DECISION

Fair Work Act 2009
s.604—Appeal of decision

GHD Pty Ltd T/A GHD
v
Kevin Alan Black
(C2022/6735)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT MILLHOUSE
COMMISSIONER P RYAN

MELBOURNE, 15 FEBRUARY 2023

Appeal against decision PR745873 of Commissioner Yilmaz at Melbourne on 15 September 2022 in matter number C2022/3325 – appeal granted.

Introduction

[1] GHD Pty Ltd trading as GHD seeks permission to appeal and if granted, appeals a decision[1] of Commissioner Yilmaz dated 15 September 2022.

[2] The Commissioner granted an extension of time to Mr Kevin Alan Black to file a general protections dismissal application pursuant to s 365 of the *Fair Work Act 2009* (Cth) (Act). GHD contends that the decision was attended by appealable error and that it would be in the public interest for permission to appeal to be granted.

[3] GHD sought a stay of the decision pending the hearing and determination of the appeal. The stay application was granted, and an order was made on 19 October 2022.[2]

[4] For the reasons that follow, we are satisfied that it is in the public interest to grant permission to appeal. The appeal is upheld and, on a redetermination of Mr Black's application for an extension of time, we dismiss the application.

Background

[5] Mr Black was employed by GHD from 9 November 2020 and performed work under a secondment to GHD's client, Main Roads Western Australia.[3] Mr Black's contract of employment with GHD was described as "*fixed term*," but would end either on 23 December 2022 or on "*the completion of your role under the Asset Management Support services contract with Main Roads Western Australia, or until GHD's client (Main Roads Western Australia) advises that you are no longer required, whichever occurs first*."[4]

[6] On 17 November 2021 GHD informed Mr Black that Main Roads Western Australia "*have advised GHD that they are concluding your secondment and you are no longer required on the project*."[5] On 25 November 2021, GHD notified Mr Black that his employment would terminate on 26 November 2021, with five weeks' pay in lieu of notice.[6]

[7] The 21-day statutory timeframe to file either an unfair dismissal application under s 394 of the Act or a general protections dismissal dispute under s 365 of the Act expired on 17 December 2021.[7] On 17 December 2021, Mr Black filed an application with the Commission under s 394 of the Act alleging that he was dismissed unfairly by GHD.[8] The unfair dismissal application proceeded to a conciliation conference before the Commission on 3 March 2022[9] at which the proceeding did not resolve.

[8] On 15 March 2022, Mr Black filed with the Commission and served upon GHD a notice of discontinuance in respect of the unfair dismissal application.[10] In an *ex parte* communication to the Commission the same day, Mr Black stated "…*this particular application has been formally discontinued by myself to enable me to lodge the correct form F8*."[11]

[9] On 3 June 2022, Mr Black filed with the Commission a general protections application pursuant to s 365 of the Act in respect of his dismissal from GHD.[12]

[10] An application under s 365 of the Act must be made within 21 days after the dismissal took effect, or within such further period as the Commission allows, having regard to the matters at s 366(2). Mr Black's general protections application was lodged 168 days beyond the 21-day statutory timeframe. In the circumstances, it was necessary for Mr Black to obtain an extension of time. GHD opposed the grant of such an extension.

[11] The 168-day delay was treated in the decision as consisting of two distinct parts. *First*, a period of 76 days from the expiration of the 21-day statutory timeframe on 17 December 2021 to the conciliation conference conducted in respect of Mr Black's unfair dismissal application on 3 March 2022, and *second*, a period of 92 days from the conciliation conference to the date the general protections application was filed on 3 June 2022.

The decision

[12] In the decision, after setting out the circumstances which led to the late lodgement of Mr Black's general protections application, the Commissioner turned to consider s 366(2) of the Act, which is as follows:

> (2) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:
>
> > (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.

[13] With respect to the reason for the delay,[13] the Commissioner observed that Mr Black relied upon the following matters:

(a) a purported delay in his unfair dismissal application proceeding to a conciliation conference in the Commission, which Mr Black attributed to the granting of an adjournment at the behest of GHD;[14]

(b) the advice Mr Black says he received from the conciliator during the conciliation conference in his unfair dismissal application on 3 March 2022, to the effect that he had "*filed the wrong form*;"[15] and

(c) the health symptoms similar to or arising from a COVID-19 infection, which Mr Black relies upon to explain the 92-day delay between the conciliation conference and the lodgement of his general protections application. In support of his position, Mr Black produced a photograph of a positive rapid antigen test.[16]

[14] The Commissioner concluded that there were exceptional circumstances in relation to the period from the expiration of the 21-day statutory timeframe on 17 December 2021 to the conciliation conference conducted in respect of Mr Black's unfair dismissal application on 3 March 2022. In this respect, the Commissioner made the following findings:

(a) Mr Black filed the unfair dismissal application on 17 December 2021, and the conciliation conference was conducted on 3 March 2022;[17]

(b) "…the delay in listing the unfair dismissal conciliation conference was not attributable to any action by Mr Black";[18]

(c) "…had Mr Black not withdrawn his unfair dismissal application he would have had recourse to a process where his dismissal would be assessed on the basis of it being harsh, unjust or unfair. While not a general protections application, he nevertheless would have had access to a process for remedy";[19] and

(d) Mr Black "did not consider that his application should have been more appropriate as a general protections application had he not had the discussion with the conciliator. While the conciliator did not advise him to withdraw and file a new claim, the discussion was enough for him to question the correctness of his application."[20]

