type described in *House v The King*[15] – that is, that the decision-maker has acted on a wrong principle, has mistaken the facts, has taken into account an irrelevant consideration or failed to take into account a relevant consideration, or has made a decision which is unreasonable or manifestly unjust.

[31] For the reasons that follow, we have come to the conclusion that the present appeal raises issues of importance and general application in relation to the following issues:

1. Whether the blank Form F2, the completed Form F80 and the covering email sent by the Appellant to the Commission on 19 December 2022 was in substance a general protections application "*made*" on that date;
2. If so, whether that application could have been corrected or amended under s. 586(a) or treated as an application the subject of an irregularity capable of waiver under s. 596(b);
3. The relevance of these matters to whether there were exceptional circumstances justifying the grant of an extension of time under s. 394(3) in respect of the application made on 22 December 2022.

[32] It is also the case that there is potential for a diversity of decisions at first instance in relation to the extent to which an applicant lodging a completely blank application form has "*made*" an application for the purposes of s. 366 or s. 394, and these issues are appropriate for consideration by a Full Bench.

[33] We therefore grant permission to appeal as required by s. 604(2).

Relevant statutory provisions

[34] It is first necessary to set out provisions of the FW Act relevant to the consideration of the issues we have identified. An overarching requirement in s. 577(b) of the FW Act is that the Commission perform its functions and exercise its powers in a manner that is "*quick, informal and avoids unnecessary technicalities*". Section 585 of the FW Act requires that "*An application to the FWC must be in accordance with the procedural rules (if any) relating to applications of that kind*". Section 586 provides that the Commission 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.

[35] Section 587(1)(a) then provides that:

> "(1) Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if:
>
> (a) the application is not made in accordance with this Act; …"

[36] Section 588 authorises persons to discontinue applications.

[37] The objects in relation to provisions that applications are seeking to access are also relevant. The provision of the FW Act the Appellant in the present case seeks to access is found in s. 365. That section is part of the range of general protections provisions in Part 3-1 of Chapter 3 of the FW Act. The Objects of that part set out in s. 336 are:

> "(1) The objects of this Part are as follows:
>
> (a) to protect workplace rights;
>
> (b) to protect freedom of association by ensuring that persons are:
>
> (i) free to become, or not become, members of industrial associations; and
>
> (ii) free to be represented, or not represented, by industrial associations; and
>
> (iii) free to participate, or not participate, in lawful industrial activities;
>
> (c) to provide protection from workplace discrimination;
>
> (d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.
>
> (2) The protections referred to in subsection (1) are provided to a person (whether an employee, an employer or otherwise)."

[38] Notwithstanding that the provisions in Part 3-1 are directed to providing effective relief for persons who have been discriminated against, victimised or otherwise adversely affected by the proscribed contraventions, the legislature has enacted a bar in the case of contraventions

involving the dismissal of an employee, requiring that an application must be "*made*" within 21 days of the dismissal taking effect. By s. 366(1)(b) the Commission may allow a further period for an application to be made, if the Commission is satisfied that there are exceptional circumstances taking into account the following matters in s. 366(2):

(a) the reason for the delay; and

(b) any action taken by the person 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 person and other persons in a like position.

[39] The *Fair Work Commission Rules 2013* deal with the lodgement of documents by various means including email and the Commission's electronic lodgement facilities. Unfair dismissal applications and general protections applications may be lodged by either of these means. Rule 14 deals with lodging documents by email and relevantly provides at (3):

"(3) If a document is lodged by email:

(a) the document must be attached to the email:

(i) for a statutory declaration—as a PDF or other image format approved by the General Manager; and

(ii) for any other document—as an attachment in Word, RTF or PDF format or another format approved by the General Manager; and

(iii) without any security restrictions; and

(b) the covering email must state:

(i) the name, address, telephone number and fax number (if any) of the natural person sending the email; and

(ii) an email address to which the Commission can send notices or other documentation; and

(iii) if the document is an application commencing a matter—that fact; and

(iv) if the document relates to an existing matter—the matter number given to the matter by the Commission.

