DECISION

Fair Work Act 2009
s.604—Appeal of decision

Matthew Duncan Hatch
v
Woodside Energy Ltd.
(C2022/6960)

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT BELL
COMMISSIONER LEE

BRISBANE, 9 MARCH 2023

Appeal against decision [2022] FWC 2572 of Deputy President Young at Melbourne on 26 September 2022 in matter number C2022/2787 – permission to appeal granted – appeal upheld.

Background

[1] Mr Matthew Duncan Hatch (the Appellant) has lodged an appeal pursuant to s.604 of the *Fair Work Act 2009* (Cth) (FW Act) for which permission to appeal is required against a decision (the Decision) of Deputy President Young (Deputy President) issued on 26 September 2022.[1] The Decision concerns an application lodged by the Appellant under s.365 of the FW Act, alleging contraventions of Part 3-1 of the FW Act associated with his dismissal by Woodside Energy Ltd (the Respondent).

[2] The Deputy President determined that the application had been lodged one day out of time having regard to the statutory time limits in s.366(1). Having then considered the factors in s.366(2) the Deputy President determined not to extend the time limit for lodging the application and dismissed the application.[2]

[3] The Applicant does not set out particular grounds of appeal but provided submissions setting out various alleged errors in the Deputy President's decision. For the reasons that follow, it is not necessary to set out or engage with those submissions in a substantive way.

[4] At the hearing of the Appeal on Monday 05 December 2022, the Full Bench indicated to the parties that the application may in fact have been lodged within time having regard to the application of the *Acts Interpretation Act 1901* (Cth) (AIA). Directions were sent and parties were provided with an opportunity to file submissions addressing that point and written submissions were filed.

[5] For the reasons that follow, we consider that the application was made in time and that it is unnecessary to consider whether an extension of time was required. Permission to appeal is granted and the appeal is allowed.

Decision Under Appeal

[6] The Deputy President set out the following background and factual findings:

> "**[4]** Mr Hatch commenced employment with the Respondent in September 2012 as an Environmental Advisor. The Respondent terminated Mr Hatch's employment on 13 April 2022. Mr Hatch resides in Western Australia.
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> **[5]** Mr Hatch sent the GP Application by email to the Melbourne Registry at 11.59 pm Australian Western Standard Time (AWST) on 4 May 2022. That email was received by the Melbourne Registry at 1.59 am Australian Eastern Standard Time (AEST) on 5 May 2022. The GP application was also sent the Perth Registry at 12.12 am AWST on 5 May 2022.
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> **[6]** At 9.20 am AEST on 5 May 2022 the Commission wrote to Mr Hatch and advised that an email had been received from him on 5 May 2022 but the GP Application had not been received because the Commission could not access the document; that is, the GP Application was not in a readable format. Mr Hatch was asked to provide the GP Application, without any security restrictions, in one of five specified formats. Mr Hatch emailed the GP Application to the Brisbane and Perth Registries as a PDF document at 10.47 am AEST that day."[3]

[7] As the period of 21 days provided under s.366(2) of the FW Act to make an application ended at midnight on 4 May 2022, then having regard to the factual findings set out above and the statutory provisions including the Rules of the Fair Work Commission, the Deputy President determined the application was lodged one day out of time.[4]

[8] Mr Hatch submitted to the Deputy President that the application was in fact lodged within the statutory period because it was lodged at 11:59pm AWST. The Deputy President rejected those submission and determined as follows:

> "**[11]** As to the reasons for the delay, Mr Hatch submits that there was no delay in lodgement as he lodged the GP Application at 11.59pm AWST. Mr Hatch submits that the email address listed on the Commission's "Deadline" webpage (Webpage) was not a defined link and had no reference to a timezone or state. Further, he submits that the Webpage simply says "*We accept documents no later than 11.59pm on the deadline*" with no specific reference to that time being AEST and that he was not aware that the GP Application would be lodged with the Melbourne Registry until he clicked the email hyperlink on the Webpage. Mr Hatch submits that the footnote to Rule 14(1) of the *Fair Work Commission Rules 2013*(Rules) provides "*The email addresses approved for lodgement of documents are available at http://www.fwc.gov.au*" and that in light of the refence to email addresses in the plural he reasonably thought this was a reference to the email addresses provided on the Commission's "contact us" webpage, which includes State specific addresses. Additionally, Mr Hatch submits that the "Apply or Lodge" section of the Commission's website has a subheading of "Approved File Types & Email addresses" which fails to list any "approved email addresses".