[15] The Commissioner stated, "*even if the period from dismissal until the conciliation conference were accepted as exceptional circumstances for the delay, there remains a delay of 92 days, not an insignificant period.*"[21] The Commissioner observed that Mr Black attributed the delay in subsequently filing his general protections application to "*symptoms similar to or the actual COVID-19 infection*."[22] The Commissioner was not satisfied that "*one picture of a*

positive RAT" was sufficient to corroborate Mr Black's position that he was "*incapable of filing his application*" until 3 June 2022.[23] Rather, the Commissioner found that the second period of the delay following the conciliation conference was "*absent of any valid or exceptional reason*"[24] and the Commissioner was not satisfied that Mr Black had demonstrated "*credible reasons regarding this consideration that weigh in his favour*."[25]

[16] The Commissioner regarded the following matters to weigh in favour of an extension of time:

(a) With respect to the steps taken to dispute the termination,[26] the Commissioner was satisfied that Mr Black "*took active steps to challenge his dismissal*" including by making an unfair dismissal application in the Commission, although "*[i]t is reasonable to conclude that Mr Black did not intended to pursue his dispute following the conciliation conference*."[27]

(b) In relation to the merits of Mr Black's application,[28] the Commissioner concluded that Mr Black "*may have an arguable case on merit*."[29]

[17] The Commissioner found that considerations as to any prejudice to GHD,[30] and fairness as between Mr Black and other persons in a like position were neutral considerations.[31]

[18] Having regard to the fact that "*there may be an arguable case*" and Mr Black had taken "*active steps to challenge his dismissal*," the Commissioner concluded that "*mismanagement*" of Mr Black's unfair dismissal application "*led to delay including his failure to present credible evidence to justify the reasons for delay*."[32] The Commissioner said that "*it was only after the discussion with the conciliator that Mr Black questioned whether his unfair dismissal should have been a general protections application*"[33] and "*for no good reason a discussion about general protections well after his dismissal led to withdrawal of his application*."[34]

[19] The Commissioner ultimately determined to grant an extension of time.[35]

Appeal grounds and submissions

[20] GHD's notice of appeal sets out nine grounds of appeal, which in summary contend that the Commissioner erred in the following respects:[36]

(1) in finding that there were exceptional circumstances to justify a 168-day extension in circumstances where the Commissioner rejected the reason advanced for more than half (92 days) of the delay;

(2) by allowing extraneous or irrelevant matters to guide or affect her;

(3) by (a) mistaking the facts by finding that "*mismanagement*" of Mr Black's unfair dismissal application led to the delay, (b) failing to take into account a material consideration being the delay in filing the general protections application prior to 3 March 2022, or (c) accepting the period of delay prior to 3 March 2022 as exceptional;

(4) by not being satisfied (or, if satisfied, then not taking into account) that the reason for the delay weighs against an extension of time;

(5) by concluding that GHD had not experienced disadvantage of prejudice and that the s 366(2)(c) consideration was neutral;
(6) by acting on a wrong principle in determining that the merits of the application favoured an extension of time;

(7) in finding that GHD did not address the consideration at s 366(2)(e) of the Act and thereby (a) denied GHD procedural fairness, (b) mistook the facts, (c) failed to take into account a material consideration, and (d) erred in being satisfied that the s 366(2)(e) factor was a neutral consideration;

(8) in determining that the following matters were "*exceptional circumstances*":

a. the matters dealt with by appeal ground 2;
b. the matters dealt with by appeal grounds 3(a) and (c);
c. the matters dealt with by appeal ground 6; and
d. the finding at [26] of the decision that Mr Black took "*active steps*" to challenge his dismissal; and

(9) in making a decision which is unreasonable or plainly unjust.

[21] GHD contends that the grant of permission to appeal is in the public interest because the result is counter intuitive, and the legal principles applied appear disharmonious with well-established principles of the Commission in determining extension of time applications in general protections disputes relating to a dismissal. Further, GHD submits that the decision is attended with sufficient doubt to warrant reconsideration and manifests an injustice to GHD.

[22] Mr Black's submissions in respect of the appeal invited the Commission to set aside the Commissioner's primary finding of fact that there was no acceptable reason for the delay of 92 days from 3 March to 3 June 2022.[37] However, at the commencement of the hearing, Mr Black confirmed that he no longer sought to pursue this matter. The appeal proceedings were conducted upon the basis of Mr Black's advice in this respect.

[23] In response to GHD's appeal, Mr Black contends, in summary, that the matters advanced by GHD in its notice of appeal are minor or otherwise taken out of context. Mr Black submits that GHD has "*subdivided*" the decision and in so doing, fails to take into consideration the decision as a whole. Mr Black's position is that the Commissioner carefully considered the facts against the criteria in s 366(2) of the Act and reached a reasonable and balanced decision.[38]

Principles on appeal

[24] An appeal under s 604 of the Act is an appeal by way of rehearing and the Commission's powers on appeal are exercisable only if there is error on the part of the primary decision maker.[39] There is no right to appeal, and an appeal may be made only with the permission of the Commission.

[25] Subsection 604(2) of the Act requires the Commission to grant permission to appeal if satisfied that it is "*in the public interest to do so.*" The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[40] The public interest is not satisfied simply by the identification of error, or a preference for a different result.[41] In *GlaxoSmithKline Australia Pty Ltd v Makin*[42] a Full Bench of the Commission 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."[43]

[26] The test of "*exceptional circumstances*" in relation to extensions of time to lodge applications under s 365, establishes a "*high hurdle*" for an application for an extension, and a decision as to whether to extend time under s 366(2) involves the exercise of discretion.[44] Therefore it will 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 and 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*[45] - 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.