Note: For subparagraph (a)(i), the statutory declaration must be signed and witnessed.

(4) If a document lodged in accordance with this rule is an application commencing a matter:

(a) the General Manager must send an acknowledgment of lodgment, by email, to the person lodging the document; and

(b) the application is not taken to have been lodged until the acknowledgment of lodgment mentioned in paragraph (a) has been sent; and

> (c) once the acknowledgment of lodgment mentioned in paragraph (a) has been sent, the application is taken to have been lodged at the time it was received electronically by the Commission."

[40] Rule 15 deals with lodging documents using the Commission's electronic lodgement facilities and relevantly provides at (2):

> "(2) If a document lodged in accordance with this rule is an application commencing a matter:
>
> (a) the General Manager must send an acknowledgment of lodgment, by email, to the person lodging the document; and
>
> (b) the application is not taken to have been lodged until the acknowledgment of lodgment mentioned in paragraph (a) has been sent; and
>
> (c) once the acknowledgment of lodgment mentioned in paragraph (a) has been sent, the application is taken to have been lodged at the time it was received electronically by the Commission."

[41] An applicant using the Commission's Online Lodgment Service is required to create an account by entering contact details including email address, given name, family name, phone number, mobile number and address. The provision of telephone contact numbers is optional and other information is mandatory. Despite the requirement in Rule 14 for information to be provided in a covering email, an applicant lodging an application by email is not prompted or required to provide such information in the covering email and can generate an email to the Commission by simply clicking on a link and attaching a document.

[42] The Rules make clear that there is a distinction between a "*document*" and an "*application*" and between a document being "*lodged*" and an application being "*made*". Lodging a document with the Commission does not automatically equate to making an application for the purposes of s. 366 or s. 394. Further, s. 586 encompasses amending any "*document*" to cure non-compliance with the Rules and would include a covering email which does not contain the details required by Rule 14 and the application that was lodged.

The approach to dealing with incomplete applications

[43] In *Brunskill v Federation Children Nth Geelong Pty Ltd* (*Brunskill*)[16] Deputy President O'Neill observed that the Commission regularly deals with applications that are incomplete or the prescribed fee is unpaid (or not waived) at the time the application is made and that the degree of incompleteness also varies significantly from an unpaid application fee at one end of the spectrum to most if not all of the information not being provided at the other end.[17] The present appeal concerns a blank Form lodged by the Appellant within the time required in s. 366(2) of the FW Act.

[44] Because of the similarity in the general protections dismissal provisions and unfair dismissal provisions in relation to the time limits for making an application and the discretion to grant a further period, the cases concerning s. 366 and s. 394 are analogous. It is instructive to briefly consider the facts in some of those cases. In *Hambridge*[18] the applicant intended to make an unfair dismissal application but used the wrong form – a Form F8 General protections application involving dismissal instead of a Form F2 Application for an unfair dismissal remedy. This application was lodged within 21 days of the date Mr Hambridge's dismissal took effect and Mr Hambridge received a response from the Commission entitled: "*Unfair*

Dismissal Claim Application has been accepted for delivery to the recipient's mailbox…". Mr Hambridge gave evidence to the Commission, which was confirmed by a file note made by a Staff Conciliator, of his belief at all times that he had filed an unfair dismissal application and was advised by the Conciliator that he could withdraw the general protections application and resubmit an unfair dismissal application and that he would need to seek an extension of time. Two days after the Staff Conciliation, Mr Hambridge discontinued his application and lodged a new unfair dismissal application using the correct Form F2. As a result of these circumstances, the second application was made 55 days outside the time required in s. 394(2) of the FW Act.

