

The attached document replaces the document previously issued with the above code on 12 January 2024.

Paragraph [73]

In the first sentence “peruse” should read “pursue”

Liam Butterworth
Associate to Deputy President Anderson

Dated 17 January 2024



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Mr Jake Hernen

v

Adelaide Integrated Precast Pty Ltd

(U2023/11598)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 12 JANUARY 2024

Application for an unfair dismissal remedy – extension of time – representative error – paid agent – whether exceptional circumstances – discretionary considerations – extension granted

[1] On 22 November 2023 Jake Hernen (Mr Hernen or the applicant) lodged an unfair dismissal application under s 394 of the *Fair Work Act 2009* (the FW Act) concerning termination of his employment by Adelaide Integrated Precast Pty Ltd (Adelaide Integrated Precast, the employer or the respondent).

[2] Depending on the date termination took effect (considered below), the application was lodged either five or six days beyond the twenty-one day statutory time limit. Mr Hernen says late lodgement was the result of representative error and seeks an extension of time.

[3] Adelaide Integrated Precast oppose the extension.

[4] This decision deals with whether an extension should be granted.

[5] I issued directions on 18 December 2023.

[6] I conducted a hearing by video on 11 January 2024.

[7] Permission was granted for Mr Hernen to be represented on the extension of time issue.

[8] Both parties filed materials.¹ Evidence was received from Mr Hernen and Mr Stephen Gaffney of Unfair Dismissal Experts Pty Ltd (UDE). The employer made submissions but did not lead evidence.

Facts

[9] I make the following findings.

[10] Adelaide Integrated Precast manufactures and supplies precast concrete to the construction industry. It operates from suburban Adelaide.

[11] Mr Hernen was employed in April 2016. He was summarily dismissed on the ground of serious misconduct on 27 October 2023 by letter dated 26 October 2023. His dismissal took immediate effect.

[12] Shortly after being dismissed, Mr Hernen took professional advice. A solicitor who was acting on his behalf in a Work Cover claim advised Mr Hernen that their firm did not deal with unfair dismissal matters, and suggested he speak to UDE.

[13] On 2 November 2023 (one week after dismissal) Mr Hernen contacted UDE and, by telephone, spoke to Mr Gaffney. Mr Gaffney informed Mr Hernen of the right to make an unfair dismissal application. He also informed Mr Hernen that such applications needed to be made within twenty-one days of a dismissal taking effect. Mr Gaffney informed Mr Hernen that he had a legitimate case of unfair dismissal and that the firm would take the case on. Based upon Mr Hernen's then instructions, Mr Gaffney believed that the dismissal had taken effect on 26 October 2023.

[14] Mr Hernen then and there decided to engage UDE. On UDE's advice during the telephone discussion on 2 November 2023, Mr Hernen agreed to UDE filing an unfair dismissal claim in the Commission. In that conversation, Mr Gaffney informed Mr Hernen that, once he completed relevant client engagement paperwork, the application would be lodged and no further action would be required of Mr Hernen until he was next contacted by UDE or the Commission. Mr Gaffney's evidence was that this is standard advice provided by UDE to clients and is designed to reduce pressure on them.

[15] Prior to acting for a dismissed person, UDE require a client to provide a written authority to act and to agree to the firm's terms of engagement. On 2 November 2023 UDE sent these forms to Mr Hernen. UDE's practice is also to open an on-line "data room" for new clients into which clients can lodge information about their dismissal to assist either the preparation of an application or subsequent proceedings. It appears, from the evidence, that due to error by UDE, Mr Hernen was not at that time (2 November) sent information about the on-line data room or requests to populate it.

[16] That notwithstanding, Mr Gaffney's evidence was that based on the information Mr Hernen conveyed on 2 November 2023, UDE had sufficient information before it to lodge an unfair dismissal claim once Mr Hernen had completed the authority to act and signed the terms of engagement.