[12] Additionally, Mr Hatch says that the following "*additional unforeseen circumstances*" arose, precluding him from lodging the application prior to 4 May 2022 and resulted in the lodgement being received by the Melbourne Registry at 1.59am AEST on 5 May 2022 consequent upon the "*conflicting information provided from the Commission specific to "approved application emails*":

(a) internet connectivity issues on 4 May 2022 which precluded him from submitting the GP Application earlier and required him to purchase a new router;

(b) the GP Application was prepared on a "*non-mobile computer*";

(c) prior to 4 May 2022 he was preoccupied with seeking new employment;

(d) he spent considerable time and effort in preparing the GP Application, including reading and interpreting the legislation relevant to his application;

(e) at the time of his dismissal he made a conscious decision to take an extended break to manage his psychological health.

[13] Turning first to whether the GP Application was lodged out of time, it is uncontested that the application was received by the Melbourne Registry at 1.59 am AEST on 5 May 2022 (Document 1). Mr Hatch then forwarded the GP Application to the Perth Registry at 12.12 am AWST on 5 May 2022 (Document 2). The GP Application was not provided in a readable form until 10.47 am AEST on 5 May 2022 (Document 3). The 21-day period expired at 11.59 pm AEST on 4 May 2022.

[14] Rule 13(2)(c) of the Rules provides that a document may be lodged with the Commission by emailing the document in accordance with Rule 14. Rule 14(1) provides that documents may be lodged by emailing the document to an email address approved by the General Manager for the lodgement of documents by email. As set out above, the footnote to Rule 14(1) provides "*The email addresses approved for lodgement of documents are available at http://www.fwc.gov.au."* Rule 14(4) provides that if the document lodged pursuant to Rule 14 is a document commencing the matter, the General Manager must send an acknowledgement of lodgement, an application is not taken to have been lodged until the acknowledgement of lodgement has been sent and once the acknowledgement has been sent the application is taken to have been lodged at the time it was received electronically by the Commission.

[15] The Commission did not provide an acknowledgment of lodgement in relation to either Document 1 or Document 2. Accordingly, those documents are not taken to have been lodged pursuant to Rule 14. Further, both were lodged outside the 21-day statutory time frame in their respective time zones. The Commission provided an acknowledgement of lodgement in respect of Document 3, upon receipt of the GP Application in readable form. Accordingly, it is the time at which Document 3 was received that is the time at which the GP Application is taken to have been lodged. The GP Application was therefore lodged one day out of time."[5] (footnotes omitted)

[9] The Deputy President then considered the evidence as was relevant to the considerations in s.366(2)(a)-(f) of the FW Act and determined, having taken into account those factors, that she was not satisfied that exceptional circumstances exist in respect to Mr Hatch's application. On that basis the Deputy President declined to grant an extension of time and dismissed the application.

Principles of Appeal

[10] 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.[6] There is no right to appeal. An appeal may only be made with the permission of the Commission.

[11] Subsection 604(2) 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.[7] The public interest is not satisfied simply by the identification of error,[8] or a preference for a different result.[9] In *GlaxoSmithKline Australia Pty Ltd v Makin* 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 issue 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..."[10]

[12] 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.[11] However, that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.

[13] An application for permission to appeal is not a de facto or preliminary hearing of the appeal. In determining whether permission to appeal should be granted, it is unnecessary and inappropriate for the Full Bench to conduct a detailed examination of the grounds of appeal.[12] However, it is necessary to engage with the appeal grounds to consider whether they raise an arguable case of appealable error.

The Parties' Contentions

[14] The Appellant filed written submissions. It is unnecessary to set them out but, simply stated, he contends that as his application was sent by email before midnight (in Perth) on 4 May 2022 AWST, it was made within time. As we understand his submissions, he relies in part on s.37 of the AIA in aid of his submission.[13] We discuss this provision further below.

