DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Ms Tiffany Louise Miegel
v
Tronox Mining Australia Limited
(C2025/3821)

COMMISSIONER CONNOLLY MELBOURNE, 8 SEPTEMBER 2025

Application to deal with contraventions involving dismissal – application for an extension of time – exceptional circumstances identified – application granted.

Introduction

[1] On 9 May 2025, Ms Tiffany Louise Miegel (the **Applicant**) lodged a general protections application against Tronox Mining Australia Limited (the **Respondent** or **Tronox**) under s.365 of the *Fair Work Act 2009* (Cth) (the **Act**) alleging that on 6 February 2025 she was forced to resign from her employment with Tronox, ending her employment on the 18th of February 2025. She claims the reasons for her forced resignation constitute a dismissal within the meaning of the FW Act and that reasons for this dismissal included matters prohibited by the FW Act's general protections provisions.

[2] On 4 June 2024, the Respondent filed a Form F8A Response and raised jurisdictional objections that Ms Miegel had voluntarily resigned and was not dismissed by the Respondent, and that her application was not filed within the 21-day requirement.

[3] The Act provides that an application for remedy under the general protection's provisions, involving dismissal, pursuant to s.365 of the Act must be made within 21 days after the dismissal took effect.[1] However, the Commission may allow a further period for the application to be made in exceptional circumstances.[2]

[4] As a result of the decision in *Coles Supply Chain Pty Ltd v Milford*,[3] I am required to determine the jurisdictional objection, extension of time, before I can exercise powers under s.368 of the Act to deal with the dispute about whether the dismissal was in contravention of the general protections provisions.

[5] On 12 June 2025, I issued directions and advised that the extension of time issue would be considered at a Video Hearing on 23 June 2025. Information about the extension of time issue and the factors that I am required to take into account in considering this matter, were provided to the parties.

Hearing

[6] A Hearing was conducted by way of video conference on 23 June 2025. A video file record of the Hearing was kept.

[7] Ms M Ivanovski from the Chamber of Commerce and Industry of Western Australia represented the Respondent. Ms Miegel appeared and represented herself.

[8] A digital court book was compiled from the material that was filed by both parties and distributed prior to the hearing. The court book was accepted by the parties into evidence, with the addition of supplementary material presented by the Applicant prior to proceedings. To the extent relevant, I rely on the court book as a record of the material filed by the parties with appropriate weight being given to all the material after an assessment of its relevance and its character (e.g. hearsay, opinion/submission).

Evidence and Submissions

Case for the Applicant

[9] Ms Miegel presented at the hearing and presented herself in proceedings, giving her evidence and submission under oath to the Commission. In addition to her oral evidence, Ms Miegel provided a series of emails and supporting materials, including doctors' certificates and assessments, medical records and a colleague's supporting statement. A summary of her position is set out below relevant to the question of extension of time:

- The principal reasons for her delay are that she was suffering from psychological stress, emotional exhaustion, sleep disruption, insomnia, depression, anxiety, fatigue, and cognitive overload.

- That these factors significantly limited her ability to function and engage in simple tasks, including meeting deadlines and filing her application with the Commission.

- That these factors were compounded by commencing FIFO work in the relevant period after her dismissal, that resulted in further negative impact to her capacity to function and file her application.

- And that they were further exacerbated by recent diagnosis of a genetic condition clinically associated with executive function, cognitive fatigue, stress and dysregulation. In addition to post dismissal contact by her employer that made things worse.

- That she first made an application for unfair dismissal on 28th of April 2025, and a subsequent general protections application, before receiving clarifying advice to file this application on the 9th of May.

[10] The Respondent filed written submissions and provided several supporting documents and emails. Ms Heather Brown presented at the hearing and provided sworn evidence in

proceedings in further support of her filed witness statements and attachments. The position of the Respondent is summarised below:

- The application has been made out of time.
- The applicant voluntarily resigned from her job and was not dismissed.
- The applicant has not provided any relevant medical evidence to support her submissions.
- The applicant has not identified any "exceptional circumstances" to warrant an extension of time.
- The application is without merit.
- The applicant has demonstrated capacity to work and seek reemployment with the respondent demonstrating capacity to file her application within time.

Applicable Law

[11] Section 366(2) of the Act states that the Commission may allow a further period for an applicant to make a general protections application if the Commission is satisfied that there are "exceptional circumstances", taking into account the following criteria:

> "(a) the reason for the delay; and
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> (b) any action taken by the person to dispute the dismissal; and
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> (c) prejudice to the employer (including prejudice caused by the delay); and
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> (d) the merits of the application; and
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> (e) fairness as between the person and other persons in a similar position."

