

[2026] FWC 390

The attached document replaces the document previously issued with the above code on 9 February 2026.

Minor corrections to Paragraph [1].

Associate to Deputy President Lake

Dated 10 February 2026



DECISION

Fair Work Act 2009
s.365—General protections

Khan Tim So

v

Greek Orthodox Community Of St George Brisbane
(C2025/10770)

DEPUTY PRESIDENT LAKE

BRISBANE, 9 FEBRUARY 2026

Application to deal with contraventions involving dismissal – application lodged 4 seconds out of time – no exceptional circumstances – application dismissed

[1] Mr Khan Tim So (the **Applicant**) lodged a general protections application involving dismissal with the Fair Work Commission (the **Commission**). The Applicant claimed his employment was terminated by the Greek Orthodox Community of St George Brisbane (the **Respondent**) in breach of ss. 340, 341, 343 and 352 of the *Fair Work Act 2009* (Cth) (the **Act**).

[2] The application was lodged 4 seconds after midnight on the 22nd day following the date of dismissal. The application was lodged outside of the 21-day statutory timeframe prescribed under s.366(1)(a) of the Act. The Application can only be accepted if the Commission allows an extension of time, taking into the factors in s.366(2) which I have considered below.

Was the application lodged out of time?

[3] To be within time, the application was required to be lodged by 23:59:59:59 on 28 October 2025. The Applicant lodged his Form F8 through the Commission’s online lodgment service, MyFWC. The Form F8 is timestamped “29-Oct-2025 01:00:04 +11:00 Australian Eastern Daylight Time (New South Wales)”. It is not contested that the application was lodged in the Brisbane registry (that is recorded on the Form F8). As Queensland does not have daylight savings time, the local time of lodgment, based on the Form F8, was 00:00:04 on 29 October 2025, or four seconds after midnight on 29 October 2025, making the application out of time.

[4] The position of the Applicant is that he took “all required steps to file the application within time”. Initially, the Applicant argued that the application was, in fact, lodged within time. Subsequently, I provided information to the Applicant from the Commission regarding the date of lodgment. The application first appeared in the system at 00:00:04 (AEST) on 29 October 2025 and payment was received in the system at 00:00:44 (AEST) on 29 October 2025.

[5] On 29 October 2025, at one minute past midnight, the Applicant received an email which confirmed payment had been made for his application. The accompanying tax invoice

sent by the Commission shows a lodgment reference number. The “date/time” of payment on the tax invoice is recorded as 28 October 2025. The Applicant argued:

The Respondent relies on a lodgment advice timestamp of “00:00:04” AEST. I submit that this reflects post-payment system processing or confirmation activity rather than the time at which payment was made or the application was substantively lodged by the Applicant. I believe the contemporaneous tax invoice issued by the Commission is the most reliable evidence of timing and confirms that the application was lodged within time.

As the payment was completed on 28th Oct and I received confirmation from the Commission that this occurred within time, I submit that a minor system-generated delay of four seconds cannot properly found a jurisdictional objection. There is no prejudice to the Respondent and no basis on which the application should be dismissed or declined.

[6] I sought clarification internally regarding the discrepancy with the date of the tax invoice. I was advised that the reason why the tax invoice was dated 28 October 2025 was because the invoice was recorded in Coordinated Universal Time (UTC) time. I provided this advice to the parties. UTC is 10 hours behind AEST. Therefore, it was 14:00:04 on 28 October 2025 in UTC time when the Applicant lodged the application, while it was 00:00:04 on 29 October 2025 in AEST. I have been advised that this issue has now been corrected so that tax invoices are recorded in local time.

[7] It appears that the applicant is arguing that he completed all the necessary steps to lodge the application within time and that the delay was “processing delay” within the Commission’s system. However, the application is not lodged when the Applicant clicks “submit application”. Nor is it lodged when all necessary steps, on the Applicant’s part, are taken to lodge the application. Rule 17 of the *Fair Work Commission Rules 2024 (FWC Rules 2024)* applies to lodgment using MyFWC. Rule 17(2) states:

(2) If a document lodged in accordance with this rule is an application commencing a matter:

(a) the General Manager must send an acknowledgment of lodgment, by email, to the person lodging the document; and

(b) the application is not taken to have been lodged until the acknowledgment of lodgment has been sent; and

(c) once the acknowledgment of lodgment has been sent, the application is taken to have been lodged at the time it was received electronically by the FWC.

[8] The Applicant received an acknowledgement email on 29 October 2025 at 00:02 AEST. After an acknowledgement email is received (which is the case in this matter), an application is taken to have been “lodged” using MyFWC at the time when it was “received electronically by the FWC”.

[9] Section 14A of the *Electronic Transactions Act 1999* (Cth) states:

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.

[10] Applying s.14A of the *Electronic Transactions Act 1999* (Cth), an application is not lodged through MyFWC until it becomes “capable of being retrieved” at the relevant electronic address. Even if the Applicant had clicked “submit application” in MyFWC at 11:59:59 on 28 October 2025, the application is not lodged until it is capable of being retrieved by the Commission. In this case, according to the advice I have received, the application first appeared in the system at 00:00:04 on 29 October 2025. The application was lodged out of time.

[11] Further, the time of payment of the filing fee is irrelevant to the time of lodgment. An applicant may lodge an application without paying. Non-payment of the fee, without an approved waiver form, will render the application invalid. However, the time of payment does not change the time of lodgment of the application under the *FWC Rules 2024*.

Should an extension of time be granted under s.366(2) of the Act?