[45] The Member of the Commission who heard the case accepted that Mr Hambridge intended to make an unfair dismissal application but used the wrong form and lodged a general protections application. The Full Bench noted that Mr Hambridge's intention was not challenged in the appeal and was correct on the basis of the material before the Commission at first instance. The Full Bench found that the Member treated the first application as if it was a general protections application and that this was an error. The Full Bench noted that the requirements for the Commission to perform its functions and exercise its powers in a manner that is "*quick, informal and avoids unnecessary technicalities*" and that this required the Commission to look at the substance of the first application, not the form that happened to be used to make it and that the use of the wrong form was a matter which could have been addressed by the application being amended by the Commission using the power in s. 586(a). The Full Bench also noted that the FW Act does not provide that an application that is not made in accordance with the applicable procedural rules is necessarily invalid. In relation to the substance of the application, the Full Bench said:

> "…In substance, we consider that it was an unfair dismissal application: it was intended to be one, it was described as one in Mr Hambridge's covering email, and its contents were concerned with contentions of unfairness in the dismissal rather than any cause of action for a contravention of Pt.3-1 of the FW Act. It must be acknowledged that Mr Hambridge attempted in the first application to respond to requests and questions concerning the general protections provisions of the FW Act, but it is apparent that he did so in an endeavour to complete a form which he understood at the time to be for an unfair dismissal remedy application."[19]

[46] The Full Bench also found that the proper characterisation of Mr Hambridge's first application as an unfair dismissal application made using the wrong form, and the potential for the irregularity to have been remedied under s. 586 rather than being dealt with by discontinuance and a second application, were fundamentally the reasons why the second application was filed late and were necessarily relevant to consideration of the reason for the delay required by s. 394(3)(a) – the equivalent provision to s. 366(2)(a). These matters were also relevant to the consideration under s. 394(3)(c) – and relevantly in the present case s. 366(2)(b). The Member was found to have erred based on a failure to consider this matter, which caused the exercise of the discretion to grant a further period to miscarry.[20]

[47] In *Arch v Insurance Group Australia Group Services Pty Limited* (*Arch*)[21] the applicant filed an incomplete Form F8 General protections application. The material filed by the Applicant comprised a Form F8 missing the first three pages, and which did not identify the Respondent or the dismissal the subject of the application and a termination letter which did identify those matters. Mr Arch sent an email attaching a screenshot evidencing that the Commission's on-line lodgement service was undergoing maintenance shortly before midnight on the date that he was required to lodge the application for it to be made within time and copy of the Commission's Form F8 – the standard form for making a general protections application.

The application was accepted by the Commission's Registry as a general protections application – albeit incomplete – and steps were taken including the recording of the application in the Commission's system and assigning it a matter number. Mr Arch also paid a filing fee in respect of the application. Subsequently there was correspondence with Mr Arch seeking that he take steps to complete the application which for reasons including his mental health issues, took a further 44 days. In proceedings before the Commission at first instance in relation to whether a further period should be granted, the application was treated as being made 44 days outside the required time and the incomplete application, made one day after the 21 day period expired, as no application at all.

[48] On appeal, a Full Bench of the Commission stated that this was not the correct approach and consistent with *Hambridge* the key consideration was that the substance of what Mr Arch did one day after the 21-day period expired, was to lodge a general protections application. The Full Bench found that because the Member at first instance proceeded on the wrong factual premise – that the application was 44 days rather than one day late – the exercise of the guided discretion pursuant to s. 366(2) miscarried and findings made by the Member about the matters relevant to whether there were exceptional circumstances, were vitiated. The Full Bench also held that in the circumstances of Mr Arch's application having been accepted by the Registry as an incomplete application it would be unconscionable for the Commission to proceed on the basis that Mr Arch did not file any application for the purpose of s. 366 until 44 days outside the required time.

[49] In *Hatch v Woodside Energy Ltd*[22] a Full Bench held that the applicant had lodged an application within the 21-day period in circumstances where he emailed an application which was unable to be opened because of the format of the file or security restrictions. Upon being advised of the issue, the applicant promptly resent the application in a readable format, but this was one day late. At paragraph [48] the Full Bench said:

> "…an application might suffer a range of (potentially fatal) defects and could still be capable of being 'made', albeit it might be liable to dismissal if those defects are not cured or, in the case of the procedural rules, the requirement to meet them is not excused. There may be circumstances where the defects or deficiencies in a purported application are sufficiently significant that an application cannot even said to have been 'made'. Save for the issue raised about the Appellant's Form F2 initially being unable to be read, we do not consider this is such a case and say nothing further on that matter."