[27] An appellate tribunal is not authorised to set aside a discretionary decision on the basis of a preference for an outcome different to that determined by the first instance decision-maker. In this respect, the High Court said in *Norbis v Norbis*:[46]

> "The principles enunciated in *House v. The King* were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."

[28] We turn now to examine the grounds of appeal.

Consideration

Appeal grounds 1, 3(b)-(c) and 4

[29] We commence with consideration of appeal grounds 1, 3(b)-(c) and 4.

[30] Appeal grounds 3(b)-(c) and 4 concern the Commissioner's findings in respect of the factor in s 366(2)(a) of the Act as to the reason for the 168-day delay. Appeal ground 1 contends that the Commissioner erred by finding that exceptional circumstances existed after she had found that the were was no credible reason for 92 days of the 168-day delay.

[31] As earlier noted, the Commissioner considered the 168-day delay as comprising of two distinct parts: the expiration of the 21-day statutory timeframe on 17 December 2021 to the conciliation conference in Mr Black's unfair dismissal application on 3 March 2022; and the period from 3 March 2022 to the making of the general protections application on 3 June 2022.

[32] With respect to the first period of the delay the Commissioner stated:

(a) "Even if the period from dismissal until the conciliation conference were accepted as exceptional circumstances for the delay, there remains a delay of 92 days…"[47]

(b) "On this basis, I do consider the period from the conciliation conference until the lodgement date of this application, as the period of delay relevant to this consideration."[48]

(c) "Despite accepting the period as unusual or exceptional circumstances in this matter, the period from the conciliation conference is absent of any valid or exceptional reason."[49]

[33] With respect to the second period of the delay the Commissioner stated:

(a) "On any objective basis, Mr Black's explanation cannot be accepted as being exceptional, unusual, out of the ordinary, uncommon or special."[50]

(b) "…the period from the conciliation conference is absent of any valid or exceptional reason."[51]

(c) "Consequently, for the period in question, I am not satisfied that Mr Black has demonstrated credible reasons regarding this consideration that weigh in his favour."[52]

[34] We consider that these statements reveal various errors.

[35] It appears from the reasoning extracted at [32](b) above that the 76-day delay, being the period *prior* to the conciliation conference, was not regarded by the Commissioner as a relevant consideration in respect of s 366(2)(a) of the Act. However, as set out at [32](a) and [32](c) above, the Commissioner accepted that the reason for the delay in first period was "*exceptional*," as that word is understood in the context of s 366(2). It follows that the Commissioner expressly considered the first period of the delay, but did so in a manner which reflects an erroneous approach to the statutory task.

[36] Exceptional circumstances are considered by reference to the s 366(2) factors, and the reason for the delay is only one of the factors to be taken into account.[53] In the context of the Commissioner's findings, we consider the Commissioner erred by accepting the period of the delay prior to 3 March 2022 as "*unusual or exceptional circumstances*" as opposed to considering the reason for the delay in its entirety as a factor in her overall consideration of s 366(2)(a) of the Act.

[37] Further, it is not evident from the decision how the findings with respect to the first and second period of the delay were taken into account in the overall assessment of the factor in s 366(2)(a) of the Act. Rather, it appears that the Commissioner made two separate findings with respect to the factor. At [23] of the decision, the Commissioner found that the second period of the delay did not weigh in favour of Mr Black (but also did not weigh against Mr Black). At [47] of the decision, the Commissioner appears to find that the first period of the delay weighs in favour of the extension of time.[54] We consider that the Commissioner erred by separately weighing the first period of the delay and the second period of the delay.

[38] In this respect, the Commissioner at [47] of the decision stated that "*mismanagement of* [Mr Black's] *application led to delay including his failure to present credible evidence to justify the reasons for delay*." To the extent it might be suggested that this explains how the first period of the delay interplays with the second period of the delay, that is rejected.

[39] We do not consider there to be any available connection between the unfair dismissal application and Mr Black's capacity to present evidence in his application for an extension of time. Additionally, the two periods of the delay are multiple times the length of the 21-day statutory timeframe. While the weighing of any factor is "*plainly a question of degree and weight*,"[55] in the context of a 168-day delay where 92 of those days are found to have no credible reason attributable to them, it is not open to infer such a balancing act where no reasons are given. Rather, the correct inference is that the two periods of the delay were considered separately.

[40] Against these observations, we reject appeal ground 1. Any notion that an unexplained 92-day delay means *ipso facto* no exceptional circumstances ignores the other factors in s 366(2) which may weigh in favour of a finding of exceptional circumstances.

[41] However, we consider that there is an error in the Commissioner's weighing of s 366(2)(a). Having found there to be no credible explanation for 92 days of the delay, it was, with respect, illogical for the Commissioner to not have considered this to weigh against a finding of exceptional circumstances. As discussed, the timeframe for making an application is 21 days from the day the dismissal took effect. Accordingly, an unexplained 92-day delay provides Mr Black with a period of over four times the statutory timeframe without reason. While it may be open to the Commission acting within its jurisdiction to find a partly explained period of delay to weigh in favour of exceptional circumstances,[56] we do not regard there to be any basis for doing so on the facts of this matter.

[42] For these reasons,[57] we uphold appeal grounds 3(b) and (c), and 4.

Appeal grounds 2, 3(a), 8(a) and (b)

[43] It is contended by appeal ground 2 that the Commissioner erred by allowing extraneous or irrelevant matters to guide her when considering the reason for the delay. The matters identified concern the unfair dismissal application. Further, by appeal ground 3(a), GHD alleges that the Commissioner erred by mistaking the facts in finding that "*mismanagement*" of Mr Black's unfair dismissal application explained the delay in filing his general protections application.

