[AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION]

CLARK v RINGWOOD PRIVATE HOSPITAL

Ross VP, Drake DP, Deegan C

22 September 1997

Termination of Employment — Application for extension of time to lodge application — Principles — Appeal — Consideration of representative error — May be sufficient reason — Delay on part of representative need not be visited upon the applicant — Distinction between delay caused by representative and delay caused by applicant — Conduct of applicant central consideration — Error by representative only one of number of factors to be considered — Whether an acceptable explanation for the delay — Merits of substantive application — Application granted — Workplace Relations Act 1996 (Cth), s 170CE(8).

THE COMMISSION.

Background

This matter concerns an appeal against a decision of Deputy President Watson in which his Honour refused to grant an application under s 170CE(8) of the *Workplace Relations Act* 1996 (Cth) (the Act) to extend the time within which an application for relief in respect of termination of employment must be lodged (see Print P0439).

Section 170CE(7) requires that an application for relief in respect of termination of employment must be lodged within 21 days after the day on which the termination took effect.

Mr Clark's termination took effect on 6 December 1996 and he lodged his application for relief in respect of the termination of his employment on 14 February 1997.

To meet the time limit prescribed in s 170CE(7) the application in this matter should have been lodged by 27 December 1996. The application was some 48 days late.

The facts in this matter are set out in the decision subject to appeal. Briefly put Mr Clark was employed by Ringwood Private Hospital as a maintenance officer from April 1989 until his termination which took effect on 6 December 1996.

A meeting took place on 31 October 1996 between Mr Clark, Ms C Royle, the hospital's Executive Director, the finance manager and Ms J McCallum. After that meeting Mr Clark was given a letter which stated, among other things:

> "Mitcham Private Hospital and Ringwood Private Hospital are grouped as a Business Unit, and as such are able to rationalise some services between the two hospitals.
>
> I regret to inform you that in the area of Maintenance, it has been

decided that this service can be conducted by the staff from Mitcham Private Hospital Maintenance Department. This will mean that your position would become redundant at Ringwood Private Hospital, effective from December 6, 1996.''

The respondent submitted that the decision to terminate the applicant was a result of a review of the operations of Ringwood Hospital and a decision to contract out its maintenance functions to the maintenance department at Mitcham Private Hospital. This was contested by the applicant who argued that the termination was in fact based on performance issues dressed up as a redundancy.

During the course of Ms Royle's evidence below the following exchange took place in relation to the meeting with Mr Clark on 31 October 1996 (ts, 2 April 1997, p 31 at lines 3-13):

''Mr Douglas: And what did you advise him?

Ms Royle: I informed Mr Clark about the liaison between Mitcham Hospital and Ringwood Hospital and that we were looking at running the maintenance currently from Mitcham Hospital through to Ringwood Hospital.

Mr Douglas: Yes, and did Mr Clark raise any concerns about the decision that had been made?

Ms Royle: No, at the meeting he said that he understood and that redundancy was something that was happening quite a lot. In fact it was quite an amicable meeting.

Mr Douglas: Right, and after that meeting you then gave him a letter in relation to the content of that meeting, did you not?

Ms Royle: Yes.

Mr Douglas: Yes, and that letter is dated 31 October 1996?

Ms Royle: That is right.''

The following exchange took place during the course of Ms Royle's cross-examination (ts, 2 April 1997, p 34 at lines 1-2, 10-12):

''Mr Bailey: Any of this put to Mr Clark that we are going to prefer someone else because of performance considerations?

Ms Royle: As I've already said it wasn't just performance, there was a cost issue in here as well. There was ...

Mr Bailey: Yes, the performance was an issue, was it not?

Ms Royle: Performance, competency is an issue whenever you are looking at ...

Mr Bailey: A big issue. But none of it was ever put to Mr Clark, was it?

Ms Royle: No, that's not true. Certainly whenever we had any concerns with regard to maintenance I spoke with Mr Clark.

Mr Bailey: Yes, but in the context of a possible redundancy none of it was put to Mr Clark?

Ms Royle: Not — no.

Mr Bailey: No. And nor was there any consultation with him as to how the redundancy could be avoided?

Ms Royle: No, but certainly as we were going through the discrepancy process I spent many, many hours talking with Mr Clark about the possibility of ending up being dismissed as a result of performance.