[12] The test of "exceptional circumstances" establishes a "high hurdle" for an applicant.[4]

[13] I have considered the provisions of s.366 of the Act in the context of the Full Bench decision in *Nulty v Blue Star Group Pty Ltd*[5] which stated:

> "[10] It is convenient to deal first with the meaning of the expression "exceptional circumstances" in s.366(2). In *Cheval Properties Pty Ltd v Smithers* a Full Bench of FWA considered the meaning of the expression "exceptional circumstances" in s.394(3) and held:
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> "[5] The word "exceptional" is relevantly defined in The Macquarie Dictionary as "forming an exception or unusual instance; unusual; extraordinary". We can apprehend no reason for giving the word a meaning other than its ordinary meaning for the purposes of s.394(3) of the FW Act."

> [11] Given that s.366(2) is in relevantly identical terms to s.394(3), this statement of principle is equally applicable to s.366(2).
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> [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."

Consideration

[14] A dismissal does not take effect unless and until it is communicated to the employee who is being dismissed.[6] A dismissal can be communicated orally.[7]

[15] In the present matter, the evidence provided by the Respondent and the material filed by Ms Miegel confirm her employment with the respondent ended on 18 February 2025.

[16] This application was lodged with the Commission on 9th May. A prior application was filed and withdrawn on 28th of April. Ms Miegel's application was required to be filed with the FWC by midnight on 11 March 2025. Both applications were filed out of time.

[17] Section 366(2) of the Act requires the Commission to take account the matters set out in s.366(2)(a)-(e). Below, I have set out my consideration of each of these factors, insofar as they are relevant.

366(2)(a) - Reason for the delay

[18] The delay required to be considered is the period beyond the prescribed 21 day period for making an application. It does not include the period from the date of the dismissal to the end of the 21 day period. However, the circumstances from the time of the dismissal must be considered when assessing whether there is a credible reason for the delay, or any part of the delay, beyond the 21 days.[8] In *Diotti v Lenswood Cold Stores Co-op Society t/a Lenswood Organic*[9], the Full Bench explained the correct approach by reference to the following example:

> "[31] For example if an applicant is in hospital for the first 20 days of the 21 day period this would be a relevant consideration if the application was filed 2 days out of time as occurred in this matter."

[19] An acceptable explanation for the entirety of the delay is not required to make a finding of exceptional circumstances. However, in considering and taking into account the reason for the delay in accordance with s.394(3)(a) of the Act, it is relevant to have regard to whether the Applicant has provided an acceptable explanation for the entirety or any part of the delay. The correct approach to be taken was explained by the Full Bench in *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters:*[10]

> "[38] As we have mentioned, the assessment of whether exceptional circumstances exist requires a consideration of *all* the relevant circumstances. No *one* factor (such as the reason for the delay) need be found to be exceptional in order to enliven the discretion to extend time. This is so because even though no *one* factor may be exceptional, *in combination* with other factors the circumstances may be such as to be regarded as exceptional.
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> [39] So much is clear from the structure of s.366(2), each of the matters needs to be taken into account in assessing whether there are exceptional circumstances. The individual matters might not, viewed in isolation, be particularly significant, so it is necessary to consider the matters collectively and to ask whether collectively the matters disclose exceptional circumstances. The absence of any 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 the applicant's favour, though, as we mention later, it is a question of degree and insight. However the ultimate conclusion as to the existence of exceptional circumstances will turn on a consideration of all of the relevant matters and the assignment of appropriate weight to each.
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> [44] As mentioned earlier, the 'reasons for the delay' is a factor to be taken into account in deciding whether there are exceptional circumstances. There is no statutory basis for the adoption of a decision rule whereby if the applicant does not provide a credible explanation for the entire period of the delay then the matter in s.366(2)(a) tells *against* the finding of exceptional circumstances. Common sense would suggest otherwise, it is plainly a question of degree and weight.
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> [45] What if the period of the delay was 30 days and the applicant had a credible explanation for 29 of those days? It seems to us that such circumstances may weigh in favour of a finding of exceptional circumstances. Of course, as mentioned earlier if there was a credible explanation for the *entirety* of the delay that would weigh *more heavily* in favour of such a finding. Conversely, if the applicant failed to provide a credible explanation for *any* part of the delay that would tend to weigh against a finding of exceptional circumstances."