[44] The apparent basis for a finding of "*mismanagement*" is that the unfair dismissal conciliation conference was listed to proceed on 22 February 2022 but was relisted to 3 March 2022 at GHD's request.[58] Further, during the conciliation conference a discussion between the conciliator and Mr Black appears to have led Mr Black to conclude that he should have instead filed a general protections application. The Commissioner considered that, had Mr Black not "*had the discussion with the conciliator*"[59] prior to withdrawing his unfair dismissal application and making a general protections application, he would have had the benefit of seeking a remedy for his dismissal.

[45] The Commissioner was "*swayed by the evidence*" that Mr Black "*questioned whether his unfair dismissal should have been a general protections application*"[60] only after discussing his application during the conciliation conference. The Commissioner stated as follows:

(a) "…the delay in listing the unfair dismissal conciliation conference was not attributable to any action by Mr Black."[61]

(b) "mismanagement of his application led to delay including his failure to present credible evidence to justify the reasons for delay."[62]

(c) "…had Mr Black not withdrawn his unfair dismissal application he would have had recourse to a process where his dismissal would be assessed on the basis of it being harsh, unjust or unfair. While not a general protections application, he nevertheless would have had access to a process for remedy."[63]

(d) Mr Black "did not consider that his application should have been more appropriate as a general protections application had he not had the discussion with the conciliator. While the conciliator did not advise him to withdraw and file a new claim, the discussion was enough for him to question the correctness of his application."[64]

(e) "…it was only after the discussion with the conciliator that Mr Black questioned whether his unfair dismissal application should have been a general protections application."[65]

(f) "for no good reason a discussion about general protections well after his dismissal led to withdrawal of his application."[66]

[46] The matters relied upon by the Commissioner provide an inadequate basis for a conclusion that the first period of the delay was wholly occasioned by the "*mismanagement*" of Mr Black's unfair dismissal application. The material does not demonstrate that the conciliation

conference was unreasonably delayed; rather it was dealt with in a routine manner over the Christmas and New Year period in 2021-22. The adjournment of the conciliation conference from 22 February to 3 March 2022 was granted on the basis that GHD's email spam filters restricted service of Mr Black's application for an unfair dismissal remedy until 17 February 2022. Further, there is nothing unusual about (a) Mr Black choosing to challenge his dismissal by first filing an unfair dismissal application before withdrawing it and filing a general protections application instead, or (b) for a conciliator to privately express views to a litigant in a conciliation conference. Precisely what was said in the conciliation is not in evidence (as is appropriate), however we note that the Commissioner found that "*…the conciliator did not advise him to withdraw and file a new claim…*"[67] In these circumstances, by concluding that the routine management of Mr Black's application amounted to "*unusual or exceptional circumstances,*" the Commissioner mistook the facts and thereby erred.

[47] Accordingly, we uphold appeal grounds 2 and 3(a).

[48] Appeal grounds 8(a) and (b) are related. It is contended that the Commissioner erred in determining that the matters set out at [45] above and the matters dealt with by appeal grounds 3(a) and (c) were exceptional circumstances. Having regard to our conclusions at [36], [42] and [46]-[47] of this decision, we also uphold appeal grounds 8(a) and (b).

Appeal ground 5

[49] By appeal ground 5, GHD contends that the Commissioner erred in reaching a state of satisfaction that (a) GHD had not experienced disadvantage or prejudice by the delay,[68] and (b) the factor in s 366(2)(c) of the Act concerning prejudice to the employer was a neutral consideration.[69]

[50] In the decision, the Commissioner's analysis as to the prejudice that may be occasioned to GHD does not address GHD's submissions in respect of this factor.[70] To the contrary, the Commissioner concluded that "*I do not consider that the Respondent has experienced disadvantage or prejudice,*" but no supporting material is relied upon in respect of this conclusion. In these circumstances it cannot be said that GHD's submission, including GHD's specific responses to questions posed by the Commissioner on the topic of prejudice during the hearing,[71] were taken into account.

[51] It is well accepted that a lengthy delay gives rise to a general presumption of prejudice.[72] The 168-day delay in Mr Black's general protections application can only be described as lengthy. A relevant prejudice is one that GHD would not have suffered, had the application been made within 21 days of the dismissal taking effect.[73] Having regard to the contentions made by Mr Black in his general protections application, and his reliance upon alleged discussions and meetings,[74] it is conceivable that, consistent with GHD's submissions, a significant delay of 168 days may impair the recollection or availability of GHD's witnesses and thereby give rise to a relevant prejudice.

[52] The Commissioner's conclusion that prejudice to GHD was a neutral consideration in the absence of addressing GHD's contentions in respect of this factor, gives rise to appealable error.

[53] We uphold appeal ground 5.

Appeal grounds 6 and 8(c)

[54] By appeal ground 6, GHD contends that the Commissioner erred by acting on a wrong principle by determining that the merits of the application favoured the grant of an extension of time. Further, it is submitted by appeal ground 8(c) that the Commissioner erred in determining that the matters set out at [56] below were exceptional circumstances.

[55] For the consideration in s 366(2)(d) to weigh in favour of an extension of time, it must be shown that there is some merit in the substantive application.[75] However, where the merits of the substantive application turn on contested points of fact or law, it is well established that they are not able to be fully examined or agitated at this stage of the proceeding which is essentially interlocutory.[76]

[56] The Commissioner concluded, in respect of this factor, as follows:

(a) "…on balance I have concluded that Mr Black may have an arguable case…"[77] and

(b) "Mr Black raises serious allegations of contravention of his workplace rights which on the material before me, consider there may be an arguable case…"[78]

[57] The decision discloses that the Commissioner's view as to merits was informed by the following:[79]

(a) "Mr Black's allegations regarding contravention of his workplace rights was not heavily contested by GHD."