[17] On 6 November 2023 Mr Hernen signed the authority to engage UDE's services and agreed to the engagement terms, and returned them electronically to UDE.

[18] Upon engaging a dismissed client, UDE's practice is to immediately enter the date of dismissal into its data base. Doing so triggers an internal prompt at a later date to an officer of the firm (such as Mr Gaffney) to prepare an unfair dismissal application so that it can be filed within time.

[19] During the telephone call with Mr Gaffney on 2 November 2023 Mr Gaffney entered the date of dismissal into the firm's data base. I make this finding based on Mr Gaffney's oral

evidence despite his witness statement saying that the entry was made by “our administrative staff”. Mr Gaffney entered the wrong month into the data base; he entered a November date instead of an October date. I find that Mr Gaffney entered “26/11/23” instead of “26/10/23”. I make this finding despite Mr Gaffney’s evidence in his written statement being that he entered “27/11/23” instead of “27/10/23”. Based on Mr Gaffney’s oral evidence he could not have entered 27 October because, at the time he made the error, he had only been told by Mr Hernen that the dismissal date was 26 October. Mr Gaffney’s oral evidence was that it was not until much later (once the application had been filed) that he formed the view that the dismissal took effect the day later, 27 October.

[20] The erroneous data entry (November rather than October) went undetected until 22 November 2023.

[21] Mr Hernen did not contact UDE between returning the signed the authority to act on 6 November 2023 and the late filing of his application on 22 November 2023. He was waiting for contact from UDE or the Commission, as he had been advised to do by Mr Gaffney on 2 November 2023.

[22] On 22 November 2023, after receiving an automatically generated prompt from UDE’s internal system, Mr Gaffney started preparing Mr Hernen’s unfair dismissal application. Only then Mr Gaffney realised that he had incorrectly entered the month of termination into the UDE system. He immediately realised that this error meant that Mr Hernen’s application was already out of time.

[23] Although the evidence of Mr Hernen and Mr Gaffney as to what next happened is somewhat unclear, it appears that each agree that Mr Gaffney telephoned Mr Hernen at some time on 22 November 2023. It is not clear whether Mr Gaffney did so before or after lodgement. It is not clear whether Mr Gaffney informed Mr Hernen that the deadline for filing his application had passed and that filing his application was or would be late, or whether he simply told Mr Hernen that his application had in fact been filed. What is not in dispute however is that Mr Gaffney did not, at that time, tell Mr Hernen that there had been an error on the part of UDE. I also accept the evidence of both that Mr Gaffney told Mr Hernen that he (Mr Hernen) had not placed information into the on-line data room and asked Mr Hernen to do so including the termination letter. Mr Hernen subsequently did so. Under questioning during the hearing, Mr Hernen’s evidence was that he felt, by inference, that he was being blamed though he readily accepted that this was not stated by Mr Gaffney.

[24] Mr Gaffney populated the F2 application form. At 4.48pm on 22 November 2023 Mr Gaffney electronically lodged Mr Hernen’s unfair dismissal application. The application as lodged stated that the dismissal took effect on 26 October 2023. The application as lodged stated that it was lodged out of time “due to an error made by the Applicant’s representative”.

[25] UDE did not send Mr Hernen a copy of the application filed on his behalf. Mr Gaffney’s evidence was that it is not standard practice for UDE to do so unless their client requests a copy.

[26] UDE did not on 22 November 2023 or in the days immediately following tell Mr Hernen of the error which had caused the late filing. Mr Gaffney’s evidence was that, having earlier told Mr Hernen to do nothing and await contact, he did not want to further trouble Mr Hernen.

Mr Gaffney's evidence was that he hoped the late application would be accepted by the Commission such that it need not be an issue of concern to their client:²

“...now we didn't tell him it was lodged on that date, we just simply told him that his form had been lodged, all he knew it could have been lodged any time...I didn't want to alert the client to any issues at that stage because I was, I guess, hoping that it may be just determined on the papers and that it would be accepted, the application, so I didn't want to alert them unnecessarily to any issue in case there wasn't an issue. I didn't know whether the case would be accepted because I detailed in the lodgement of what happened and I was hoping there was a chance that the Commission would accept it based on that. We informed the client that it had been lodged, we didn't tell him when it had been lodged...”