[20] Ms Miegel's principal reason for the delay in her application is that the significant medical and overall health conditions she was suffering impacted her capacity to file within the required time. And that these conditions were exacerbated by a combination of additional factors, including her working and adjusting to a FIFO work and shift patterns, ongoing contact with her former employer and a diagnosed genetic condition.

[21] Ms Miegel acknowledges that her application is out of time. She submits that the reasons for this delay, when viewed collectively, meet the threshold of exceptional circumstances and that she should be granted an extension of time

[22] In support of this submissions, Ms Miegel has provided medical records and statements supporting her insomnia, the various mental health challenges she confronted, including anxiety and depression and her genetic diagnosis. She has also provided further research supporting the impact of these conditions on capacity, cognitive and executive functioning abilities.

[23] I accept this evidence establishes the significance of these conditions on a person's capacity to function and engage with legal and administrative tasks, however simple, including filing an application with the FWC. I also accept the evidence presented establishes Ms Miegel is a person who has been dealing with these issues for period of some time.

[24] In May 2024, she had period of leave following surgery where she made the Respondent aware of her declining mental health and poor headspace, also that she accessed onsite support and EAP services. A further period of leave followed in June 2024, where the medical reports she has presented identify her mental health, depression, and anxiety as factors identified by the treating doctor.

[25] Further material presented after her application to the Commission also identify severe insomnia, poor mental health, anxiety and depression as factors Ms Miegel continued to be struggling with in May 2025.

[26] The respondent submits the fact Ms Miegel has not presented any evidence of these factors impacting her capacity dated prior to making her application with the Commission counts against her. While I accept this is a valid concern, I am satisfied Ms Miegel has presented evidence that she has been dealing with significant mental health concerns for a period of some time. On this basis, it is reasonable to conclude Ms Miegel continued suffering these conditions during the period of delay. I am satisfied this is the case. I am further satisfied these conditions would have had an impact on her capacity to make her application to the Commission on time.

[27] Ms Miegel submits her condition was exacerbated by the additional pressures and stressors of adjusting to FIFO shift patterns in the new job she commenced not long after leaving the respondent. Her evidence is that she worked 26 days of 12-hour shifts, with 5 days in transit and up to 14 hours traveling in the 35 days from 6th February 2025. She was provided additional evidence of the impact of FIFO work patterns on workers' overall health, capacity and functional capacity. I accept this evidence.

[28] I have considered the Respondent's submissions that the fact Ms Miegel was able to competently perform in her new role and did not take sick leave suggests she had capacity to file with the Commission. I am satisfied, however, that the impact of FIFO work patterns, rosters and adjustment phases are well established.[11] I also consider Ms Miegel's submission that she did not disclose her mental health challenges to her new employer out of concern it would jeopardise her prospects to be a reasonable conclusion for her to make in the circumstances.

[29] Ms Miegel submits that her capacity to perform work should not be taken as evidence of her capacity to make an application with the FWC on time. Further, explaining she sought her old job back because she had reason to believe her concerns may be addressed and was in a desperate situation. Adding, that she did nothing to advance or inform her understanding of the FWC's requirements until April 2025, when she made her first application.

[30] I accept these submissions and, on the evidence presented, I am satisfied Ms Miegel's adjustment to FIFO work was a further factor impacting her capacity to file her application within time.

[31] Ms Miegel also presented additional evidence that she is a carrier of the Fragile X permutation, as a further factor impacting her functional and cognitive capacity.[12] And further that contact with the Respondent after her employment also made things worse.

[32] The Respondent maintains the evidence demonstrates Ms Miegel had capacity to take part in regular activities and should have been able to file her application on time. Furthermore, that she was aware of the requirements having previously indicated an intention to make an application to the FWC in October 2024. They submit there is nothing exceptional about the explanations she has provided to the Commission to explain the delay.

[33] To be exceptional, circumstances must be out of the ordinary course, or unusual, or special or uncommon but need but be unique, or unprecedented or very rare. Each circumstance of the ending of a job and its impact will be different and need to be considered on its own merits.

[34] In the present case, Ms Miegel has presented several factors that I have accepted provide reasonable explanations for the delay in filing her application out of time. These include her ongoing mental health challenges, impact of FIFO work, and fragile-X permutation.

[35] Viewed separately, all these factors may not necessarily be uncommon. When considered together, however, I am satisfied this combination of circumstances are exceptional and not commonly confronted by employees claiming to have been constructively dismissed.