(b) "GHD contends the dismissal occurred simply because the client no longer required Mr Black. This in itself appears inconsistent with the evidence of the terms in the fixed term contract, the secondment terms and the expected duration of the project to be managed by GHD."

(c) "Mr Black contested the allegations [that he did not comply with safety requirements], and his request for evidence against him and his evidence disputing the allegations appears not to have been taken into account."

[58] While it was not necessary or appropriate for the Commissioner to determine the parties' respective merits case, the decision does not address GHD's response to Mr Black's merits case. On the contrary, the Commissioner made a finding that Mr Black's allegations were "*not heavily contested by GHD*" which is at odds with GHD's stated position, as follows:

(a) "Under GHD's contract with Main Roads WA, Main Roads WA had rights to terminate the secondments of GHD personnel. Main Roads WA decided to conclude the Applicant's secondment…"[80]

(b) "GHD engaged with the Western Australian business, including our regional offices and other clients, to seek to identify alternative roles for the Applicant, however no alternate roles were identified."[81]

(c) "The Applicant also states that the secondment was terminated because he did not attend site pre-start meetings and refused to undertake a breathalyser. Main Roads WA did communicate their concerns to GHD relating to the Applicant failing to attend site pre-start meetings and not undertaking required drug and alcohol screening tests and GHD understands that this was a factor in their decision to terminate the secondment arrangement. GHD explored these concerns with the Applicant and Main Roads WA and concluded that the required safety practices had not been undertaken by the Applicant to the expected standard. The Applicant was given an opportunity to respond as part of the process."[82]

(d) "The Applicant references certain project related safety concerns which he raised with GHD and Main Roads WA and alleges that his raising these concerns led to the conclusion of his secondment and dismissal. GHD understands that Main Roads WA investigated the concerns and that no major issues were identified. The Applicant raising such concerns was entirely appropriate for someone undertaking his role and our understanding is that the Applicant's raising project related safety concerns had no bearing on the client's decision to conclude his secondment."[83]

(e) "Mr Black has raised allegations that his dismissal was due to raising safety concerns. That is not correct. GHD's position is that raising safety concerns was part of Mr Black's role and it was expected that he would do that."[84]

(f) "The suggestion that Mr Black would be subject to an adverse action for raising safety concerns is not credible and would be vehemently denied…we would be calling evidence that we vigorously deny those allegations made."[85]

(g) "GHD refutes these allegations in the strongest possible terms and, in the event that an extension of time is granted, GHD will vigorously defend such allegations…"[86]

[59] The Commissioner's conclusion in respect of merits is that Mr Black may have an arguable case. Notwithstanding the equivocal nature of the Commissioner's finding, the Commissioner concluded that "*this consideration weighs in his favour for an extension of time*."[87] However, in the absence of a hearing of the evidence in respect of these matters, which are squarely in contest as [58] above demonstrates, it was not possible for the Commissioner to make a firm assessment of the merits of Mr Black's application.

[60] Accordingly, in circumstances where the Commissioner's finding that Mr Black *may* have an arguable case was (a) based on an inaccurate factual premise that GHD did not heavily contest the allegations put against it, and (b) did not take into account the contentions advanced by GHD in response to Mr Black's merit case, we find that the Commissioner made an error of principle by weighing this factor in favour of an extension of time.

[61] We uphold appeal ground 6.

[62] Appeal ground 8(c) is rejected. While the Commissioner found that the matters set out at [56] above favoured an extension of time, it is not apparent from the decision that the Commissioner determined that those matters were, of themselves, "*exceptional circumstances*" as contended by this ground of appeal.

Appeal ground 7

[63] The consideration at s 366(2)(e) of the Act concerns fairness between Mr Black and other persons in a like position. The substance of appeal ground 7 is that the Commissioner erred by failing to take into account GHD's submissions in relation to this factor. This is plainly correct. GHD made submissions[88] in relation to s 366(2)(e). However, the Commissioner stated in the decision that GHD "*did not address*"[89] this matter and concluded that the factor was a neutral consideration.

[64] In light of the Commissioner's conclusion at [44] of the decision, it is apparent that the Commissioner did not take GHD's submissions into account. In this circumstance, we consider the Commissioner erred by mistaking the facts or by failing to take into account a relevant consideration in respect of s 366(2)(e) of the Act. This gives rise to an appealable error of the kind set out in *House v The King*. It follows that we uphold appeal grounds 7(b)-(d).

[65] In the circumstances, we consider it unnecessary to consider whether this error denied GHD procedural fairness as contended by subsection (a) of this ground of appeal.

Appeal ground 8(d)

[66] It is contended by appeal ground 8(d) that the Commissioner erred by finding that it was an exceptional circumstance that Mr Black "*took active steps to challenge his dismissal.*"[90] We reject this ground. While the Commissioner was satisfied that the consideration at s 366(2)(b) weighed in favour of an extension of time, the decision contains no express statement that would support a conclusion that the Commissioner regarded this finding, of itself, to be an "*exceptional circumstance*" as contended.

Appeal ground 9

[67] Appeal ground 9 invokes what is often referred to as the "*second limb*" of the *House v The King* test for error in discretionary decision-making. That is, that the decision under appeal was unreasonable and plainly unjust and permitted the inference to be drawn that the decision-maker failed properly to exercise the discretion invested in them.