[27] On 11 December 2023 I listed the application for directions.

[28] On 15 December 2023 (2.38pm) Mr Gaffney filed an amended F2 application on behalf of Mr Hernen which provided further particulars. The date dismissal took effect in the amended F2 remained stated as 26 October 2023.

[29] On 15 December 2023 (2.43pm) Adelaide Integrated Precast filed an employer response and later that afternoon (4.07pm) an amended response. The response and the amended response objected to a late application.

[30] Mr Hernen was only informed that the late filing of his application was on account of representative error at around the time the employer filed its response and once directions had been listed before me.

[31] On 18 December 2023 I conducted a directions hearing.

Submissions

Mr Hernen

[32] Mr Hernen contends that an extension of time should be granted because the delay was attributable to representative error.

[33] Mr Hernen submits that he gave prompt instructions to UDE well inside the 21-day period for the lodgement of an unfair dismissal claim.

[34] Mr Hernen submits that it was reasonable to rely on his representative to file the application within time. Mr Hernen submits that it was reasonable to wait until he was contacted by his representative and not follow them up inside the time period because UDE told him to do nothing until next contacted. Mr Hernen submits that he did not know of the reason for the delay until well after lodgement.

[35] Mr Hernen submits that it would be unfair to prevent his application being heard on account of an error by his representative.

[36] Mr Hernen also submits that it would be unfair to prevent his application being heard in circumstances where he considers it strong on the merits.

Adelaide Integrated Precast

[37] Adelaide Integrated Precast submit that exceptional circumstances do not exist.

[38] Adelaide Integrated Precast submit that Mr Hernen knew that his application needed to be filed within twenty-one days yet remained passive after 6 November 2023 including in the delay period. Adelaide Integrated Precast submit that Mr Hernen could have calculated that his application needed to be filed by at least no later than 17 November 2023 and could have, but failed to follow-up with UDE, prior to or after that date.

[39] Adelaide Integrated Precast submit that the application is weak on merit given admitted conduct by Mr Hernen on which the dismissal was based.

Consideration

[40] Section 394 of the FW Act provides as follows:

“394 Application for unfair dismissal remedy

...

(2) The application must be made:

- (a) within 21 days after the dismissal took effect; or
- (b) within such further period as the FWC allows under subsection (3).

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

- (a) the reason for the delay; and
- (b) whether the person first became aware of the dismissal after it had taken effect; and
- (c) any action taken by the person to dispute the dismissal; and
- (d) prejudice to the employer (including prejudice caused by the delay); and
- (e) the merits of the application; and
- (f) fairness as between the person and other persons in a similar position.”

[41] The application can only proceed if Mr Hernen can establish that “exceptional circumstances” exist within the meaning of s 394(3).

[42] An applicant for an extension of time has an onus to adduce evidence in support of matters which that applicant asserts constitute exceptional circumstances.³

[43] The test of “exceptional circumstances” establishes a “high hurdle”.⁴ A decision whether to extend time under s 394(3) involves the exercise of a discretion.⁵

[44] I apply s 394(3) in the context of the Full Bench decision in *Nulty v Blue Star Group Pty Ltd*:⁶

“[13] In summary, the expression “exceptional circumstances” has its ordinary meaning and requires consideration of all the circumstances. To be exceptional, circumstances must be out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare. Circumstances will not be exceptional if they are regularly, or routinely, or normally encountered. Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional. It is not correct to construe “exceptional circumstances” as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural “circumstances” as if it were only a singular occurrence, even though it can be a one off situation. The ordinary and natural meaning of “exceptional circumstances” includes a combination of factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon.”