[50] In *Brunskill*[23] Deputy President O'Neill considered whether an applicant who inadvertently uploaded an entirely blank form F8 to the Commission's website had made an application. After detailing the process involved in making an application using the Commission's online system, legislative provisions and the Commission's Rules and Regulations, the Deputy President observed that:

> "[28] It is difficult to discern a basis, for the purposes of s.366, for treating an application form that is blank as not being an application, but an application form that is missing or contains incorrect essential information is an application. The lack of a meaningful distinction between the two is particularly significant given the Commission is not a Court, is statutorily obliged to perform its functions and exercise its powers in a manner that is fair and just, is quick, informal and avoids unnecessary technicalities, and is not bound by the rules of evidence and procedure. In the context of a relatively short period in which to make an application of 21 days, a generous and purposive construction of what it means to 'make an application' is to be preferred. In my view, the blank application submitted within time is not necessarily to be treated as being entirely invalid and of no effect."[24]

[51] The Deputy President went on to conclude that it was sufficiently clear that the applicant was seeking to make a general protections dismissal application and that through her action of

submitting a general protections involving dismissal application form, although blank, the Applicant conveyed that she was making a request or claim, consistent with the plain meaning of the term "*application*".[25] The Deputy President also noted the relevance of a receipt generated by the Commission's online filing system on lodgement identifying the type of application as a general protections application and correspondence sent by the Commission to the applicant advising that the "*application*" was incomplete and the applicant was required to update her application form or could withdraw her application. The Deputy President found that on becoming aware that she had submitted a blank form the applicant acted relatively promptly to resubmit the form she had completed and inadvertently failed to upload. The Deputy President decided that on balance, the blank and unsigned application form submitted by the Applicant on 22 May 2023 constituted an application within the meaning of s. 366 of the FW Act. The Deputy President also indicated that she would have exercised discretion to grant a further period if necessary for reasons including that the Applicant received a lodgement receipt in response to filing the blank Form F8 and had been informed that she had 14 days to file a completed application.

[52] The principles to be derived from these cases can be summarised as follows. In a case requiring the Commission to determine whether an application has been "*made*" under s. 365 or s. 394, it is necessary to look at the substance of what the person attempting to make the application did. The question is whether the steps taken, and the material lodged by a person attempting to make an application are sufficient to be considered in substance, an application for the purposes of s. 365 or s. 394. The form in which material is provided to the Commission is relevant, but not determinative of whether in substance, an application has been made. Where material is lodged by email or the Commission's online lodgement facility, the time at which an application is made is the time when material sufficient to constitute an application in substance, is received by the Commission. Material relevant to whether an application has been "*made*" in substance, is not limited to information set out in a Form which the Commission's rules require an application to be made in. Documentary information including a letter advising of the termination of an applicant's employment, payslips or the contents of a covering email to which documents are attached, may be capable of being accepted as an application in substance, so that the application will be made at the time that material is lodged.

[53] A defective application – including an application with potentially fatal defects – is still capable of being "*made*". Defects may be cured by the Commission exercising discretion under s. 586 to amend the application or to waive an irregularity in the form or manner in which the application is made. Section 586 of the FW Act operates to direct the Commission to look at the substance of an application, not the form that is used to make it[26] or the manner in which it is made.[27] The question of whether an application is fatally flawed or can be cured by use of the discretion in s. 586 of the FW Act is not determinative in circumstances where an application in substance, is made within the time required by s. 366 or s. 394. In such cases the question of whether the defect can be cured by the exercise of discretion in s. 586 is decided separately and where the defect is fatal the application may be dismissed under s. 587 on application or the Commission's own initiative. This should not be taken as us stating conclusively that an objectively fatal defect – for example where on the facts pleaded by an applicant the application cannot succeed – will not be relevant to the consideration of merit as provided in s. 366(2)(d) or s. 394(3)(e) for the purposes of whether a further period should be granted.