Mr Bailey: I am putting to you that this is not a disciplinary procedure,

this is to do with counselling or asking Mr Clark whether there is an alternative to redundancy; was that raised with him?

Ms Royle: No."

In our view the above extracts from Ms Royle's evidence and the extract we set out at 421-422 of this decision, support the following findings:

1. Performance was one of the reasons why Mr Clark was selected for redundancy.
2. When Mr Clark was informed that he was being made redundant, performance issues were not raised with him.
3. Alternatives to redundancy were not canvassed during the meeting of 31 October 1996.

The evidence below also supports a finding that Mr Clark did not make it clear to the respondent that he intended to contest his termination.

In the course of his evidence the applicant stated that at the meeting on 31 October he said to Ms Royle (ts, 2 April 1997, p 17 at lines 18-20):

"... because I had been made redundant, I can't complain about it."

Further, it is clear from Mr Clark's evidence that he did not approach the hospital's management at any time prior to lodging his application for relief to express any concerns over his termination (see ts, 2 April 1997, at 27-28).

Mr Clark contacted his then solicitor, a Mr Lees of Mulcahy, Mendelson and Round, on 31 October 1996. Mr Lees advised him to wait until the hospital employed someone to perform the work he previously performed. Mr Clark contacted Mr Lees on two further occasions before the end of 1996 and received the same advice (see ts, 2 April 1997 at p 18).

In the course of his evidence Mr Clark said that he contacted his current solicitors on 11 February 1997 (ts, 2 April 1997, p 19 at lines 11-13):

"I felt things weren't right. To me, the waiting for somebody to go on full time even — I was made redundant. It didn't seem right. I decided to get another — a second opinion."

Mr Clark also gave evidence that since his termination he had undertaken investigations into the way in which his former work was being performed (see ts, 2 April 1997, p 19 at lines 3-5).

The essence of the case put on behalf of the applicant in the proceedings below was that there was an acceptable explanation for the delay and it would be unfair to the applicant if the application was not accepted.

The acceptable explanation related to the fact that the delay had been occasioned by what later turned out to be inappropriate advice provided to Mr Clark by his former solicitors. Mr Bailey also submitted that the applicant's former solicitors had been misled by the termination letter of 31 October 1996 as that letter did not disclose the real reason for Mr Clark's termination, namely performance issues.

As we have already noted the application was some 48 days late.

Section 170CE(8) provides that an application that is lodged out of time may be accepted if "the Commission considers that it would be unfair not to do so".

On 29 April 1997 Deputy President Watson issued the decision which is the subject of this appeal. The Deputy President decided that it would not be unfair to the applicant if the application was not accepted. In the course of his decision his Honour said (Print P0439, p 6):

"I agree with and adopt the approach of Murphy JR in *Watts* and Leary C

> in *Jordan* that when an applicant puts a matter in the hands of a representative and the representative has failed to take appropriate action within the statutory time period this, of itself, does not constitute an acceptable explanation for delayed lodgment which would justify acceptance of the application out of time.
>
> In the present matter, the application was lodged 7 weeks late, with the application lodged 15 weeks after the applicant was first made aware of his termination and legal advice was first sought. At no stage during that 15 week period, until the lodgment of the application, was the respondent made aware that the termination was challenged. Indeed the respondent believed from the 31 October 1996 meeting that the applicant was accepting of the termination.
>
> In those circumstances I am not satisfied that the alleged erroneous advice of the applicant's first solicitors in itself provides a sufficient basis for the long delay in bringing of the application. In the absence of an acceptable explanation of the delayed lodgment, I am not satisfied that it would be unfair not to accept the application. Accordingly, the application is not accepted out of time.
>
> I note that the parties put considerable evidence before me on the merit of the claim brought by the applicant. In reaching my decision I formed a view that the claim was not so lacking in merit that it should count against acceptance of the application out of time. I am satisfied that there existed a case which was potentially arguable at least in relation to the issues of choice of the applicant for redundancy and the failure to put any performance related issues involved in the choice to him."

We also note that on p 4 of his decision the Deputy President rejected a submission by Mr Bailey, appearing on behalf of the applicant, that "the requirement for an acceptable explanation has been watered down in the context of s 170CE(8) of the present Act".

Relevant principles

The principles applicable to the exercise of the Commission's discretion under s 170CE(8) were considered in *Telstra-Network Technology Group v Kornicki* (unreported, AIRC, Print P3168, 22 July 1997) per Ross VP, Watson SDP and Gay C.