[12] Section 366 of the Act provides when a further period is granted to accept a late application.

366 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).

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

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

[13] There must be exceptional circumstances in order to be granted a further period to lodge this application. In summary, exceptional circumstances are:

- Out of the ordinary course, unusual, special or uncommon. It does not need to be unique, unprecedented or vary rare.
- It can be 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.¹

Section 366(2)(a) – Reason for delay

[14] In his written submissions, the Applicant stated:

17. Reason for the delay: if late at all, the delay is minimal (seconds to minutes) and is best explained by processing/confirmation timing around midnight, rather than any lack of diligence by the Applicant. The Commission’s own record shows payment was received on 28/10/2025 (KT-1).

[15] “[P]rocessing/confirmation timing” as a reason for delay does not make sense. There is no evidence of any internet issues which caused a delay in processing the application. It seems that the Applicant simply waited, literally, until the last second and now seeks to have the application progressed because the delay was “minor”. This is not an acceptable reason for delay. The Commission is not allowed to grant extensions of time simply because the lodgment was “close enough” to the end of the statutory timeframe.

[16] The Applicant also advised during the hearing that he sought advice from the Commission within 24 to 48 hours of being dismissed. This evidences that he knew about the 21-day limitation period and could have taken steps to ensure he filed within time. There is evidence to suggest that the form was completed in a rush, as the final parts of the form are incomplete and state: “to be discussed further”.

[17] The Applicant also faintly argued that he faced financial difficulties and that this caused him to prioritise other matters, meaning he left lodgment of the application to the last minute. Financial difficulties following termination of employment are common and do not substantiate exceptional circumstances.

[18] There is no evidence of the exact time the Applicant clicked submit in the MyFWC portal. However, even if I were to be generous and assume that occurred before midnight,

waiting until the very last second to lodge the application does, contrary to the Applicant's submission, demonstrate a lack of diligence on the Applicant's part. As I have stated, for an application to have been within time, it has to be capable of being retrieved by the Commission by that time. It is reasonable to expect that applicants take care to ensure their applications are received within time.

[19] The Applicant has provided no acceptable reason for the delay. This weighs against a finding of exceptional circumstances.

Section 366(2)(b) – Any action taken by the person to dispute the dismissal

[20] According to the Respondent, the Applicant attempted to respond to the reasons for dismissal following being dismissed during a meeting on 7 October 2025. The Respondent's representative told him that the decision was final and that there would not be further discussion. The Applicant provided evidence during the hearing that he verbally challenged the stated reasons for dismissal. I consider that this weighs marginally in favour of a finding of exceptional circumstances.

Section 366(2)(c) – Prejudice to the employer (including prejudice caused by the delay)

[21] The Respondent did not submit that it is prejudiced. It could not be sensibly argued that a delay of 4 seconds has caused prejudice to the Respondent.

[22] I consider that this is a neutral factor.

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

[23] It is not appropriate to embark on a detailed exploration of the merits of the matter when considering whether to grant an extension of time.

[24] In *Kornicki v Telstra-Network Technology Group*,² the Commission considered the principles applicable to the exercise of the discretion to extend time under s.170CE(8) of the *Workplace Relations Act 1996* (Cth). In that case the Commission said:

“If the application has no merit then it would not be unfair to refuse to extend the time period for lodgment. 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.”

[25] In short, the Applicant alleges that he was dismissed for raising issues with compliance with the NDIS code of conduct and for challenging the directions given to him. He also noted that he had taken sick leave prior to being terminated but he does not articulate how that leave was connected with his termination.

[26] The Respondent submits that the Applicant was dismissed during the probation period because he failed to complete tasks in a timely manner and had an ongoing pattern of lateness.

[27] I find the claim is not devoid of merit. This factor is neutral.

Section 366(2)(e) - Fairness as between the person and other persons in a like position.

[28] The Applicant submitted:

19. Fairness as between the Applicant and other persons in a similar position: refusing jurisdiction over a minor processing/confirmation timing issue would be disproportionate in circumstances where the Applicant took timely steps and there is no prejudice.

[29] The Commission may have consideration to fairness in matters of a similar kind that are currently before the Commission or have been decided in the past.³ The Respondent referred me to Commissioner Connolly's decision of *Michela Luppino v Family Clinics Armadale Pty Ltd, Sally Dawn Lapin* [2024] FWC 2480 in which the Applicant filed 3 seconds out of time. The Commissioner found there were no exceptional circumstances and dismissed the application. I agree that the facts of that decision are similar to this matter. It is desirable that the Commission reach a similar outcome in this matter.

[30] I find this to be a neutral factor in this application.

Conclusion

[31] I note the Applicant's view that it would be "unfair and disproportionate" to dismiss his application for a minor delay of four seconds, thereby preventing him from being heard. The Commission's role is not to go about dispensing fairness in any way it sees fit. The Commission's role is to apply the provisions of the Fair Work Act. In this case, I have no discretion to grant an extension of time unless I am satisfied that there are exceptional circumstances.

[32] Having regard to all the matters set out above, I am not satisfied that exceptional circumstances exist in this matter. Accordingly, the extension of time is not granted and the application is dismissed.

[33] I Order accordingly.



Appearances:

K So for the Applicant

H Schoenherr for the Respondent

Hearing details:

9 February 2026

Hearing via Microsoft Teams

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¹ *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [13].

² Print P3168, 22 July 1997 per Ross VP, Watson SDP and Gay C.

³ *Perry v Rio Tinto Shipping Pty Ltd* [2016] FWCFB 6963