[15] The Respondent filed submissions on 12 and 22 December 2022. The submissions dated 22 December 2022 contain a concise summary of the Respondent's contentions regarding the AIA as follows:

"The Respondent's position remains that the Original Application was not lodged within time. While the Respondent continues to rely upon the matters set out in its Outline, in reply to the Appellant's submissions, the Respondent further submits that:

> (a) section 37 of the Acts Interpretation Act 1901 (Cth) (AIA) is not relevant to the determination of whether the Original Application was filed within the time limit prescribed in section 366 of the Act; and
>
> (b) it is unclear what program the Appellant alleges was able to open the Original Application documents attached to the First Email and Second Email sent to the Commission. In any event, the unchallenged evidence before the Commission is (and was at first instance) that the Commission's officer was unable to open the documents, and therefore the Original Application was not received by the Commission at the time of the First Email (or Second Email)."

[16] In relation to the relevance of s.37 of the AIA, the Respondent further states:[14]

"4. For the reasons expanded upon below, section 37 of the AIA is not relevant. It does not resolve the issue of which State or part of the Commonwealth is taken to be the relevant jurisdiction for the lodgement of an application to be considered in time and it does not have any direct application to rule 14(4)(c) of the Rules, or section 366 of the Act.

…

7. Section 37 of the AIA was amended by the *Acts Interpretation Amendment Act 2011* (Cth) which removed the reference to 'standard time' so that only the reference to 'legal time' remains. The explanatory memorandum provided that the amendment was made due to the way 'standard time' was at that time being interpreted; which may be confused with 'summer time' or 'daylight saving time'. This merely confirmed the previous operation of the section, to deal only with expressions of time, as the reference to 'standard time' was causing confusion. The provision merely suggests the legislature contemplated it might be necessary to calculate the precise moment of time with a degree of specificity greater than involved in nominating a day.

8. Section 366 of the Act states '*an application under section 364 must be made: within 21 days after the dismissal took effect*'. There is only a reference to the number of "days" in which an application must be made, not a reference to an expression of a particular "time" by which an application must be lodged.

9. The Respondent maintains its submission that the proper approach to determining when an application is "made" requires focus on when the application is <u>received</u> by the Commission. That is, "*the word 'made' suggests in ordinary language in the context of an application to a Court, a request actually <u>made and received in whatever form permitted by the Court</u>*" ([original] emphasis added).

10. Therefore, for the purposes of the Act and the Rules, where the application is purported to be made by email, as is this case here, this determination is guided by the ETA." (footnotes omitted, original emphasis)

[17] The reference to the "ETA" is to the *Electronic Transactions Act 1999* (Cth). The Respondent relies on the ETA in distinct respects.

[18] Firstly, the ETA is said to be engaged because s.14A(1) of the ETA provides that, unless otherwise agreed, the time of receipt of a communication is the time when it becomes "capable of being retrieved" by the addressee at a designated electronic address. In this respect, the Applicant's 'Form F2' was unable to be read or opened by the Commission registry and that Appellant subsequently resent that file in a different format. There is no dispute that the subsequent email containing a readable format of his original application was out of time.

[19] Secondly, the ETA is also said to be engaged because s.14B of the ETA provides that, unless otherwise agreed, an electronic communication is taken to be received "at the place where the addressee has its place of business". Allied to that provision is the fact that the Commission's website stipulated the email address for receipt as being melbourne@fwc.gov.au and that completed forms were to be emailed "by no later than 11:59pm Melbourne time on the 21st day after your dismissal took effect." The Respondent contends that a particular consequence that flows from this provision is that the Appellant's application was required to have been received, in Melbourne, before 11.59pm Melbourne time.

Consideration

[20] We note at the outset that there is a distinction between when an application is "made" for the purposes of s.366 of the FW Act and when it is "lodged" for the purpose of the *Fair Work Rules 2013* (**Rules**). While there is overlap between the two concepts, they are not always the same.

Was the application "made"?

[21] The Respondent submits and we agree that the proper approach to determining when an application is "made" requires a focus on when the application is received by the Commission.

[22] The Applicant sent his application (the first document) by email and it was received at the Melbourne registry at 1:59am AEST on the 5th of May and 11:59pm AWST on the 4th of May.[15] The Deputy President determined that the fact that the email was received at that time was uncontested.[16]

[23] The application attached to the above email was unable to be opened by Fair Work Commission staff when they attempted to do so during business hours in Melbourne on the morning of the 5th of May.