[68] As the Full Bench in *King v Catholic Education Office Diocese of Parramatta t/a Catholic Education Diocese of Parramatta*[91] observed, where a decision is accompanied by full reasons, the basis upon which the decision has been reached will usually be apparent and any specific error in the exercise of the discretion will be identifiable.[92] In that circumstance, consideration of whether the decision or outcome was "*unreasonable or plainly unjust*" will usually be unnecessary.[93]

[69] Having identified specific errors in the exercise of the Commissioner's discretion in the context of this decision, we do not consider it to be necessary to make a finding in respect of appeal ground 9.

[70] We dismiss this ground of appeal.

Permission to appeal

[71] The appealable errors we have identified caused the Commissioner's discretion to miscarry. As a result, we are satisfied that the decision manifests an injustice. It cannot be said that the appealable errors we have identified would not have made a difference to the ultimate outcome of the application. Accordingly, we consider that it would be in the public interest to grant permission to appeal.

[72] The appeal should be upheld and the decision of the Commissioner quashed.

Re-determination of the extension of time application

[73] We consider that the procedurally convenient course is for us to re-determine Mr Black's application for an extension of time under s 366(2) of the Act on the basis of the evidentiary material that was before the Commissioner.[94] These matters are considered in the analysis which follows.

Reason for the delay – s 366(2)(a)

[74] Mr Black relies upon the following matters to explain the delay in filing his general protections application:

(a) Mr Black filed an application for an unfair dismissal remedy on 17 December 2021. The 22 February 2022 conciliation conference was adjourned to 3 March 2022 at GHD's request. Further, GHD did not file its employer response document until 24 February 2022.[95]

(b) During the conciliation conference on 3 March 2022 "*it was recognised*" that Mr Black "*had filled in the wrong Form and should have filled in a Form 8 (General Protections)*." On 15 March 2022, Mr Black discontinued his unfair dismissal application.[96]

(c) Mr Black contends that he was unwell during the period between approximately 15 March to 25 May 2022 and "*wasn't able to think clearly or operate a lap top*." Mr Black submits that he tested positive for COVID-19 sometime in March and early April 2022. While Mr Black says that he returned a negative COVID-19 test in the second week of May 2022, he subsequently tested positive to COVID-19 on 13 May 2022. Mr Black produced a photograph of a rapid antigen test that he says was taken of his test result on that date.[97]

[75] For the reasons that follow, we are not satisfied that Mr Black has provided an acceptable reason for the 168-day delay in lodging his general protections application.

[76] *Firstly,* Mr Black elected to make an unfair dismissal application in the Commission and had the benefit of a conciliation conference in respect of it. There is no material before the Commission which demonstrates that the conciliation conference was unreasonably delayed. GHD's request for an adjournment was dealt with in a routine manner and the conference was

adjourned by only nine days. GHD filed its employer response form filed prior to the conference.[98]

[77] Further, as noted at [46] of this decision, there is nothing unusual about Mr Black choosing to challenge his dismissal by first filing an unfair dismissal application before withdrawing it and filing a general protections application instead. Nor is it unusual for a conciliator to privately express views to a litigant in a conciliation conference.

[78] Accordingly, we reject that these matters constitute an acceptable or credible reason for the delay.

[79] *Secondly,* Mr Black has produced no medical evidence in support of his contention that he was not capable of filing his general protections application at any stage prior to 3 June 2022. An undated photograph of a positive rapid antigen test is insufficient to support Mr Black's contention. In the absence of medical evidence which provides some insight into the extent to which Mr Black was incapacitated in the period from the conciliation conference to 3 June 2022,[99] we do not accept the contention that the delay was occasioned by Mr Black's health. Nor does the material before the Commission support such a conclusion in any event. Mr Black contends that the "*substance*" of his claim "*remains the same*" as his unfair dismissal application, and "*has not changed part from being further clarified*."[100] In these circumstances, there is no credible basis advanced by Mr Black to explain the three-month delay in filing his general protections application following the conciliation conference in his unfair dismissal application.

[80] Having concluded that Mr Black has not provided an acceptable reason for any part of the 168-day delay, we consider that this factor weighs against a finding of exceptional circumstances.

Action to dispute the dismissal – s 366(2)(b)

[81] It is apparent on the evidence that Mr Black challenged the matters put to him during the course of the dismissal meeting on 25 November 2022.[101] However, there is no evidence before the Commission that GHD was on notice of the possibility of Mr Black making an application to challenge his dismissal in the Commission before Mr Black filed his application for an unfair dismissal remedy on 17 December 2022. Nor is there any material before the Commission which demonstrates that Mr Black provided any indication to GHD that he would seek to make a general protections application after discontinuing the application for an unfair dismissal remedy on 15 March 2022. Rather, Mr Black's notice of discontinuance advised that Mr Black "*wholly discontinued*" the matter. Mr Black did not select the option of discontinuing the matter to pursue an alternative application.[102]

[82] It follows that GHD was not on notice of the possibility of Mr Black making a general protections application pursuant to s 365 of the Act before it was made. In the circumstances before us, we regard this factor to be a neutral consideration.