[45] The principles of *Nulty* have been cited with approval by subsequent full benches of the Commission.

Status of the application

[46] It is not in dispute that Mr Hernen’s application is out of time and can only proceed if an extension is granted. How much so requires a finding of fact.

[47] Although Mr Hernen’s application states that his dismissal took effect on 26 October 2023 it is the employer’s position, agreed by Mr Hernen at the hearing, that the date dismissal took effect was 27 October 2023.

[48] This is factually correct. Although the letter of dismissal is dated 26 October 2023, it is not in dispute that Mr Hernen was not provided that letter nor advised of summary dismissal until 27 October 2023.

[49] The dismissal having taken effect on 27 October 2023, the twenty-one day statutory period expired on 17 November 2023. The application is five days out of time.

[50] I now consider the factors in s 394(3).

Reason for the delay (s 394(3)(a))

[51] The reason for delay in lodging an application is a factor that must be considered.

[52] The FW Act does not specify what reason or reasons for delay might fall in favour of granting an extension though decisions of the Commission have referred to an acceptable or reasonable explanation. The absence of an explanation for any part of the delay will usually weigh against an applicant in such an assessment. Similarly, a credible explanation for the entirety of the delay will usually weigh in an applicant's favour, though it is ultimately a question of degree and insight.⁷

[53] However, a reasonable explanation for the delay is not needed for the whole of the period of delay or may in fact not be required at all if the circumstances are otherwise exceptional.⁸

[54] The period of delay requiring explanation is the period commencing immediately after the time for lodging an application has expired, ending on the day on which an application is ultimately lodged. That said, regard may be had to circumstances from the date the dismissal took effect when assessing whether the explanation for the delay is acceptable or credible.⁹

[55] The reason advanced by Mr Hernen is representative error.

[56] The long-standing approach adopted by the Commission and its predecessors is that representative error may be an acceptable reason for delay insofar as it may not be fair to visit the error of a representative on an applicant. However, that approach requires primary consideration to be given to the conduct of the applicant to establish whether they took appropriate steps to provide instructions and not contribute to the delay.¹⁰

[57] As said by a full bench of the Commission in *McConnell v A and PM Fornataro*:¹¹

“(i) Depending on the particular circumstances, representative error may be a sufficient reason to extend the time within which an application for relief is to be lodged.

(ii) A distinction should be drawn between delay properly apportioned to an applicant's representative where the applicant is blameless and delay occasioned by the conduct of the applicant.

(iii) The conduct of the applicant is a central consideration in deciding whether representative error provides an acceptable explanation for the delay in filing the application. For example it would generally not be unfair to refuse to accept an application which is some months out of time in circumstances where the applicant left the matter in the hands of their representative and took no steps to inquire as to the status of their claim. A different situation exists where an applicant gives clear instructions to their representative to lodge an application and the representative fails to carry out those instructions, through no fault of the applicant and despite the applicant's efforts to ensure that the claim is lodged.

(iv) Error by an applicant's representative is only one of a number of factors to be considered in deciding whether or not an out of time application should be accepted.”

[58] And as stated by a separately constituted full bench:¹²

“We think that representative error, in circumstances where the applicant was blameless, would constitute exceptional circumstances under s.366(2), subject to consideration of the statutory considerations in ss.366(2)(b) to (e) of the Act.”

[59] It has also been observed by a more recent full bench that whilst it is relevant to consider whether an applicant has been blameworthy or blameless for delay caused by an error of their representative, it is not necessary to find an applicant blameless for exceptional circumstances to exist beyond establishing that the dismissed employee gave appropriate instructions to their representative in a timely fashion.¹³

[60] Further, the issue is not whether the representative has an acceptable explanation for their conduct or delay, but whether the applicant has an acceptable explanation for the delay.¹⁴

[61] In this matter, it is readily apparent that the reason for the delay was representative error.

