DAVIDSON v ABORIGINAL & ISLANDER CHILD CARE AGENCY

Ross VP, Watson SDP, Eames C

12 May 1998

Termination of Employment — Election to proceed to arbitration or begin court proceedings — Application to extend time to lodge election — Party unrepresented in proceedings below — Application refused — Appeal — Discretion of Australian Industrial Relations Commission to accept election out of time if it considers it would be unfair not to do so — Factors to be considered — Error by party's representatives — Whether an acceptable explanation for delay — Role of Commission in relation to unrepresented parties — Necessary to balance interests of unrepresented litigants with need to afford procedural fairness — Leave to appeal refused — Workplace Relations Act 1996 (Cth), ss 45, 170CFA(8).

THE COMMISSION.

Introduction

This matter concerns an appeal by C Davidson (the appellant) against a decision by Commissioner Gay in Print P7711 not to accept an out of time s 170CFA election, pursuant to s 170CFA(8) of the *Workplace Relations Act* 1996 (the Act).

The decision subject to appeal arises out of a s 170CE application by the appellant in U80127 of 1997. Following conciliation before Commissioner Redmond in Darwin on 19 September 1997, a s 170CF certificate was issued on that day. Section 170CFA(6) provides that an election to proceed to arbitration to determine whether a termination was harsh, unjust or unreasonable must be lodged with the Commission ''not later than seven days after the day of issue of the certificate by the Commission under s 170CF(2) in relation to the application''. A completed R23 election form was received in the Northern Territory Registry on 7 October, 11 days beyond the period prescribed in s 170CFA(6) of the Act. Section 170CFA(8) provides that the Commission may accept an election that is lodged out of time if the Commission considers that it would be ''unfair not to do so''.

The matter was listed before Commissioner Gay in Darwin on 24 November

1997 for the purpose of determining whether the election should be accepted, out of time, pursuant to s 170CFA(8) of the Act. Following an adjournment, Commissioner Gay decided in transcript on that day not to exercise the discretion in s 170CFA(8) in favour of the appellant. The decision in transcript was later reproduced, in a slightly edited form, in Print P7711.

In his decision, Commissioner Gay states that he applied the principles established in *Kornicki and Telstra Network Technology Group* (unreported, Print P3168, 22 July 1997) (*Kornicki*). He concluded in the following terms: ''I have not been persuaded that there is an explanation for the delay such as to warrant extension. It would therefore not be unfair to the applicant not to accept the application. I refuse the application.''

The proceedings at first instance

In the proceedings below the appellant represented herself. The respondent was legally represented. Commissioner Gay was conscious of the unrepresented status of the appellant. At the commencement of the proceedings, he said: ''I want you — you are unrepresented so I want to make it clear to the parties generally, but to you, so you know what the process is, you know what is happening at every step as we go along.'' [Transcript 24 November 1997, 2 at lines 20-23]

The Commissioner went on to say:

''The Commissioner:	I am conscious that you are unrepresented and so I am going to tell you that there has been an unsuccessful conciliation.
Ms Davidson:	That is right.
The Commissioner:	And the Commissioner gave a certificate to you and a copy to Mr Gosford's party which made it clear that you had seven days to elect, if you chose to do so, to go on and have your claim arbitrated. Do you remember that?
Ms Davidson:	Yes I do.
The Commissioner:	... So what I am now doing is hearing your application that I should accept your election out of time. Do you understand that?
Ms Davidson:	Yes. Yes, Commissioner.''

[Transcript 24 November 1997, 3 at lines 9-30]

The Commissioner then drew the appellant's attention to the terms of s 170CFA(7) and (8) and said:

> ''Now, do you understand that? That is why we are here. I am looking for you to tell me why — explain the circumstances why the application was not — the election was not in on time, there is an objection to it and why I should now grant an extension in relation to the late lodgment.'' [Transcript 24 November 1997, 4 at lines 27-30]

The Commissioner then took the appellant to the relevant dates — the date of the certificate (19 September), the date for the making of an election in compliance with s 170CFA(6) (26 September) and the date of the filing of the election (7 October). The Commissioner went on to question the appellant in relation to the steps she had taken, by contacting her solicitor, to ensure that her notice of election was lodged with the Commission. The appellant had recourse to and utilised her diary in responding to the Commissioner's questions.

During the course of the respondent's submissions, the Commissioner explained to the parties the principles in relation to extension of time applications which had been adopted by a Full Bench in *Kornicki*.

The respondent did not submit that the substantive application was so lacking in merit as to constitute a factor against the acceptance of the application out of time. Rather it was argued that in the absence of evidence the issue of merit would be neutral. Nor did the respondent submit that it had suffered a prejudice as a result of the late election.