[54] It is also the case that s. 586 is not a source of power for the Commission to "*correct*" or "*amend*" an application made under one type of statutory provision so that it becomes an

application under a fundamentally different provision.[28] Further, where an applicant attempts to make an application, and the material lodged is not sufficient for the Commission to conclude that in substance the application was "*made*", a genuine and reasonable belief by the applicant that the application has been made is relevant to explaining any period of delay between the attempt and the lodgement of material that is sufficient to constitute an application being made. Correspondence received from the Commission in relation to the material lodged will also be relevant in assessing the genuineness and reasonableness of an applicant's belief as to whether the putative application has been made.

Consideration

[55] In the present case, the Appellant lodged documents by email. The covering email set the Appellant's name, mobile telephone number and variously referred to "*unfair dismissal lodgement*", an attachment titled "*unfair dismissal.pdf*" and "*my General Protections Unfair Dismissal*". Attached to the email was a blank Form F2 and completed Form F80 Fee waiver application. The email and attached documents were lodged on 19 December 2022, within the 21-day period after the Appellant's dismissal took effect.

[56] The Appellant lodged a general protections application using the correct form – albeit incomplete – on 22 December 2022, three days outside the 21-day period in which such an application was required to be made, after being informed of his error in filing the blank Form F2 by Commission staff.

[57] The Appellant did not contend in his submissions to the Deputy President at first instance or in his appeal grounds, that the documents he lodged on 19 December 2022 are in substance a general protections application made in an incorrect form. Notwithstanding the Appellant's failure to make this contention, the Deputy President considered whether the material the Appellant lodged on 19 December 2022 was, in substance, an application for the Commission to deal with a general protections dispute involving dismissal.

[58] After considering the material lodged by the Appellant and the relevant case law, the Deputy President decided that the Appellant had not made a general protections application in substance. The Deputy President also found that it was not appropriate to exercise discretion under s. 586 to amend the Form F2 filed on 19 December 2022, as the Form F8 filed on 22 December was a completely new and different application. In our view, the first conclusion was open to the Deputy President and neither conclusion involves error.

[59] The present case is not one where the Form F2 Application for an unfair dismissal remedy filed on 19 December 2022 included information that was in substance, a general protections application made in the wrong form. The Deputy President found that a covering email stating that the attached document was a "*General Protections Unfair Dismissal Form*" attaching a blank Form F2 is not in substance a general protections application. The material filed in the present case was not a Form F2 into which had been inserted information relevant to a general protections application[29] or a partially completed application with sufficient information being included in the form or contained in appended material, to be considered as an application in substance.[30] Nor was the blank form that was lodged (Form F2) a form that related to the application the Appellant intended to make (Form F8). Here, the Form F2 lodged by the Appellant was the wrong form and was completely blank, there was a lack of clarity in the covering email about what application the Appellant intended to make and no other documentation lodged with the blank Form F2 to clarify that intention. In those circumstances

it was open to the Deputy President to conclude that the Appellant had not, in substance, made a general protections application involving dismissal.

[60] The Appellant's written statement filed in the proceedings before the Deputy President is also unclear. It does not explain how the Appellant lodged a blank Form F2 in circumstances where he also states that the mistake occurred because he had downloaded a Form F8 in PDF and had been unable to complete it and then downloaded a Word version of the Form F8 and that he then inadvertently lodged the blank PDF document. The Appellant's statement indicates that he saved two versions of the Form F8 in two formats – PDF and Word. If, as the Appellant states, that on 22 December 2022 he looked at what he had filed and realised he had lodged "*the PDF version*" he does not explain why he lodged a PDF version of the Form F2 rather than a PDF version of the Form F8 in circumstances where he also states that the fact he had "*two forms*" was the reason for his mistake.

[61] On the material that was before the Deputy President, it is at least equally probable that the Appellant had two different documents rather than the same document in different formats, and that is why he could save two documents with the same name. There is also no evidence – either before the Deputy President or the Full Bench – that the Appellant had completed the Form F8 before he mistakenly lodged the blank Form F2. On being advised of his error, the Appellant may have completed the Form F8 on 22 December 2022 notwithstanding that he dated that Form 19 December 2022.