[24] At 9.20 am AEST on the 5th of May 2022, the Commission wrote to Mr. Hatch advising him an email had been received from him on 5th of May but that the email and attachments could not be accessed because of the format of the files, or security restrictions imposed by the Applicant, or security restrictions of the Commission for some file sharing websites. The Applicant was requested to send the documents again without security restrictions as either a PDF, Word, RTF, JPEG, or TIF document. The Applicant replied at 10.47 am AEST that day indicating he was not sure what the issue was and speculated it may be because he was using a

newer version of Word. The Applicant attached a PDF document in readable form, which the Commission provided an acknowledgement of lodgement upon receipt.

[25] The starting point (and, we consider for this matter, the end point) is s.366 of the FW Act. Section 366 of the FW Act is in the following terms:

> "**Time for application**
>
> (1) An application under section 365 must be made:
>
> (a) within 21 days after the dismissal took effect; or
>
> (b) within such further period as the FWC allows under subsection (2)."

[26] There are no definitions in the Act as to what it means for an application to be "made" within the time period specified in s.366(1)(a).

[27] We consider the AIA is relevant to the consideration. The AIA applies to all Acts and consequently applies to the FW Act.[17]

[28] There are three propositions relevant to this matter that are established by the case law and the AIA, which are applicable to the construction of s.366 of the FW Act. They are:

- First, the expression "within" a period of days means the full period up until midnight at the end of the specified period of days, excluding the day of the event in question.
- Second, a "day" constitutes a calendar day comprised of twenty-four hours.
- Third, where (as here) time is to run from a particular event, "local" time for that event is the applicable time.

[29] While we do not understand the first of the above propositions to be controversial, that proposition is supported by the AIA and authority. For the AIA, s.36(1) is as follows:

> "(1) Where in an Act any period of time, dating from a given day, act, or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event."

[30] In *Susiatin v Minister for Immigration and Multicultural Affairs* (1998) 83 FCR 574, Beaumont J considered a provision in the *Migration Act 1958* (Cth) which stated that certain applications for the purposes of the migration statute "must be lodged with a Registry of the Federal Court within 28 days of the applicant being notified of the decision".

[31] After reviewing the authorities, his Honour stated that the word "within" in the context before him "s*hould be read as indicating the limits of a period before the end of which the relevant act must be done and that for this purpose, the day of the act in question is to be excluded*."[18] His Honour further consider the same result was contemplated by s.36(1) of the AIA.[19] We consider no different result applies for s.366(1)(a) of the FW Act.

[32] For the second proposition, being that a "day" constitutes a twenty-four-hour period, Windeyer J stated in *Prowse v McIntyre* (1963) 111 CLR 264 at 278, "[a] day for legal purposes

is the mean solar day, a period of twenty-four hours."[20] Again, we consider no different result applies for s.366(1)(a) of the FW Act

[33] For the third proposition, namely the application of "local" time, s.37 of the AIA is as follows:

> "**Expressions of time**
>
> Where in an Act any reference to time occurs, such time shall, unless it is otherwise specifically stated, be deemed in each State or part of the Commonwealth to mean the legal time in that State or part of the Commonwealth.

[34] In *Loucas G Matsas Salvage & Towage Maritime Co v Fund in Respect of Proceeds of Sale of Ship "Ionian Mariner"* (1997) 79 FCR 351 (*Ionian Mariner*), Justice Ryan was considering a claim under s.396(1) of the *Navigation Act 1912* (Cth). Section 396(1) required a claim to be brought within 2 years of "the date when the damage or loss or injury was caused or the salvage services were rendered". The salvage in question occurred off the coast of Chile in in the mid-afternoon of 23 October 1994 (local Chilean time), which was equivalent to the early morning of 24 October 1994 (Eastern Standard Time in Australia).

[35] After a consideration of various authorities, his Honour concluded as follows:

> "In my view, the authorities canvassed above to which I was referred by Mr Williams do not support the proposition that the time and day at which an event occurs for the purpose of s 396(1) of the *Navigation Act* is the time and day at which the event would have occurred had it taken place in the forum. Consistently with the view expressed by Lord Goddard CJ in *R v Logan*, I regard the expression in s 396(I) "the date when ... the salvage services were rendered" as referring to the date at the place where the services were rendered, that is, in this case, 23 October 1994. Accordingly, the limitation period required proceedings to be commenced within two years from that date, that is to say by midnight on 23 October 1996; …"

[36] We consider no different result applies for s.366(1)(a) of the FW Act.

[37] Returning to the terms of s.366(1)(a) of the FW Act, it requires an application to be made within 21 days "after the dismissal took effect". There are two temporal events in s.366(1)(a).