At p 10 of that decision the Commission said:

> "In enacting s 170CE(8) Parliament has clearly chosen to use different language to that which appeared in the former s 170EA(3)(b). In particular the words 'if the Commission considers that it would be unfair not to do so' suggest that considerations of fairness towards an applicant are central to the exercise of the discretion . . .
>
> We agree with Mr Staindl's submission that s 170CE(8) is intended to convey an approach to the exercise of the Commission's discretion which is more generous to applicants than that which prevailed under the former s 170EA(3)(b).
>
> The prima facie position is that the legislative time limit should be complied with and an applicant seeking to pursue an application lodged out of time must persuade the Commission to exercise the discretion in s 170CE(8) in their favour.
>
> The central consideration in determining whether or not an out of time

application should be accepted is whether it would be unfair to the applicant not to extend the time limit. We note that such a consideration necessarily involves the exercise of a general discretion. The following guidelines may assist in determining whether it would be unfair not to grant an application to extend time:

A. Primary consideration should be given to two factors:

- Is there an acceptable explanation for the delay? It would generally not be unfair to refuse to accept an application lodged out of time where no acceptable explanation for the delay exists: *Alonzo v Harvey Norman-Fyshwick* (unreported, AIRC, Print P0319, 21 April 1997 per Ross VP, Watson DP and Gay C). However, consistent with the view of Brooking J in *Dix v Crimes Compensation Tribunal*, while the existence of an acceptable explanation for the delay is relevant to the exercise of the discretion under s 170CE(8), it is not a condition precedent to the exercise of that discretion; and
- The merits of the substantive application. 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.

B. Depending on the circumstances of a particular case the provision of a 'fair go all round' may also allow regard to be had to the following considerations:

- Whether the applicant actively contested the decision to terminate his or her employment prior to lodging the application for relief; and
- Prejudice to the respondent caused by the delay in filing the application.

We note however that these considerations are very much secondary in nature and are, of themselves, unlikely to be determinative of an application.

We emphasise that the matters set out above are *guidelines only*. In taking into account any of the factors identified the Commission will be cognisant of the prima facie position that the legislative time limit be complied with and in deciding whether to accept a late application the central consideration is whether it would be unfair to the applicant not to accept the application.

Given the broad nature of the discretion in s 170CE(8) the question of whether or not an application for an extension of time should be granted in a particular case will largely be a matter for the impression and judgment of the Commission member at first instance. It follows that such decisions would only rarely be overturned on appeal.''

Decision

The decision in *Kornicki* makes it clear that s 170CE(8) is intended to convey an approach to the exercise of the Commission's discretion which is more

generous to applicants than that which prevailed under the former s 170EA(3)(b).

The Deputy President's decision was handed down before the decision in *Kornicki*. In rejecting Mr Bailey's submission that the requirement for an acceptable explanation has been "watered down" in the context of s 170CE(8), as opposed to the position in relation to the former s 170EA(3)(b), his Honour fell into error as a more generous approach now applies to s 170CE(8) applications. The Deputy President's decision does not disclose that he applied the more liberal approach now applicable to the exercise of the discretion in question.

As was noted in *Austin v Qantas Airways Ltd* (unreported, AIRC, Print P4317, 21 August 1997 per Ross VP, Drake DP and Hodder C) no fault can be ascribed to the Deputy President in this regard as he clearly could not have taken the *Kornicki* decision into account as it had not been handed down at the time he issued his decision.

We are satisfied that the Deputy President erred in that he applied the wrong principles to the determination of the matter before him.

In this regard Mr Douglas referred to *Kornicki* and argued that the Commission should be reluctant to overturn a decision of a member pursuant to s 170CE(8) as such decision is largely "a matter for the impression and judgment of the Commission member at first instance". We agree with the proposition that where the guidelines established in *Kornicki* are properly taken into account it would be rare for such decisions to be disturbed on appeal. But that is not what happened in this case. As we have noted, the decision subject to appeal does not disclose that the more liberal approach now applicable to extension of time applications was in fact applied in this case.

We grant leave to appeal and for the reasons set out below uphold the appeal.

We now turn to consider for ourselves, on the basis of the material put at first instance and on appeal, whether the application should be accepted pursuant to s 170CE(8). We indicated to the parties that such an approach was open to us and no objection was taken to that course.