[62] It is also significant that there is no correspondence on the file from the Commission to the Appellant acknowledging that he had made an application of any kind or accepting the material lodged on 19 December 2022. The first correspondence from the Commission after the Appellant's material was lodged on 19 December 2022 was sent to the Appellant on 22 December 2022. Accordingly, this is not a case where it is unconscionable for the Commission to proceed on the basis that an application was not made until 3 days after the time for making it had expired.

[63] In those circumstances, it was open for the Deputy President to conclude that the material lodged on 19 December 2022 was not, in substance, an application for the Commission to deal with a general protections dispute involving dismissal. The limited grounds of appeal advanced by the Appellant do not disclose error in the Deputy President's decision or reasoning in this regard. In relation to the Appellant's grounds of appeal, the Respondent was entitled to raise an objection on the ground that the application was not made within the required time and to have that objection dealt with. The fact that the Applicant lodged a document he did not intend to lodge and made a genuine mistake in this regard, does not, of itself, establish exceptional circumstances. While we accept that a dismissal at any time, much less during the Christmas period, is distressing and that the Appellant's distress must have been exacerbated by his recent ill health, these matters individually or in combination, are not generally exceptional circumstances. We also note that the Appellant did not provide any evidence to establish that his stress or health issues impacted in any way on his ability to file his application in the required time or that his health issues contributed to him mistakenly lodging a blank Form F2 within time.

[64] Of itself, the fact that Commission staff did not inform the Appellant of his mistake until two days after it had been made, is also not a basis to find that there were exceptional circumstances. The Appellant filed the blank Form F2 outside business hours at 8.08 pm on the last day of the 21-day period. Commission staff could not have advised of his error before

midnight on 19 December to enable him to make the application within time. Further, at first instance and in the appeal the Appellant has not provided any evidence to establish that he had completed the Form F8 General protections application before the expiration of the 21-day period and could have immediately filed it had he been informed of his mistake between 8.02 pm and midnight on 19 December 2022. As we have noted, the Appellant has not explained his error in circumstances where he states he had two versions of the Form F8 and mistakenly lodged a blank Form F2.

[65] However, we are of the view that the Deputy President erred by not considering whether the Applicant's belief that he had made a general protections application within the time required was a genuine and reasonable belief, and whether that belief constituted a reasonable explanation for the delay in making his application. It is arguable that such a belief explains the entire period of the delay given that the Appellant responded promptly to advice from the Commission on 22 December 2022 that he had lodged a blank Form F2 unfair dismissal application on 19 December and corrected his error. These matters could have been explored at a hearing. The Deputy President did not conduct a hearing at first instance. It is arguable that the failure to conduct a hearing resulted in error on the part of the Deputy President. In this regard, we note that the Deputy President referred to s. 397 of the FW Act in relation to her decision not to conduct a hearing.[31] That provision, which requires that a hearing or conference is held where there are disputed facts, applies in relation to unfair dismissal applications under Part 3 – 2 of Division 5 and not to general protections applications. While it is a matter for Members to determine whether to conduct a hearing, the provisions in s. 397 and 399 which provide a particular basis for Members not to conduct a hearing, apply only to unfair dismissal applications.

[66] It is also arguable that the Respondent's attitude as to whether there were disputed facts was not determinative of whether the matters the Deputy President was required to consider in deciding whether to grant a further period. It is apparent from the material on the file that before the Decision was reserved, the Deputy President was considering the implications of the Appellant filing a blank Form F2 application. Relevantly, the covering email and the blank Form F2 lodged by the Appellant on 19 December 2022 were obtained by the Deputy President from the Commission's Client Services Branch[32] and sent to the parties from the Chambers of the Deputy President on 29 March 2023. In light of the Appellant's submission, it would have been appropriate for the Deputy President to have conducted a hearing to explore the issues we have identified. However, in the circumstances of this appeal, we are unable to conclude that these matters caused the Deputy President's discretion to miscarry.