[36] I have also had regard to the period of delay. While not insignificant, I have considered Ms Miegel's attempts to file her application at the end of April and that she genuinely engaged with the FWC when advised of an issue with multiple applications, acting on this advice. I consider this evidence supports the credibility of her overall submissions in the circumstances of this case.

[37] Ultimately, I have been satisfied Ms Miegel was confronted with a combination of factors that when considered together were exceptional, rare and uncommon. I am therefore satisfied she has provided a credible reason for the delay in filing her application and that this factor weighs in favour of granting an extension of time.

366(2)(b) - any action taken by the person to dispute the dismissal

[38] Action taken by the employee to contest the dismissal, other than lodging an unfair dismissal application, may favour granting an extension of time.[13]

[39] Ms Miegel acknowledges that she did not take any action to dispute her dismissal during the 21-day lodgement period. Her reason for this is set about above, in essence because of her incapacity to do so. She maintains however, that both before her resignation and afterwards she made several such efforts. Further submitting she acted to lodge her application as soon as she was psychologically able to do so.

[40] The Respondent submits Ms Miegel's acknowledgment counts against her in relation to this factor. I accept Ms Miegel clearly attempted to raise concerns about her employment, treatment and the reasons she claims she was left with no choice but to resign. I do not however, consider this action counts in Ms Miegel's favour.

[41] This factor weighs against the granting of an extension of time.

366(2)(c) - prejudice to the employer (including prejudice caused by the delay)

[42] Prejudice to the employer will weigh against granting an extension of time.[14] However, the "mere absence of prejudice to the employer is an insufficient basis to grant an extension of time".[15]

[43] A long delay gives rise "to a general presumption of prejudice".[16]

[44] The employer must produce evidence to demonstrate prejudice. It is then up to the employee to show that the facts do not amount to prejudice.[17]

[45] Ms Miegel submits there is no prejudice to the employer that would arise from the delay. The Respondent argues that prejudice would be occasioned in the usual way of having to bear the inconvenience of defending the application.

[46] The Commission's consideration of this factor looks to prejudice beyond the usual requirements of having to respond to a claim. In these circumstances, I cannot identify any greater prejudice that would accrue to the Respondent caused by the application being dealt with now than there would have been had it been made within the 21-day time period. The mere absence of prejudice is not in my view a factor that weighs in favour of the granting of an extension of time.

[47] This factor is a neutral consideration.

366(2)(d) - merits of the application

[48] The merits of an application are relevant; however, the assessment of the merits for the present purposes is limited to, in effect, a preliminary consideration.[18] Further, the primary consideration is whether the Applicant, Ms Miegel, has an arguable case.[19]

[49] In *Telstra-Network Technology Group v Kornicki*[20] the Full Bench considered the principles applicable to the extension of time discretion under the former s.170CE(8) of the *Workplace Relations Act 1996* (Cth). In that case the Full Bench stated:[21]

> "If the application has no merit then it would not be unfair to refuse to extend the time period for lodgement. However, we wish to emphasise that a consideration of the merits of the substantive application for relief in the context of an extension of time application does not require a detailed analysis of the substantive merits. It would be sufficient for the Applicant to establish that the substantive application was not without merit."

[50] The substantive merits of this application have not been fully tested and as identified by the Full Bench of the Commission in *Kyvelos v Champion Socks Pty Ltd*, the Commission "should not embark on a detailed consideration of the substantive case" for determining whether to grant an extension of time to an Applicant to lodge their application.[22]

[51] The Respondent submits that Ms Miegel's application is without merit or clarity of what adverse action it has taken against her in response to an exercise of workplace rights. Ms Miegel maintains she was subjected to a hostile and psychological unsafe work environment, bullying, and breaches of health and safety legislation amongst other things. She maintains these factors forced her to resign, contrary to the protections she is afforded under the general protection provisions.

[52] The factual context and merits of these respective positions would need to be further scrutinised in this case, including under cross-examination, if an extension of time was granted for the application to proceed. This being the case, I do not consider the merits of the case tell in favour or against the granting of an extension of time. I consider them to be a neutral factor.

366(3)(e) - fairness as between the person and other persons in like position

[53] The Full Bench in *Perry v Rio Tinto Shipping Pty Ltd*[23] considered this criterion and said:

> "[41] Cases of this kind will generally turn on their own facts. However, this consideration is concerned with the importance of the application of consistent principles in cases of this kind, thus ensuring fairness as between the Appellant and other persons in a similar position. This consideration may relate to matters currently before the Commission or matters previously decided by the Commission."

