



DECISION

Fair Work Act 2009
s.365—General protections

Ruby Sumal

v

RACQ Operations Pty Ltd, Rebecca Stephens, Connie Sheahan
(C2025/8080)

COMMISSIONER SIMPSON

BRISBANE, 2 OCTOBER 2025

Application to deal with contraventions involving dismissal – Application filed out of time – Representative Error – Exceptional Circumstances – Extension granted

[1] On 14 August 2025, Ms Ruby Sumal (**Sumal / the Applicant**) applied to the Fair Work Commission (**the Commission**) under s.365 of the *Fair Work Act 2009* (Cth) (**the Act**) for an application to deal with a general protections dispute involving dismissal. The Respondents in the matter were named as RACQ Operations Pty Ltd, Ms Rebecca Stephens, and Ms Connie Sheahan (**the Respondents**).

[2] The Respondents raised a jurisdictional objection that the application was lodged outside of the 21-day statutory timeframe.

[3] On 10 September 2025, I issued a Notice of Listing and Directions to the parties regarding the jurisdictional objection. On 26 September 2025, the parties confirmed their consent to have the matter determined on the papers.

[4] The Applicant was represented by Mr Cameron Niven, Solicitor at Tailored Legal in the proceedings.

[5] Mr Niven provided a witness statement dated 24 September 2025 for the Applicant, and Ms Keisha Boutwood, Head of People Operations provided a witness statement dated 17 September 2025 for the Respondents.

Background and Evidence

[6] The Applicant was dismissed on 23 July 2025. The application was therefore due to be filed by no later than 11:59pm on 13 August 2025.

[7] The Applicant had a consultation with the Legal Practitioner's office on 4 August 2025.

[8] The Applicant formally engaged the Legal Practitioner on 5 August 2025.

[9] On 8 August 2025, the Applicant provided instructions to the Legal Practitioner. On 11 August 2025, the Applicant provided instructions and documents.

[10] On 12 August 2025, the Applicant sought an update on the application twice.

[11] On 14 August 2025:

- a) the Legal Practitioner informed the Applicant the drafting was progressing and would look to have a draft to her; and
- b) the Legal Practitioner returned to Australia

[12] the Application was lodged, one day out of time on 14 August 2025.

Consideration

[13] In order for the application to proceed, it is necessary for the Applicant to obtain an extension of time to make the application under s.366(2) of the Act. This section provides that the Commission may allow a further period for the application to be made if it is satisfied that there are exceptional circumstances, taking into account the following:

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

[14] In the decision of *Nulty v Blue Star Group Pty Ltd (Nulty)*, the Full Bench of Fair Work Australia, the predecessor of this Commission, noted that even when ‘exceptional circumstances’ are established, there remains discretion to grant or refuse an extension of time.¹ The Full Bench observed that what it will come down to is a consideration of whether, given the exceptional circumstances found, it is fair and equitable that time should be extended.

[15] The Act does not define ‘exceptional circumstances’ per se, but guidance can be gleaned from previous decisions. In *Nulty*, the Full Bench said that in order to be exceptional, the circumstances must be out of the ordinary course, or unusual, or special, or uncommon, although they need not be unique or unprecedented.² 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 can be considered exceptional.³

[16] In *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd*, the Full Bench provided clarification regarding the assessment of exceptional circumstances:

“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”⁴

(original emphasis)

Reason for the delay

[17] The Respondent submitted that representative error did not constitute exceptional circumstances and therefore the application should not proceed.

[18] The Applicant submitted that the error is wholly the attributable to the Applicant’s legal representative and the Applicant took diligent steps to enquire as to the status of the application’s progression and lodgement.

[19] Within the timeframe for filing this application, the Applicant has provided clear instruction to the Applicant’s legal representative and has provided the requisite documents. The corollary of these matters is the Applicant, through no fault of her own and despite her efforts to ensure the application was lodged within the applicable timeframe, has suffered a prejudice.

[20] The Applicant’s evidence was that during a consultation with the Legal Practitioner on 4 August 2025, the Legal Practitioner incorrectly counted out the 21-day timeframe to lodge the application and in so doing incorrectly made a calendar note that the application was due to be lodged no later than 14 August 2025.

[21] The Applicant’s legal representative was travelling for a period on 13 August 2025 and could not attend to the Applicant’s emails in due course on the day and had incorrectly listed the 21-day timeframe for lodgement of the application as not including the date of dismissal.

[22] The Applicant referred to the Full Bench decision of *N M Robinson v Interstate Transport Pty Ltd*,⁵ concerning practitioner error which has remained undisturbed, which states:

“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.”

[23] The Applicant contended that where representative error is relied upon, it is necessary to consider the qualifications of the party representing the Applicant, as discussed in *Office Works Ltd v David Parker*,⁶ which states:

“In circumstances where “representative error” is relied upon in Commission proceedings as an excuse or explanation for the failure to meet time limits, it is appropriate to have regard to the professional qualifications and expertise of the representative concerned. This will enable an assessment to be made as to the extent to which it was reasonable for a party to rely upon the skills and expertise of the representative in acting on their behalf. Clearly where the representative is a lawyer, an experienced industrial advocate, or an officer or employee of an organisation of employers or employees, it might more readily be concluded that representative error

provides an acceptable explanation for the delay and such error should not be blamed upon the party concerned....”