[67] The Appellant in the present case has failed to prosecute his appeal or to engage in any way with the Commission or the Full Bench after lodging it. Had the Appellant prosecuted his appeal he could have sought to call further evidence in the appeal to explain the apparent inconsistencies in his material we have identified. Regrettably, the Appellant did not prosecute his appeal, despite being given every opportunity to do so. The Appellant did not respond to attempts to contact him by telephone and email. Other than his Form F7 Notice of appeal the Appellant filed no material to support his appeal grounds. When the Appellant did not comply with Directions requiring him to file an appeal book, the Commission prepared an appeal book for the appeal. The Full Bench convened a hearing and considered the Appellant's notice of appeal and material on the file. The Appellant failed to attend the hearing of his appeal despite attempts by Commission staff to contact him in relation to his non-compliance with Directions and to ensure his attendance at the appeal hearing.

[68] As we have stated, we consider that permission to appeal should be granted because the appeal raises a novel question concerning the approach to be taken to the question of when an application is "*made*" for the purposes of whether a further period of time should be granted. We are also of the view that approach taken by the Deputy President was erroneous in that she did not consider whether the Applicant had a genuine and reasonable belief that he had lodged a general protections application within the required time, and whether that belief constituted a reasonable explanation for the delay in making that application. It is therefore arguable that the decision as to whether to exercise discretion was based on an error of fact of the kind identified in *House v The King*[33] – that is the Deputy President failed to take into account a relevant consideration,

[69] However, in circumstances where the Appellant has failed to prosecute his appeal and has not responded to all attempts by Commission staff to make contact with him and has failed to attend the hearing of his appeal, we have decided to dismiss the appeal.

Orders

[70] We make the following orders:

1. Permission to appeal is granted; and

2. We dismiss the appeal.

VICE PRESIDENT

Appearances:

No appearance from the Appellant.
T Spence of Counsel instructed by Peters Bosel Lawyers, the Respondent.

Hearing details:

2023.
By Microsoft Teams
8 June.

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[1] [2023] FWC 802.

[2] Appeal Book pages 172 – 186.

[3] Appeal Book page 38.

[4] Appeal Book page 38.

[5] Appeal Book pages 40 – 50.

[6] *Arch v Insurance Australia Group Services Pty Ltd* [2020] FWCFB 601, [32].

[7] *Hambridge v Spotless Facilities Services Pty Ltd* [2017] FWCFB 2811, [27].

[8] Decision at [11].

[9] This is so because on appeal the Commission has power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

[10] Wan v AIRC (2001) 116 FCR 481 at [30].

[11] *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 288, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe*; *Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB1663, 241 IR 177 at [28].

[12] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78 at [44]-[46].

[13] [2010] FWAFB 5343, 197 IR 266 at [24]-[27].

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

[15] (1936) 55 CLR 499 at 505.

[16] [2023] FWC 1756.

[17] Ibid at [26].

[18] *Hambridge v Spotless Facilities Services Pty Ltd* [2017] FWCFB 2811.

[19] [2017] FWCFB 2811 at [26].

[20] Ibid at [34].

[21] [2020] FWCFB 601.

[22] [2023] FWCFB 51.

[23] Op. cit. [2023] FWC 1756.

[24] Ibid at [28]

[25] Ibid at [30].

[26] *Hambridge v Spotless Facilities Services Pty Ltd* op. cit.

[27] *Mihajlovic v Lifeline Macarthur* [2014] FWCFB 1070; 241 IR 142 at [42].

[28] *Ioannou v Northern Belting Services Pty Ltd I[2014] FWCFB 6660; 245 IR 279 at* [22] – [24].

[29] Cf. *Hambridge v Spotless Catering Facilities Services Pty Ltd* op. cit.

[30] Cf. *Arch v Insurance Australia Group Services Pty Ltd* op. cit.

[31] Decision at [7] and note 1.

[32] Decision at [11].

[33] [1936] HCA 40, 55 CLR 499.