[54] Ms Miegel referred to several previous decisions in relation to exceptional circumstances arising from mental health incapacity and administrative errors. She submits these decisions weigh in favour of the granting of an extension of time in her circumstances. That she has made every effort to engage with the Commission as soon as she was able and should not be disadvantaged because of her exceptional circumstances.

[55] The Respondent submits the Applicant has not discharged the evidentiary onus of establishing "exceptional circumstances" and that her application should not be granted considering all the circumstances of this case.

[56] I have considered these submissions, and the previous decisions of the Commission referred to by Ms Miegel.

[57] I have weighed Ms Miegel's submissions and evidence. I have been satisfied a combination of factors she was confronted with provide "exceptional circumstances" for the reasons for the delay in filing her application.

[58] In the circumstances of this case, I am persuaded there is level of fairness in favour of granting Ms Miegel's application with respect to other persons who have satisfied the Commission of exceptional circumstances for the delay in their applications being filed. I consider this factor in favour of Ms Miegel.

Conclusion: Is the Commission satisfied of exceptional circumstances?

[59] I have set my findings of each of the statutory factors in 366(2)(a) to (e) of the Act above. Two factors specifically point in favour of a finding of exceptional circumstances. The three other factors are neutral.

[60] Having considered all the circumstances of this case within the statutory requirements of s 366(2), I am persuaded, on balance, that there are exceptional circumstances warranting the exercise of my discretion to allow a further period within which an application for relief under the general protection provisions may be lodged by the Applicant.

Order

[61] Pursuant to s.366(2) of the *Fair Work Act 2009* (Cth), I order that the time for Ms Tiffany Louise Miegel to make her application under s.365 of the Act, to the Commission, be extended to the actual date of lodgement being 9 May 2025.

COMMISSIONER

Appearances:

T Miegel, Applicant.
M Ivanovski of Chamber of Commerce and Industry WA for the Respondent.

Hearing details:

2025.
Melbourne (by video):
June 24.

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[1] *Fair Work Act 2009* (Cth) s366(1)(a). Note that the 21 days for lodgement does not include the date that the dismissal took effect by reason of the operation of the *Acts Interpretation Act 1901* (Cth) s.36(1) (item 6—where a period of time 'is expressed to begin after a specified day' the period 'does not include that day').

[2] *Fair Work Act 2009* (Cth) s366(2).

[3] [2020] FCAFC 152.

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

[5] [2011] FWAFB 975.

[6] *Ayub v NSW Trains* [2016] FWCFB 5500 at [35], [41] & [48]-[49].

[7] *Plaksa v Rail Corporation NSW* [2007] AIRC 333 (unreported, Cartwright SDP, 26 April 2007) at [8]; citing *Barolo v Centra Hotel Melbourne* (unreported, AIRC, Whelan C, 10 December 1998) Print Q9605.

[8] *Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank* [2015] FWCFB 287 at [12]; *Ozsoy v Monstamac Industries Pty Ltd* [2014] FWCFB 2149 at [31]; *Diotti v Lenswood Cold Stores Co-op Society t/a Lenswood Organic* [2016] FWCFB 349 at [29]-[31].

[9] [2016] FWCFB 349.

[10] [2018] FWCFB 3288 at [35]-[45].

[11] *Impact of FIFO Work Practices on Mental Health, Education and Health Standing Committee Report, Parliament of Western Australia, June 2015*.

[12] Attachment BC, Applicant's Statement, Court Book p.72-73 and Rachael C Birch, Jonathan Cohen and Julian N Trollor, 'Fragile X-associated disorders: Don't miss them' (2017) 46(7) *Australian Journal of General Practice* 487-491.

[13] *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 at [299] – [300].

[14] Ibid.

[15] Ibid.

[16] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at [556].

[17] *Jervis v Coffey Engineering Group Pty Limited* (unreported, AIRCFB, Marsh SDP, Duncan SDP, Harrison C, 3 February 2003) PR927201 at [16].

[18] *Kyvelos v Champion Socks Pty Ltd,* AIRCFB Print T2421, 10 November 2000 at [14].

[19] *Craig Thomson v Linx Cargo Care Pty Ltd T/A Linx Port Services* [2022] FWCFB 40 at [32] - [34].

[20] Print P3168, 22 July 1997 per Ross VP, Watson SDP and Gay C.

[21] Ibid.

[22] AIRC 10 November 2000 at [14]; See also *Collier v Saltwater Freshwater Arts Alliance Aboriginal Corporation* [2016] FWC 2899 at [38].

[23] [2016] FWCFB 6963.