Prejudice to the employer – s 366(2)(c)

[83] As noted at [51] of this decision, a long delay gives rise to a general presumption of prejudice.[103]

[84] GHD submits[104] that it will be prejudiced if an extension of time were to be granted. It contends that the statutory time limits for bringing an application under the Act are directed toward the timely resolution of disputes and the provision of certainty to parties. GHD says that it was entitled to, and did, treat the dispute concerning Mr Black's dismissal as being finalised upon receipt of the notice of discontinuance concerning Mr Black's unfair dismissal application. GHD's position is that if an extension of time were to be granted, it would be "*prejudiced in its ability to defend*" Mr Black's general protections application, having regard to the extensive delay. In this respect, GHD relies upon issues with witness availability and "*recollection issues*," which would be prejudicial to its interests.[105]

[85] Mr Black contends[106] that GHD will suffer no disadvantage by an extension of time. In support of this position, Mr Black notes that GHD "*caused previous delays by not lodging responses in time*." Mr Black submits that he is simply asking for "*similar consideration that GHD has been given*" particularly noting that the delay was occasioned by his illness. Further, Mr Black submits that the basis for his claim "*remains unchanged*" from his earlier unfair dismissal application.

[86] For the reasons stated at [51] of this decision, we accept GHD's contention that the lengthy, 168-day delay in Mr Black's general protections application gives rise to a material and relevant prejudice to GHD. This factor weighs against a finding of exceptional circumstances.

Merits of the application – s 366(2)(d)

[87] We refer to and repeat our observation at [55] that for the consideration in s 366(2)(d) to weigh in favour of an extension of time, it must be shown that there is some merit in the substantive application.[107] However, the substantial merits of the application are not able to be fully examined or agitated at this stage of the proceeding which is essentially interlocutory.[108]

[88] In summary, Mr Black contends[109] that he was dismissed because he raised serious safety and construction breaches. As a consequence, Mr Black submits that he was "*personally attacked and falsely accused of not attending PreStarts and refusing a breathalyser*." Mr Black's position is that his ongoing tenure was threatened, and when he chose not to "*be quiet or sign off on illegal activities*" he was relieved of his employment duties, given medial work to do and ultimately dismissed.

[89] GHD's response to Mr Black's contentions are set out at [58] of this decision and are not repeated here. In summary, GHD submits that its client, Main Roads Western Australia, elected to conclude Mr Black's secondment and did so in accordance with the relevant contractual terms. GHD understands that Main Roads Western Australia held concerns that Mr Black had failed to attend pre-start meetings and undertake required drug and alcohol screening tests. GHD contends that Mr Black was given an opportunity to respond to these concerns. Mr Black's contention that he was dismissed for raising safety concerns is rejected in "*the strongest possible terms*."[110]

[90] In response to GHD's position, Mr Black submits[111] that "*all correspondence*" to him prior to the dismissal meeting concerned the "*PreStart and Breathalyzer allegations*." Initially Mr Black was informed that these matters formed the basis for his dismissal, but GHD later changed its position and informed Mr Black that those matters had no bearing upon his dismissal. We infer from Mr Black's submissions before us[112] that Mr Black holds the view that in the absence of a reason for the dismissal, Mr Black's contention that he was dismissed due to raising safety concerns has merit.

[91] Having considered the materials, it is evident that the merits of Mr Black's general protections application turns on contested points of fact. It is not possible to make any firm or detailed assessment of the merits of Mr Black's application at this stage. Nor would it be appropriate for the Commission to resolve these contested issues of fact for the purposes of taking account of the factor in s 366(2)(d) of the Act.[113] Accordingly, we regard this factor as a neutral consideration.

Fairness as between the person and other persons in a similar position - s 366(2)(e)

[92] In support of the factor at s 366(2)(e) of the Act, Mr Black relies upon an inherent unfairness associated with employees being threatened with the loss of employment for raising safety breaches.[114]

[93] GHD submits that Mr Black's failure to promptly file a general protections application following the discontinuance of his unfair dismissal application should weigh against him, in circumstances where other applicants in a similar position comply with a 21-day statutory deadline.

[94] This consideration is concerned with the consistent application of principles in applications of this kind. This ensures fairness between an applicant and other persons in a similar position. However, applications for an extension of time generally turn on their own facts. There is no material before us which deals with considerations that are similar in kind to the factual circumstances of Mr Black.

[95] It follows that in the circumstances of this case, considerations of fairness between Mr Black and persons in a similar position is a neutral consideration.

Conclusion

[96] The test of exceptional circumstances in s 366(2) of the Act is a stringent one, establishing a high hurdle for an applicant for an extension.[115] It is for Mr Black to satisfy the Commission that grounds exist for exercising the discretion to extend time in his favour. We are not satisfied that Mr Black has done so. Having regard to our consideration of the relevant statutory criteria, and the conclusions reached, none of the s 366(2) factors weigh in favour of a finding of exceptional circumstances. We are not satisfied that the matters raised amount to exceptional circumstances either when the various circumstances are considered individually or together.

[97] As we are not satisfied that there are exceptional circumstances in this case, there is no basis to allow further time for Mr Black's general protections application to be made.

Orders

[98] We order as follows:

(1) Permission to appeal is granted.

(2) The appeal is upheld.

(3) The decision of Commissioner Yilmaz in [2022] FWC 2467 dated 15 September 2022 is quashed.

(4) Mr Black's application for an extension of time in matter number C2022/3325 is dismissed.

(5) The stay order PR747019 dated 19 October 2022 is discharged.

VICE PRESIDENT

Appearances:

Mr Kevin Alan Black, on his own behalf
Mr Craig Naughton, on behalf of the Respondent

Hearing details:

16 November 2022, by Microsoft Teams

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[1] [2022] FWC 2467.

[2] PR747019.

[3] Appeal Book (AB) 88.