[62] The late lodgement was caused by human error by a UDE officer on 2 November 2023 caused initially by an erroneous data entry that was compounded by a failure by UDE over the following days to have systems to ensure the application was filed on time, and a further failure in the delay period to be alert to the application not having been filed on time.

[63] There is little to be said in explanation for UDE’s failings. Perhaps the best that can be said is that it now openly acknowledges its error and Mr Gaffney moved quickly to fix it.

[64] It appears from the evidence that UDE and Mr Gaffney relied entirely on a prompt by an internal data system to inform it that preparation of Mr Hernen’s application was due. No internal checks and balances appear to have existed to guard against an initial erroneous data entry by human hand. A business whose data system is calibrated to control compliance with statutory time frames yet has no inbuilt checks or balances against human data entry error is flawed. That this appears to have occurred in a business that represents itself as “Unfair Dismissal Experts. You are in safe hands”¹⁵ reflects poorly on the business, despite the many applications it files on time. The evidence of Mr Gaffney that UDE’s systems are now being reviewed in light of this sorry tale is of no immediate comfort to Mr Hernen.

[65] I take into account that Mr Gaffney moved without further delay (that same day) to file an application once he realised the error.

[66] However, that UDE did not inform Mr Hernen of its error at the time the error was detected (22 November 2023), and hoped that it need not have done so, is alarming. UDE appears to have allowed Mr Hernen to first learn of its mistake weeks later and only once it was apparent that late filing would not be rectified administratively or without contest in the Commission. It is difficult to fathom how it could be thought that the Commission could extend time on a late application without the client applicant having a line of sight into such a process. However, as that conduct largely occurred after the delay period, I do not take it into account.

[67] I now turn to Mr Hernen's conduct.

[68] The delay period is the five day period 18 November 2023 to 22 November 2023 inclusive.

[69] In this period Mr Hernen did not contact UDE. He was waiting for contact from UDE. His evidence was that he did not initiate contact because he was told by Mr Gaffney on 2 November to do nothing until advised by UDE or the Commission on next steps.

[70] For the same reason, Mr Hernen made no contact with UDE between 6 November and 17 November.

[71] I accept this evidence.

[72] The question then is whether this was reasonable conduct by Mr Hernen.

[73] A litigant or intended litigant has a responsibility to attentively and in an informed way peruse and protect their litigation interests. Where a person is wholly passive about their interests this would generally count against them in assessing whether time should be extended.

[74] Weighing in Mr Hernen's favour is that:

- he promptly sought professional advice after dismissal;
- he gave clear instructions to UDE on 2 November 2023 to file an in-time application on his behalf;
- he promptly completed and returned the authority to act and terms of engagement on 6 November 2023; and
- he did not know and could not have reasonably known about the data entry error by UDE.

[75] However, it remains the fact that Mr Hernen remained passive as to his interests after 6 November 2023. However, mitigating against that passiveness is that:

- Mr Hernen had engaged professional advisers;
- Mr Hernen had been told by UDE to do nothing until next contacted by UDE or the Commission; and
- even though Mr Hernen knew that a twenty-one day deadline applied, could have calculated 17 November as the date by which his application needed to be filed and could have checked on whether it had been filed, waiting a period of five days for a firm of professional advisers to make contact after an assumed lodgement was due is not of itself unreasonable.

[76] Guidance provided by the full bench in *McConnell v A and PM Fornataro* is of some assistance to Mr Hernen but not entirely so as the principles expressed in that matter refer to “no fault of the applicant despite the applicant's efforts to ensure that the claim is lodged”. As noted, Mr Hernen took no steps after 6 November to ensure that his claim was lodged. As further observed by the full bench:

“it would generally not be unfair to refuse to accept an application which is some months out of time in circumstances where the applicant left the matter in the hands of their representative and took no steps to inquire as to the status of their claim.” (emphasis added)

[77] Mr Hernen’s application is not “some months out of time” but only days. Nonetheless his failure to take steps to inquire as to the status of his claim weighs somewhat against him.