[38] Chronologically, the first event is when the dismissal "took effect". Consistently with Justice Ryan's conclusion that the date where salvage services were rendered was the date "at the place" those services were rendered (i.e. in Chile), we consider that the time period beginning "after" the dismissal "took effect" refers to the local time where the dismissal took place – in this case, Western Australia. We consider that s.37 of the AIA provides for the same conclusion.[21]

[39] The second chronological event required by s.366(1)(a) of the FW Act is that an application be "made" within the required 21-day period. Consistently again with Justice Ryan, we consider that the 21-day period runs from the same local time where the dismissal took effect. We consider it would be contrary to the intention of the statute if the local time for

making an application under s.366(1)(a) was different to the local time commencing where the dismissal took effect.

[40] Taking the above propositions together, we consider that for a dismissal that took effect in Western Australia:

- The point in time from which an application under s.366(1)(a) must be made is within 21 days after the dismissal took effect, commencing in local (AWST) time;
- The day of the dismissal is excluded from the 21-day period;
- A "day" for each of the 21 days is a full 24-hour period;
- The 21-day period extends to midnight on the 21st day, which is necessarily midnight in the local time where the dismissal took effect.

[41] The Applicant who resides and worked for the Respondent in Western Australia, emailed his application and it was received by the Fair Work Commission one minute to midnight in the State of Western Australia. Applying the provisions of the AIA and the applicable authorities, the time that the application was received by the Fair Work Commission was at the legal time of 11.59 pm in the state of Western Australia and therefore the application was made in time.

Section 585 of the FW Act

[42] The Respondent submits that s.37 of the AIA is not relevant to the determination of whether the original Application was filed within the time limit prescribed in s.366 of the FW Act. The Respondent submits that s.37 of the AIA only applies where any reference to time in an Act occurs "unless it is otherwise specifically stated".[22]

[43] The Respondent submits that s.585 of the FW Act state provides for Applications to be made in accordance with the rules of the Commission and thereby the relevant time is as "otherwise specifically stated" and therefore s. 37 of the AIA does not apply.

[44] Section 585 of the FW Act reads as follows:

> "**585. Applications in accordance with procedural rules**
> An application to the FWC must be in accordance with the procedural rules (if any) relating to applications of that kind."

[45] The Fair Work Commission has made rules, pursuant to s.585 of the FW Act, which regulate the way in which Applications to the Commission must be made. Relevant to the consideration here are Rules 13 and 14. Those rules provide as follows:

> "Subrule 13(2) provides that documents can be lodged with the Commission by physical delivery to an office of the Commission between 9am and 5pm on a business day, by post, by email in accordance with Rule 14, by using the Commission's electronic lodgment facilities in accordance with rule 15 or by fax in accordance with Rule 16.
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> Rule 14 sets out general requirements for lodging documents by email.

> Subrule 14(1) provides that a document that is required or permitted to be lodged under the Rules may be lodged by emailing the document to an email address approved by the General Manager for the lodgment of documents by email. A legislative note provides that the email addresses that have been approved for lodgment of documents by email are available on the Commission's website.
>
> Subrule 14(2) provides that, if a matter has been allocated to a Commission Member, a document lodged by email in relation to the matter must be sent to the email address of the Commission Member's chambers. A legislative note provides that the approved email addresses for Commission Members' chambers are available on the Commission's website.
> Subrule 14(3) provides the format and covering documentation necessary for statutory declarations and any other documents lodged by email. A legislative note specifies that a statutory declaration must be signed and witnessed.
>
> Subrule 14(4) concerns the time at which an application that is lodged by email is taken, under the Rules, to have been lodged with the Commission. It provides that, if a document lodged in accordance with Rule 14 is an application commencing a matter, the General Manager must, by email, acknowledge receipt of the application. The application is not taken to have been lodged until the acknowledgment of lodgment has been sent. Once the acknowledgment of lodgment has been sent, however, the application is taken to have been lodged at the time it was received electronically by the Commission."[23]

[46] The Respondent submits that the email address approved by the General Manager for the purposes of Rule 14(1) is the Melbourne email address, and that the application was not lodged in accordance with this rule because it was not lodged "by no later than 11:59pm Melbourne Time on the 21st day after the dismissal took effect" Therefore s.37 of the AIA has no application because by virtue of the operation of s.585 of the FW Act, including by reference to the rules, it is otherwise specifically stated.