In this case the effect of representative error is an important consideration in deciding whether or not to exercise our discretion under s 170CE(8).

The question of whether an error by an applicant's representative constitutes an acceptable explanation for delay in filing an application for relief needs to be considered in the context of the general discretion in s 170CE(8) and having regard to the observations made in *Kornicki*. In this respect Commission decisions which deal with this question but were decided before *Kornicki* need to be treated with caution. In our view the following general propositions should be taken into account in deciding whether or not representative error constitutes an acceptable explanation for delay:

(1) 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: see *Sophron v Nominal Defendant* (1957) 96 CLR 469 at 474; *Jess v Scott* (1986) 12 FCR 187; *Martin v Nominal Defendant* (1954) 74 WN (NSW) 121 at 125; *Winter v Deputy Commissioner of Taxation* (1987) 87 ATC 4065; *Comcare v A'Hearn* (1993) 45 FCR 441; *Turner v K & J Trucks Coffs Harbour* (1995) 61 IR 412.

In *Comcare v A'Hearn* a Full Court of the Federal Court held that delays by a solicitor need not be visited upon a client and inexcusable delay on the part of

a solicitor may amount to an acceptable explanation for the delay in making an application. The Court said at 443-444:

> "A consistent thread thus revealed in the reasoning is that the tribunal considered that delays by a solicitor were to be visited upon a client. Thus, despite the inexcusable delay on the solicitors' part that the tribunal found, it was able to say that there was 'no acceptable explanation whatsoever' for the delay. This approach cannot stand in the light of modern authorities such as *Jess v Scott* (1986) 12 FCR 187; see also *Lighthouse Philatelics Pty Ltd v FCT* (1991) 32 FCR 148 at 156.
>
> In our view, therefore, the primary judge was correct in concluding that the tribunal's reasons did reveal an error of law and he was correct in deciding that the matter ought to be remitted to the tribunal for further consideration according to law."

(2) 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. In *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 Wilcox J said at 351:

> "... although the fact that a relevant failure is the fault of the solicitor for a party rather than the party himself does not of itself amount to sufficient cause to excuse the delay 'the blamelessness of the claimant and the responsibility of his solicitor is very material': see *Sophron v The Nominal Defendant* (1957) 96 CLR 469 at 474. It would be erroneous to treat the fault of the solicitors as if it were the direct fault of the client."

Further in *Coyne v Ansett Transport Industries (Operations) Pty Ltd* (unreported, Industrial Relations Court of Australia, Marshall J, 9 May 1996) Marshall J noted:

> "However, as Wilcox J made clear in *Hunter Valley Developments Pty Ltd v Cohen* at 351, a delay by a solicitor although not necessarily to be treated as the direct delay of a client is not necessarily a sufficient basis to excuse the delay in bringing an application. Given the initial delay in the applicant's raising the matter of his termination of employment with his solicitors, it is my view that such inertia would not have enlivened the solicitors to the urgency of the matter. Therefore, some blame should be visited upon the applicant for the slow reaction of his solicitors."

His Honour's judgment was subsequently upheld on appeal: see *Coyne v Ansett Transport Industries (Operations) Pty Ltd* (unreported, Industrial Relations Court of Australia, Wilcox CJ, Ryan and Madgwick JJ, 24 September 1996). In the course of its judgment the Full Court said:

> "The delay from 25 April 1995 is attributable to a combination of apparent ignorance or oversight by the appellant's solicitors of the existence of the time limit and the time taken by the appellant to raise the money required by those solicitors as a condition of instituting proceedings. We find nothing erroneous in the learned primary Judge's analysis of those facts or his discussion of the circumstances in which a solicitor's delay or negligence may prejudice a client's application for extension of time."

(3) 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 his/her representative and took no steps to inquire as to the status of his/her claim. A different situation exists where an applicant gives clear instructions to his/her 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.

(4) Error by an applicant's representatives is only one of a number of factors to be considered in deciding whether or not an out of time application should be accepted pursuant to s 170CE(8).

We now turn to consider the application of the guidelines set out in *Kornicki* and the above observations about representative error to the circumstances of this case.

(i) Is there an acceptable explanation for the delay?