[78] Considered overall, the representative error is clearly established and the explanation for the delay weighs materially but not conclusively in favour of extending time.

Awareness of the dismissal taking effect (s 394(3)(b))

[79] Mr Hernen was aware on 27 October 2023 (but not prior) of the summary dismissal and that it took effect that day. The reasons were stated in the termination letter.

[80] This is a neutral consideration.

Action taken to dispute dismissal (s 394(3)(c))

[81] There is no evidence that Mr Hernen put the employer on notice that he intended to seek advice or take action to contest the dismissal.

[82] However, Adelaide Integrated Precast was aware that the termination was at its initiative and non-consensual. Further, Mr Hernen acted promptly after dismissal to secure professional advice.

[83] This is a neutral consideration.

Prejudice to the employer (s 394(3)(d))

[84] As a general principle, an employer is entitled to arrange its affairs and organise its resources on the basis that claims can no longer be made beyond the lodgement period, except in exceptional circumstances.¹⁶

[85] Whilst, if time is extended, a late claim would have to be defended involving time and cost, Adelaide Integrated Precast does not submit any special or particular prejudice should time be extended, and none is apparent with a five day delay.

[86] However, the absence of prejudice is not of itself a reason to grant an extension.¹⁷

[87] This is a neutral consideration.

Merits of the application (s 394(3)(e))

[88] The merits of the dismissal are contested matters between Mr Hernen and Adelaide Integrated Precast. Each claim they have a “strong” case.

[89] I have not conducted a hearing on the merits. The case appears relatively straightforward. The employer asserts a singular instance of conduct which it claims was subsequently admitted and which it considered warranted summary dismissal.

[90] Whilst, if the employer’s evidence establishes the facts asserted, the respondent may be able to establish valid reason, unfair dismissal matters also involve other matters set out in s 387 including questions of proportionality – whether the sanction was proportionate to the alleged misconduct.

[91] Whilst I would not, on this provisional view, express the applicant’s case as “strong” it is not unarguable.

[92] A provisional examination of the merits only slightly weighs against granting an extension of time.

Fairness between persons in similar position (s 394(f))

[93] Adelaide Integrated Precast submit that it would send the wrong signal to other dismissed employees who likewise do not follow up progress with their representative to guard against late filing.

[94] I do not accept this submission. Each unfair dismissal matter where an extension of time is sought is decided on its own facts based on the statutory test of “exceptional circumstances”. Extending time in this matter neither strengthens nor weakens the hand of other dismissed employees seeking an extension or other employers defending an out of time application in future proceedings. This is because the statutory rule must be tested against the unique facts of each case.

[95] In these circumstances, this is not a relevant factor.

Conclusion on extension of time

[96] Two factors weigh in Mr Hernen’s favour – that the delay period is relatively short (five days) and the delay was unquestionably the consequence of representative error. That explanation weighs materially but not conclusively in favour of granting an extension.

[97] Other factors are neutral except that the merits weigh, but only slightly, against granting an extension.

[98] On balance and considered overall, I find that the circumstances for late filing are exceptional. Those circumstances are the combination of the representative error, Mr Hernen’s initial promptness in pursuing his rights and engaging professional advisers, that he could not

have reasonably known of the data entry error by UDE, and the fact that Mr Hernen acted on advice from the representative to do nothing until next contacted by them or the Commission.

[99] It is not usual or common that a dismissed employee gives instructions within time to file proceedings in a lawful manner only to subsequently discover that their legal representatives have failed to file on account of an undisclosed internal error on their part and had been advised to remain passive throughout that period.

[100] I consider it appropriate to extend time. There are no discretionary reasons to not do so. It was not unreasonable for Mr Hernen to place his interests in the hands of UDE.

[101] There is no particular prejudice to Adelaide Integrated Precast in defending a claim that is late by five days.