[47] We do not accept this is a correct construction of these provisions. Section 585 of the FW Act does not specifically state that the time period as contemplated in s.366 of the FW Act is to be applied in a particular way. Nor do we consider that the rules made by the Fair Work Commission can be said to displace or alter in any way the statutory time limit in s.366 of the FW Act, which we described above. In any event, the rules can be waived, including after the time for compliance has passed, which suggest they are not intended to govern when an application was made. We therefore consider that s.37 of the AIA is relevant and applies to the interpretation of s.366 of the FW Act.

[48] Put another way, an application might suffer a range of (potentially fatal) defects and could still 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.

[49] By way of further illustration, a typical event following an application is the acknowledgement email contemplated by Rule 14(4). That subrule provides than an application is "not taken to have been lodged" until an acknowledgement email is provided to the applicant by the Commission. We consider this subrule illustrates the difference between the statutory time limit for an application to be "made" and procedural rules regarding "lodgement". It would be a curious result if a delay by the Commission in sending an acknowledgement email had the effect of taking an application outside of the statutory time for making the application. We do not consider the statute operates in such a way.

[50] One issue of significance was the fact that the Appellant's initial email at 11.59pm AWST attached a document that the FWC Registry was unable to read. On the material before us, we consider that was an issue of "lodgement" and did not affect whether the application had been "made". It is also unclear to us exactly what the reason was for the Registry being unable to view the initial attachment. As noted above, the email sent on 5 May 2022 from the Registry stated that the attachment could not be opened because of the format of the files, or security restrictions imposed by the Applicant, or security restrictions of the Commission for some file sharing websites. We note that correspondence does not indicate what the actual reason was that the files contained with the Appellant's first email could not be read. We also note the Appellant has stated (and we have no reason to doubt) that his initial email did contain a "Word" format document, which is consistent with the correspondence from Registry regarding its preferred file formats. In the event that it was not, compliance with rule 14 is waived.

[51] Nonetheless, the Applicant resent the attachment in PDF format.[24] There is no suggestion that what he resent in PDF form was any different in content to his initial document, such that it was a different application. We do not consider that these events allow a conclusion that the application was not "made" at 11.59 AWST.

Electronic Transactions Act

[52] When an application is made by email, as in the case here, the ETA is relevant.

[53] The ETA provides as follows:

> "**ELECTRONIC TRANSACTIONS ACT 1999 - SECT 14A**
> **Time of receipt**
>
> (1) For the purposes of a law of the Commonwealth, unless otherwise agreed between the originator and the addressee of an electronic communication:
>
> (a) the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee; or
>
> (b) the time of receipt of the electronic communication at another electronic address of the addressee is the time when both:
>
> (i) the electronic communication has become capable of being retrieved by the addressee at that address; and
>
> (ii) the addressee has become aware that the electronic communication has been sent to that address.

> (2) For the purposes of subsection (1), unless otherwise agreed between the originator and the addressee of the electronic communication, it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address.
> (3) Subsection (1) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been received under section 14B."[25]

[54] Having regard to s.14(A)(2) of the ETA, we understand this to mean that it is to be assumed that the electronic communication is capable of being retrieved once received. This does not apply if there is agreement between the originator and the addressee to the contrary. However, there is no such agreement in evidence in this matter.

[55] Applying these provisions, as the application was received at 11:59pm AWST, it is to be assumed that it was capable of being opened. The facts are in this matter that the Fair Work Commission officer was unable to access the document. The Applicant submits that the application was made in the required format and the Fair Work Commission should have been able to open the document.

[56] We do not think it the intent of the legislature that the Fair Work Commission embarks on an enquiry as to the technical reasons that the file could not be opened. Short of adducing potentially complex evidence to explain why (and whose 'fault' it might be) that a file could not be opened, in many cases the evidence will go no further than one party asserting that an electronic file was in good order and the other saying they could not open it and therefore the opposite must be true. The answer to those practical problems are provided for in s.14(A)(2) of the ETA, which establishes that an assumption is to be made that it could be capable of being retrieved. The fact that it could not be opened does not mean that the application was not made with the 21-day time period, where the presumption is engaged.

