[INDUSTRIAL RELATIONS COURT OF AUSTRALIA]

BRODIE-HANNS v MTV PUBLISHING LIMITED

Marshall J

31 October 1995

Termination of Employment — Initial application filed under provisions of Employee Relations Act 1992 (Vic) — That application held made out of time and application not heard on its merits — Applicant did not appeal — Application to Industrial Relations Court of Australia pursuant to s 170EA of the Industrial Relations Act 1988 (Cth) — Application sought an extension of time — Principles to be applied — Explanation of delay — Prejudice to respondent — Application dismissed — Industrial Relations Act 1988 (Cth), ss 170EA, 377.

MARSHALL J.

Background

The applicant was employed by the respondent as its Administrative Manager from August 1993 until August 1994. The respondent is a publisher which produces a magazine called *Cinema Papers*. On 29 August 1994 the applicant applied for an order under Div 1 of Pt 5 *Employee Relations Act* 1992 (Vic) (the State Act). Section 38(1) of the State Act provides as follows:

> ''[Application for order] If an employer dismisses, or threatens to dismiss, an employee and the employee believes that the dismissal, or threatened dismissal, is harsh, unjust or unreasonable, the employee, if eligible to do so under section 39, may apply for an order under this Division.''

The application under the State Act was heard by Commissioner Turner of the Employee Relations Commission of Victoria (ERCV) on 12 December 1994. No issue arose as to whether s 39 of the State Act operated to make the applicant ineligible to make the application. The only issue dealt with by the ERCV was whether the application was lodged with the ERCV in accordance with s 40 of the State Act. That section provides that:

> ''An application for an order may be lodged with the Commission at any time before an employee is dismissed up until 10 business days after a dismissal.''

Commissioner Turner held that the applicant's employment had come to an end on 10 August 1994 and that she had until the close of business on 24 August 1994 to lodge her application. The Commissioner found that as the applicant had lodged her application on 29 August 1994, s 40 operated to prevent the ERCV from hearing the application on its merits. The applicant had submitted before the ERCV that her last day at work was 15 August 1994 and that therefore her application was within time. Commissioner Turner rejected the submission that the applicant's employment continued until 15 August 1994. He found that she had attended at the place of her former employment

beyond her dismissal and until 15 August 1994 but not for the purpose of carrying out duties which she was to be paid to perform.

The decision of Commissioner Turner was a reserved one. It was delivered and published on 10 February 1995 (decision E95/0035). It was open to the applicant pursuant to Div 1 of Pt 13 of the State Act to lodge an appeal against the decision of Commissioner Turner. An appeal lay pursuant to s 140 of the State Act to the ERCV in Full Session. Under s 141 of the State Act the applicant was a person affected by the decision. Section 142 of the State Act provides a time limits of 10 business days from the date of the decision for the lodging of an appeal. The applicant had until 24 February 1995 to lodge an appeal but did not do so.

On 23 February 1995, the applicant filed in the registry an application pursuant to s 170EA *Industrial Relations Act* 1988 (Cth) (the Act). The application sought various orders including reinstatement, compensation and ''an extension of time''. The request for ''an extension of time'' was obviously a request to invoke the jurisdiction of the Court under s 170EA(3)(b) of the Act to extend the time within which an application under the section may be made to beyond the 14 day time limit from the receipt of written notice of the termination of the applicant's employment. The written notice of termination in this matter was dated 8 August 1994. It was given to the applicant by Mr Murray of the respondent on 9 August 1994. When the applicant applied to the ERCV on 29 August 1994, more than 14 days had expired from the receipt by her of written notice of the termination of her employment by the respondent.

On 20 March 1995 the respondent moved the Court for an order that the application before the Court be dismissed. The notice of motion was heard by Judicial Registrar Ryan on 4 April 1995. On that day the judicial registrar dismissed the application and refused to extend the time within which the application could be lodged in compliance with the Act.

On 26 April 1995 the applicant moved the Court for orders that the judgment of the judicial registrar be set aside and that ''an extension of time be granted for this application''. The first order sought was effectively an order pursuant to s 377(1) of the Act that the exercise of power by the judicial registrar be reviewed. It is not clear whether the second order sought relates to the application or the notice of motion. The Court will treat it as relevant to the application because the notice of motion was filed on the last permissible day in accordance with O 74, r 3 of the Rules of Court when read with O 3, r 3.

Principles for extension of time

The relevant principles which should govern the Court's discretion to extend the time within which an application under s 170EA of the Act may be lodged are set out in the decisions of Keely J in *Transport Workers Union of Australia v National Dairies Ltd (No 2)* (1994) 57 IR 186 and Beazley J in *Turner v K & J Trucks Coffs Harbour Pty Ltd* (1995) 61 IR 412. In each case the Court applied the tests referred to by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 349.

I agree, with respect, that those principles are appropriate to be applied in the circumstances of this matter.

Briefly stated the principles are:

1. Special circumstances are not necessary but the Court must be

positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.

2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion.

Explanation of the delay

The applicant claims that she was unaware that she had a possible avenue of redress in the Court until immediately after the decision of Commissioner Turner on 10 February 1995, when she was so advised by a representative of the Media Entertainment and Arts Alliance (MEAA).

Her evidence was that the MEAA representative advised her of her ability to seek an extension of time under s 170EA(3) of the Act. Such evidence is not inconsistent with possession by her of knowledge at the time she lodged the ERCV application that she had recourse under the Act. In fact it was the evidence of Mr Murray that the applicant told him on 14 September 1994 that she deliberately chose to make her application in the ERCV instead of seeking to invoke the jurisdiction of the Court. In the circumstances it is exceedingly difficult for the Court to determine that there has been an acceptable explanation for the delay.

Other action taken by applicant

The other action taken by the applicant left the respondent in no doubt that its decision to terminate her employment was in active dispute up to a fortnight before she filed her application under s 170EA of the Act. However, the context of that other action (apart from her initial approach to the respondent to reconsider its decision) was completely in the nature of her pursuit of an alternative avenue of redress to the one provided for by the Act. Whilst ordinarily the taking of steps designed to challenge the termination may assist in the attaining of an extension of time, I believe, in the instant circumstances, that such a factor is neutral.

Prejudice to the respondent

The respondent is a small employer which only has one full-time and one part-time employee. It relies, in part, on subsidies to cover its operating costs. It should not be lightly put to the cost and inconvenience of defending an application lodged out of time unless the interests of justice so dictate. Further, the delay occasioned by the lateness in bringing the application will doubtless impact on the recollections of the respondent's officers concerning the relevant

events relating to the applicant's termination. This aspect favours the respondent.

Merits of the application

In the circumstances the Court has not had available to it any evidence to justify it holding any view on the merits of the matter. This aspect is neutral.

Fairness as between others in like positions

In the circumstances this criterion provides little assistance to the resolution of the issue before the Court. To the extent that it does provide assistance it favours the respondent in that this Court should not encourage late applications before it where remedies have been denied by an industrial tribunal of a State albeit one which fails to provide an adequate alternative remedy.

Conclusion

Given the inadequate explanation for the delay in instituting proceedings and the prejudice to the respondent that arises from such delay, it is the view of the Court that the notice of motion should be dismissed.

Order

The order of the Court will be:

1. The applicant's motion brought by notice of motion filed on 26 April 1995 be dismissed.