[4] AB 81, AB 88, AB 94

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[5] AB 95

[6] AB 96

[7] *Fair Work Act 2009* (Cth), ss 394(1) and 366(1)

[8] AB 112

[9] AB 114

[10] AB 116, AB 130

[11] AB 117

[12] AB 55-71

[13] *Fair Work Act 2009* (Cth), s 366(2)(a)

[14] Decision at [18]; cf [7]

[15] Ibid

[16] Decision at [19]-[20]; AB 118

[17] Decision at [21]

[18] Decision at [23]

[19] Ibid

[20] Ibid

[21] Decision at [22]

[22] Ibid

[23] Ibid

[24] Decision at [23]

[25] Ibid

[26] *Fair Work Act 2009* (Cth), s 366(2)(b)

[27] Decision at [26] and [47]

[28] *Fair Work Act 2009* (Cth), s 366(2)(d)

[29] Decision at [42] and [47]

[30] *Fair Work Act 2009* (Cth), s 366(2)(c), decision at [30]

[31] *Fair Work Act 2009* (Cth), s 366(2)(e), decision at [45] and [47]

[32] Decision at [47]

[33] Ibid

[34] Ibid

[35] Decision at [48]

[36] AB 6-9

[37] Mr Black's submissions on appeal at p. 5-6

[38] Ibid at p. 2-4

[39] *Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ

[40] *O'Sullivan v Farrer and another* (1989) 168 CLR 210 at [216]-[217] per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 243 CLR 506 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; (2011) 207 IR 177 at [44]-[46]

[41] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]-[27], 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at [28], 202 IR 388, 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] FWCFB 1663 at [28]

[42] [2010] FWAFB 5343

[43] Ibid at [27]

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

[45] [1936] 55 CLR 499; 55 CLR 499

[46] [1986] HCA 17; (1986) 161 CLR 513 at 518-9 per Mason and Deane JJ

[47] Decision at [22]

[48] Decision at [23]

[49] Ibid

[50] Ibid

[51] Ibid

[52] Ibid

[53] *Stogiannidis v Victorian Frozen Food Distributors Pty Ltd* [2018] FWCFB 901; (2018) 273 IR 156 at [41]

[54] Decision at [23] at [47]

[55] *Stogiannidis v Victorian Frozen Food Distributors Pty Ltd* [2018] FWCFB 901; (2018) 273 IR 156 at [44]

[56] Ibid at [45]

[57] Taking into account the appellant's submissions on appeal at [7.1]-[7.4]

[58] AB 124

[59] Decision at [23]

[60] Decision at [47]

[61] Decision at [23]

[62] Decision at [47]

[63] Ibid

[64] Decision at [23]

[65] Decision at [47]

[66] Ibid

[67] Decision at [23]

[68] Decision at [30]

[69] Decision at [30] and [47]

[70] AB 48 at [239]; AB 125 at [1g]

[71] AB 49 at [243]-[246]

[72] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 556; *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 at 299-300

[73] *Clarke v Service to Youth Council Incorporated* [2013] FCA 1018 at [31]

[74] AB 55-70

[75] *Long v Keolis Downer (t/as Yarra Trams)* [2018] FWCFB 4109 at [71]

[76] See, eg, *Broadbent v Goulburn Flight Training Academy P/L* [2021] FWCFB 2794 at [28]; *Donohoe v QuickComms Australia Pty Ltd* [2020] FWCFB 5426 at [53]

[77] Decision at [42]

[78] Decision at [47]

[79] Decision at [42]

[80] AB 78 at [5]

[81] AB 78 at [9]; 126 at [8]

[82] AB 78 at [13]; 126 at [11]

[83] AB 79 at [14]; cf 126 at [12]

[84] AB 48 at [236]

[85] AB 48 at [237]

[86] AB 127

[87] Decision at [42]

[88] AB 124-125 at [1f]

[89] Decision at [44]

[90] Decision at [26]

[91] *King v Catholic Education Office Diocese of Parramatta t/a Catholic Education Diocese of Parramatta* [2014] FWCFB 2194; 242 IR 249

[92] Ibid at [41]

[93] See, *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8, 165 FCR 560 at [76] per Graham J

[94] *Fair Work Act 2009* (Cth), s 607(3)(b)

[95] AB 101 at [1]-[7]

[96] AB 101 at [8]-[13]

[97] AB 101-102 at [14]-[39]

[98] AB 124 at [1e]

[99] *Australian Postal Corporation v Lili (Karen) Zhang* [2015] FWCFB 5285 at [21]-[22]; *Woolworths Ltd v Lin* [2018] FWCFB 1643; (2018) 273 IR 380 at [65]-[67]; *Becke v Edenvale Manor Aged Care* [2014] FWCFB 6809 at [9]

[100] AB 102 1d at [46]-[47]

[101] AB 1051e at [39]-[50]

[102] AB 124 at [1e]

[103] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 556*; Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 at 299-300

[104] AB 125 at [1g]

[105] AB 48 at [239]

[106] AB 107 at [1f], [1]-[7]

[107] *Long v Keolis Downer (t/as Yarra Trams)* [2018] FWCFB 4109 at [71]

[108] See, eg, *Broadbent v Goulburn Flight Training Academy P/L* [2021] FWCFB 2794 at [28]; *Donohoe v QuickComms Australia Pty Ltd* [2020] FWCFB 5426 at [53]

[109] AB 109 at [1h]

[110] AB 127

[111] AB 108 at [1g]

[112] Mr Black's submissions on appeal at p.3, 5

[113] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [36]

[114] AB 109 at [1i], [1]

[115] *Stogiannidis v Victorian Frozen Food Distributors Pty Ltd* [2018] FWCFB 901; (2018) 273 IR 156 at [14] citing *Lombardo v Commonwealth of Australia* [2014] FWCFB 2288 at [21]