[57] The Respondent drew our attention to *Flahive v Comcare (Compensation)* [2020] AATA 3044 (*Flahive*). In *Flahive,* Deputy President Boyle of the Administrative Appeal Tribunal carefully considered the operation of s.14A in the context of an application, which was out of time, to review a decision – described as a the "reconsideration decision" – by a delegate of Comcare made in relation to an injury claim. The reconsideration decision was sent by email from the delegate to Mr Flahive, whose evidence was that he was unable to open it.

[58] The circumstances of *Flahive* were somewhat different to those before the Commission, in that the communication in question was an email sent from the delegate (at which point, the time for making a review application commenced upon the receipt of that communication) as opposed to the making of an application at the very end of a limitation period. The reconsideration decision was sent by email on 23 September 2019. Under the statutory provisions in question, any review application should have been commenced within 60 days.

[59] The AAT was satisfied that the presumption in s.14A(2) had been displaced, effectively from at least from 23 September 2019 when the reconsideration decision was issued, on the basis of complaints made by Mr Flahive about corrupted files. While the timing of Mr Flahive's

complaints is not entirely clear, we note that evidence given by Mr Flahive that was accepted included an email he sent on 20 November 2019 stating: "*Once again* your attached document cannot be opened & is corrupted" (our emphasis). It appears from the reasons that followed in *Flahive* that the AAT considered that complaints about corrupted files had been made *prior* - i.e., "once again" – to the reconsideration decision being sent on 23 September 2019 and was not merely a reference to later correspondence between the parties.

[60] In the appeal before us, there is no conduct or event prior to the Appellant's email being sent on 11.59pm AWST that would displace the presumption in s.14A(2) of the ETA concerning the attachment to that email. We do not consider that s.14A(1) operates to conclude that the email and attachment not "capable of being retrieved" – and therefore received – at the same time it was sent.

[61] The Respondent further relied upon s.14B of the ETA, which relevantly states:

> "**ELECTRONIC TRANSACTIONS ACT 1999 - SECT 14B**
> **Place of dispatch and place of receipt**
> (1) For the purposes of a law of the Commonwealth, unless otherwise agreed between the originator and the addressee of an electronic communication:
> (a) the electronic communication is taken to have been dispatched at the place where the originator has its place of business; and
> (b) the electronic communication is taken to have been received at the place where the addressee has its place of business.
> (2) For the purposes of the application of subsection (1) to an electronic communication:
> (a) a party's place of business is assumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location; and
> (b) if a party has not indicated a place of business and has only one place of business, it is to be assumed that that place is the party's place of business; and
> (c) if a party has not indicated a place of business and has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the transaction; and
> (d) if a party has not indicated a place of business and has more than one place of business, but paragraph (c) does not apply—it is to be assumed that the party's principal place of business is the party's only place of business; and…"[26]

[62] Section 14A(1) of the ETA relevantly provides that:

> "For the purposes of a law of the Commonwealth, unless otherwise agreed between the originator and the addressee of an electronic communication:

> (a) the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee… (emphasis added)."[27]

[63] Section 14B of the ETA is relevant in determining the place of receipt of an electronic communication. In particular, section 14(B)(1)(b) provides that an electronic communication is taken to have been received "at the place where the addressee has its place of business".[28]

[64] Section 14B(2) provides for the method by which a party's "place is business" is to be determined. First, a party's place of business is "assumed to be the location indicated by that party" (emphasis added), unless another party demonstrates that the party making the indication does not have a place of business at that location.[29]

[65] Having regard to these provisions, the Respondent submits that the Commission's website makes it clear that general protections applications must be sent to the Melbourne registry by email. The Respondent submits that the publishing of the Commission's email address "melbourne@fwc.gov.au" (being the only email address approved for the purposes of the Rules) on its website provided prospective applicants with a clear indication that the location of the Commission's place of business for the purposes of making general protections applications was the Commission's Melbourne registry. Therefore, there is no scope for the Commission to consider which of the Commission's registries had the "closest relationship" to the underlying transaction."[30]

[66] Although arguably it is not necessary for us to decide, we do not consider that the Commission has clearly indicated that Melbourne is its place of business. The Commission has offices in each state and territory, and lists the contact details of each office on its website, including email addresses. These email addresses are all approved email addresses for the purpose of rule 14(1) of the Rules. Although the Commission's website in one location does ask applicants to email their completed general protections involving dismissal application form to melbourne@fwc.gov.au, the website and the form itself also advise applicants that they can lodge their application in a number of ways, including by email, and provides contact details for all Commission offices.