Conclusion

[102] Having regard to the factors in s 394(3) of the FW Act, the time for lodgement of application U2023/11598 is extended so as to permit the application to be heard and determined.

[103] An order¹⁸ to this effect is issued in conjunction with publication of this decision.

[104] The evidence in this matter raises issues as to the protection of an employee's litigation interests given the absence of specific industry standards over the conduct of paid agents operating in the industrial jurisdiction. No regulatory or self-regulatory scheme applies akin to that governing legal practitioners which would give clients of paid agents access to an independent forum to deal with conduct complaints. The Commission's statutory obligation to determine extension of time matters is not a substitute for such avenues.

[105] Whether a case exists for industry regulation or self-regulation of paid agents are matters for policy makers and the industry itself, not the Commission. However, given the volume of unfair dismissal and other applications now being handled by paid agents, some well and some less so, Commission decisions are capable of informing such assessments. This is not the only decision where such issues have arisen.¹⁹ The obvious question arising from this matter is, if the Commission had not granted Mr Hernen an extension of time, what avenue(s) would he have had to seek recompense for the representative error that had compromised his litigation interests?

[106] I direct that application U2023/11598 be conciliated.



DEPUTY PRESIDENT

Appearances:

S. Kavenagh of Unfair Dismissal Experts, *with permission*, on behalf of J. Hernen

T. Ho, *of and on behalf of Adelaide Integrated Precast Pty Ltd*

Hearing details:

2024.

Adelaide;

11 January.

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¹ Including an amended application (F2) and amended employer response (F3)

² Audio recording 11 January 2024 1.52.08 – 1.53.06

³ *Smith v Canning Division of General Practice* [\[2009\] AIRC 959](#)

⁴ *Lombardo v Commonwealth of Australia as represented by the Department of Education, Employment and Workplace Relations* [\[2014\] FWCFB 2288](#) at [21]

⁵ *Halls v AR & MA McCardle & Sons Pty Ltd and Ors* [2014] FCCA 316

⁶ [\[2011\] FWAFB 975](#) “Nulty” at [13]; see also *Cheval Properties Pty Ltd t/as Penrith Hotel Motel v Smithiss* [\[2010\] FWAFB 7251](#), [5]

⁷ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* [\[2018\] FWCFB 901](#), [35]-[45]

⁸ *Stogiannidis* (Ibid); *Elliott v LEAP Legal Software Pty Ltd t/a LEAP Legal Software* [\[2018\] FWCFB 3288](#)

⁹ *Shaw v Australia and New Zealand Banking Group Limited* [\[2015\] FWCFB 287](#), [12]; *Ozsoy v Monstamac Industries Pty Ltd* [\[2014\] FWCFB 2149](#), [31] – [33]; *Perry v Rio Tinto Shipping Pty Ltd T/A Rio Tinto Marine* [\[2016\] FWCFB 6963](#); *Czoy v Monstamac Industries Pty Ltd* [\[2014\] FWCFB 2149](#)

¹⁰ *Officeworks v David Anthony Parker* [\[2014\] FWCFB 5779](#), [25]

¹¹ [\[2011\] FWAFB 466](#), [35] citing *Clark v Ringwood Private Hospital* (1997) 74 IR 413 and *Davidson v Aboriginal and Islander Child Care Agency* Print Q0784

¹² *Robinson v Interstate Transport Pty Ltd* [\[2011\] FWAFB 2728](#), [24]

¹³ *Qantas Ground Services Pty Ltd v Simon Rogers* [\[2019\] FWCFB 2759](#), [17]

¹⁴ Ibid, [16]

¹⁵ A3 Annexure A

¹⁶ *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25

¹⁷ *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 at 299-300

¹⁸ [PR770192](#)

¹⁹ Other examples include *Gabriel v Titan Recruitment Pty Ltd* [\[2023\] FWC 230](#), [11] – [14]; *Cannon v Quad Services* [\[2019\] FWCFB 2097](#), [44], [54]