[24] The Applicant submitted this matter is one which is captured by the considerations expressed above, in addition to the matter of *Ms Tanya Webber v Stanwell Corporation Limited*.⁷

[25] In *Stanwell*, an application was filed with the Queensland Industrial Relations Commission instead of the Fair Work Commission, and, upon learning of the application being filed in the incorrect jurisdiction, the practitioner further delayed an additional ten (10) days. The result was that the application was eventually filed 24 days outside the timeframe. The Commission accepted that the delay was due to practitioner error and permitted the extension of time to file. In light of this, the Applicant submitted ‘representative error’ is an exceptional circumstance which is relevant to the exercise of the Commission’s discretion.

[26] The Applicant also referred to the matter of *Clark v Ringwood Private Hospital*,⁸ which said:

“... A different situation exists where an applicant gives clear instructions to their representative to lodge an application and the representative fails to carryout those instructions, through no fault of the applicant and despite the applicant’s efforts to ensure that the claim is lodged”

[27] In this matter, the Applicant took diligent steps to engage the Legal Practitioner and followed up the on the status of the application on several instances, and as a consequence, where there has been a delay, the Applicant lays blameless. The Applicant entirely relied upon the Legal Practitioner, did not contribute to the delay, and instead expected the Legal Practitioner to have acted diligently in drafting the requisite documents.

[28] The explanation for the delay is uncontroversial – the Legal Practitioner set a calendar event as a reminder after incorrectly calculating the 21-day timeframe to lodge the Application. The reason for delay favours a granting of an extension on the basis that representative error meets the test of an exceptional circumstance.

Action taken to dispute the dismissal

[29] The Respondent submitted that on 29 July 2025, six days following the Applicant’s termination, the Applicant initiated contact with Ms Boutwood, Head of People Operations, to raise concerns regarding perceived inconsistencies between her understanding of her performance and the contents of the termination letter, which cited unsatisfactory performance and conduct as the reason for termination. Specifically, this was in the context of the Applicant seeking clarity regarding the payment of 1 week’s pay in lieu of notice (based on probation) as opposed to one month’s pay. The Respondent said the Applicant did not dispute the termination itself, but rather the reasoning provided.

[30] The Respondent said attempts were made by Ms Boutwood to obtain a contact number from the Applicant to facilitate a more detailed discussion and provide clarification. However, the Applicant did not respond further.

[31] The Applicant submitted that on the Respondent's own submissions, the Applicant expressed at an early stage that she disputed the reasons for the dismissal. The Applicant contended this consideration is relevant in that it demonstrates the Applicant has diligently taken steps to raise concern, engage the Legal Practitioner and has a vested interest in the claim progressing.

[32] The Applicant has taken steps to dispute the dismissal by querying the contents of the termination letter with the Respondent, and consulting with a lawyer promptly after her termination. These factors favour extending time.

Prejudice to the employer

[33] The Applicant submitted that the Respondent's submissions do not assert there is prejudice from the delay, and further, a delay of one day could not result in prejudice such that this consideration ought to be provided significant weight.

[34] I consider this to be a neutral factor.

Merits of the application

[35] In *Telstra-Network Technology Group v Kornicki*,⁹ the Full Bench of the Australian Industrial Relations Commission said, in respect to the merits of an application:

“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.”

[36] Evidence on the merits is rarely called at an extension of time hearing and was not called in this case. The Commission ‘should not embark on a detailed consideration of the substantive case’ for the purpose of determining whether to grant an extension of time to an applicant to lodge her or his application.¹⁰ The merits of the application more generally would need to be scrutinised and would include consideration of the circumstances of the dismissal. If an extension of time were granted and the matter proceeded these matters would need to be examined.

[37] I consider the merits to be a neutral factor.

Fairness between the person and other persons in a similar position

[38] The Applicant submitted that whilst there are numerous applications seeking leave to file outside the 21 statutory time frame there are very few that the delay in this matter is attributable entirely to representative error and the Applicant is blameless. This ought to weigh in favour of granting an extension of time.

[39] There was no evidence that there was another person in a similar position to that of the Applicant and this is a neutral matter.

Conclusion

[40] Having considered all the matters I am required to take into account in s.366 of the Act, I am satisfied that there are exceptional circumstances in this case justifying a further period of one day to allow the Applicant to file her application. On that basis I grant an extension of time to the Applicant.

[41] The matter will be programmed for conference.



COMMISSIONER

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¹ (2011) 203 IR 1, 6 [15].

² Ibid 5 [13].

³ Ibid 5–6 [13].

⁴ (2018) 273 IR 156, 165 [38].

⁵ [\[2011\] FWAFB 2728](#) at [24].

⁶ [\[2014\] FWCFCB 5779](#) at [18]–[19].

⁷ [\[2025\] FWC 2670](#).

⁸ (1997) 74 IR 413.

⁹ (1997) 140 IR 1.

¹⁰ *Kyvelos v Champion Socks Pty Ltd*, 10 November 2000) [14]; *Collier v Saltwater Freshwater Arts Alliance Aboriginal Corporation* [\[2016\] FWC 2899](#), [37]–[38].