We are satisfied that there was an acceptable explanation for at least part of the delay in this case. In particular part of the delay was a result of the applicant acting on inappropriate advice given by his solicitor. In this regard it is important to note that the applicant was vigilant in contacting his solicitor and indeed spoke to him on three occasions about this matter before the end of 1996.

It is also relevant in this context that the reasons provided to Mr Clark for his termination by the respondent did not fully disclose the factors which led to the decision to terminate his employment. In particular Mr Clark was not informed that performance issues were a consideration in his dismissal. If Mr Clark had been so informed and had communicated this to his solicitor then the advice he received may well have been different.

We also note that in the period prior to lodging his application for relief the applicant was actively investigating the circumstances surrounding his redundancy.

(ii) The merits of the substantive application

The respondent submitted that the substantive application was devoid of merit. The basis of this submission was that Mr Clark's dismissal was for reasons of redundancy associated with the hospital's decision to contract out its maintenance services. As Mr Clark was the only maintenance employee at Ringwood Hospital it was argued that the decision in *Kenefick v Australian Submarine Corporation Pty Ltd (No 2)* (1996) 65 IR 366 was not relevant. In essence it was put that it was only necessary to put allegations of poor performance in a redundancy context where the person concerned was being selected from a pool of employees. In this case Mr Clark was said to be the only employee concerned, so the question of who should be selected for redundancy did not arise.

We are unable to accept the respondent's submissions on this point. In our view it is clear from Ms Royle's evidence that the employer selected Mr Clark for redundancy out of the maintenance employees at both Ringwood and Mitcham hospitals. The following extract from Ms Royle's evidence makes this clear (ts, 2 April 1997, p 33 at lines 27-35, p 34 at lines 1-22):

> "Mr Bailey: And what has happened is that it is not a true redundancy because the work is still there?
>
> Ms Royle: No, it was a true redundancy insofar as we restructured the

maintenance and how the maintenance was being carried out at Ringwood Hospital.

Mr Bailey: You restructured? Now what you did is that you got Mr Jerry Veldhuizen — is that the right pronounciation?

Ms Royle: Mr Veldhuizen.

Mr Bailey: Veldhuizen, who works at Mitcham?

Ms Royle: That's right.

Mr Bailey: To come in and do some of the work?

Ms Royle: Mr Veldhuizen is the Maintenance Manager at Mitcham Hospital.

Mr Bailey: That is right?

Ms Royle: He's now overseeing the maintenance at Ringwood Hospital.

Mr Bailey: Now why was not Mr Veldhuizen made redundant instead of Mr Clark?

Ms Royle: Okay. There are a couple of very clear reasons as to why we didn't make Mr Veldhuizen redundant. First, the man had a very clean slate. His performance was impeccable. His responsiveness to the maintenance tasks in his hospital were absolutely no question. He was significantly — he cost significantly less than Mr Clark did and, thirdly, he had been with the company certainly a lot longer than Mr Clark had as well.

Mr Bailey: Yes. So you decided to dismiss Mr Clark rather than Mr Veldhuizen on the basis of performance criteria?

Ms Royle: No. We looked at how we could better do our maintenance tasks at Ringwood Hospital . . .

Mr Bailey: And you chose what in your view was the better maintenance man, the one over in Mitcham?

Ms Royle: Certainly when you are looking at redundancy and you have three people to choose from you clearly look at performance; you look at what it costs the company and, obviously, then a decision is made. And I believe that decision was made very fairly."

We are satisfied that the applicant has established that the substantive application is not without merit.

(iii) Other considerations

Three other issues need to be considered in the context of the matter.

First, it is apparent that prior to lodging his application for relief the applicant did not take any steps to make it clear to the respondent that he contested his termination.

Secondly, the respondent submitted that if Mr Clark's substantive application was successful then the respondent would suffer prejudice. It was argued that the respondent had made other arrangements to have the maintenance function performed and if reinstatement was ultimately awarded then those arrangements would have to be set aside. We note that the respondent did not identify any prejudice which was particularly referable to the delay in filing the application. For example it was not argued that key witnesses were now unavailable.

Thirdly, as we have already noted, at the time Mr Clark was informed of his dismissal the respondent did not fully disclose the reason which led to the decision to terminate his employment.

We have decided, having regard to the matters identified above that, on balance, it would be unfair to the applicant if we did not accept his application.

We will exercise our discretion under s 170CE(8) and accept the application.

The file will now be referred to a member of the Commission for conciliation.

(P5279.)