[67] Section 14(2)(c) of the ETA provides that if a party has not indicated a place of business and has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the transaction. In our view, the Commission's place of business that has the closest relationship to the underlying transaction is the Commission's Perth office, being the office in the state where the dismissal took effect.

[68] However, these provisions do not affect the primary position that s.366 of the FW Act as affected by s.37 of the AIA which provides that applications are to be made within 21 days of the dismissal taking effect. The application needed to be made by 11.59 pm at the legal time in the state the application was made. While the Respondent is correct in stating that the application was received at 1.59am AEST, that does not alter the reality that it was also received

at 11:59pm Perth time on 4th May 2021 and therefore was made within 21 days of the dismissal taking effect.

[69] Therefore, the application was received in time, and there was no need to consider whether to grant an Extension of Time. The Deputy President's finding that the application was one day out of time was in error.

[70] The applicant's application for an Appeal was lodged out of time by one day. Having regard to the error identified, we consider it is in the public interest to grant an extension of time to lodge the appeal.

Public Interest

[71] Having regard to the above, we are satisfied that the appeal enlivens the public interest. The public interest has been enlivened for the purpose of s.400(1) because the Decision that the application was made out of time was one made in error. Appellate intervention is therefore both warranted and necessary to correct the error and allow the matter to proceed, at first instance, to conciliation in the Fair Work Commission consistent with Section 368 of the FW Act.

Orders

[72] For the above reasons, we order as follows:

1. Permission to appeal is granted.

2. The appeal is upheld.

3. The decision of Deputy President Young of 26 September 2022 is quashed.

4. The matter is remitted to the General Protections Team for allocation to a conciliator.

VICE PRESIDENT

Appearances:

Mr M Hatch, on his own behalf.
Mr G Giorgi, for the Respondent.

Hearing details:

2022.
Melbourne.
December 5.

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[1] [2022] FWC 2572 (the Decision).

[2] Ibid at [35] and [36].

[3] Ibid at [4], [5] and [6].

[4] Ibid at [15].

[5] Ibid at [11], [12], [13], [14] and [15].

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

[7] *O'Sullivan v Farrer* (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 at [44] – [46].

[8] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, 197 IR 266 at [24]-[27].

[9] Ibid at [26]-[27], *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/ Warkworth* [2010] FWAFB 10089 at [28], affirmed on judicial review; *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 178; *NSW Bar Association v Brett McAuliffe*; *Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, 241 IR 177 at [28].

[10] [2010] FWAFB 5343, 197 IR 266 at [24] – [27].

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

[12] *Trustee for The MTGI Trust v Johnston* [2016] FCAFC 140 at [82].

[13] The Appellant appeared to rely on the AIA as currently in force. As the Respondent correctly observes, by s.40A of the FW Act, the AIA, as in force on 25 June 2009, applies to the FW Act and amendments to the AIA made after that date do not apply to the FW Act. For avoidance of doubt, all references to the AIA that follow are to that act in force on 25 June 2009.

[14] Respondent's Outline of Submissions in Reply dated 22 December 2022.

[15] Decision at [13].

[16] Ibid.

[17] *Acts Interpretation Act 1901* (AIA) at section 2. While s.2 of the AIA states it applies "[e]xcept so far as the contrary intention appears", we do not consider there is any contrary intention for the matters considered in this decision.

[18] (1998) 83 FCR 574 at 580 (emphasis added).

[19] More recently, see *Sopikiotis v Owners Corporation RP017740* [2013] FCA 353 (Kenny J) at [29] – [30].

[20] More recently, see *Antegra Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 107 (Payne JA) at [122].

[21] We note that s.37 of the AIA was not referred to in *Ionian Mariner*, presumably for the reason that it relates to a time event in a relevant "State of part of the Commonwealth", which evidently excludes Chile.

[22] *Fair Work Act 2009* at section 366.

[23] *Fair Work Commission Rules 2013* at rule [13(2)], [14(1)], [14(2)], [14(3)] and [14(4)].

[24] Decision at [6].

[25] *Electronic Transactions Act 1999* at section 14A.

[26] Ibid at section 14B.

[27] Respondent's Outline of Submissions at [42].

[28] Ibid at [43].

[29] Ibid at [44]

[30] Ibid at [46].