On the basis of the appellant's account of the events the respondent submitted that she had taken no steps between 19 September and 26 September to ensure that her solicitor had lodged the notice of election.

During the course of the appellant's reply Commissioner Gay drew her attention to the respondent's submission that she had taken no steps before 26 September to ensure that her solicitor had filed the notice of election. In response the appellant referred to telephone and personal contact with her representative's firm on 30 September and 3 October. Both these dates were after the time period within which the election should have been lodged with the Commission.

The Commissioner then announced that he would adjourn briefly and would hand down his decision after the adjournment.

Upon resuming, the Commissioner confirmed that he would hand down his decision. Before doing so the appellant sought to introduce some new information. The Commissioner allowed her to do so. The appellant stated that, following further recourse to her diary, she had contacted her representative on 23 and 25 September and had asked if her election had been lodged. She was assured that it had been lodged.

The Commissioner said that the additional information did not change his conclusion and proceeded to issue the decision which is the subject of this appeal.

Submissions on appeal

The appellant advanced six (amended) grounds of appeal, namely that the Commissioner:

1. Misdirected the appellant as to the information relevant to her application according to the principles in *Kornicki*.
2. Failed to give the appellant an opportunity to provide the facts as evidence on oath.
3. Erred in treating the late submissions of the appellant after reopening the hearing as irrelevant and insufficient to cause him to change the conclusion earlier reached.
4. Erred in finding that it was not unfair to the appellant to accept the application.
5. Erred in failing to find that the respondent had notice within the time period prescribed by s 170CFA(6) of the appellant's intention to prosecute her claim.
6. Erred in visiting upon the appellant the inaction of her legal representatives.

The grounds of appeal can be distilled into two broad issues:

- In reaching his decision and in his questioning of the appellant the Commissioner erred in that he restricted himself to the question of the

explanation of the delay in making the election, at the expense of the consideration of a broader range of issues relevant to the exercise of his discretion.

- The Commissioner erred in not accepting and acting upon an uncontested submission by the appellant, following the reopening of the hearing, that she had twice followed up the filing of the election with her legal representative, within the time period prescribed within s 170CFA(6).

The respondent advanced the following submissions:

1. Leave to appeal should be refused as no grounds had been made out for granting leave.
2. The hearing before the Commissioner at first instance was conducted on the basis that it was not put that a prejudice to the respondent arose from the late election or that the application was so lacking in merit that no purpose would be served by accepting the election out of time. Accordingly, the focus of the hearing was properly upon the explanation for the delay in the making of the election.
3. Commissioner Gay was entitled to conclude that the appellant was not blameless in respect to the delay. In this context, he was entitled to question the credibility of the appellant's account of the steps taken by her to ensure the filing of the election in time.
4. Commissioner Gay correctly applied the principles in respect of representative error in *Clark v Ringwood Hospital* (1997) 74 IR 326; [Print P5279] (*Clark*).

Relevant principles

Three broad issues of principle are raised by this appeal:

- the general approach to the exercise of the discretion in s 170CFA(8);
- the relevance of representative error to the exercise of discretion under s 170CFA(8); and
- the role of the Commission in relation to unrepresented parties.

We propose to deal with the principles relating to each of these issues before considering their application in this case.

1. The general approach to s 170CFA(8)

In deciding the matter before him, the Commissioner applied the principles in relation to the exercise of the discretion under s 170CE(8) in *Kornicki*. In his decision, the Commissioner said:

> ''The issues brought to notice in this matter were not argued according to recent authority and it was necessary for the Commission to attempt to focus upon the issues by reference to the approach as to extension of time set out in *Kornicki and Telstra Network Technology Group*. I should say that I have applied the authority relevant as to s 170CE(8) in relation to the s 170CFA(8) discretion, particularly as to the centrality of considerations of fairness to the applicant. In applying *Kornicki*, one is reminded that prima facie, the position is that the legislative time limit is to be complied with subject to the fairness consideration. I have not had regard for any merit considerations and am unable to accept that prejudice, other than that normally resulting from a live application, accrues to the respondent.''

The Full Bench in *Kornicki* stated:

> ''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, Print P0319, 21 April 1997 per Ross VP, Watson DP and Commissioner Gay). 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 cognizant 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.''

We think the approach in *Kornicki* is also relevant to the exercise of the discretion in s 170CFA(8), except that the contesting, or otherwise, of a termination decision prior to the lodgment of a s 170CE application would have little relevance to the discretion under s 170CFA(8).

2. Representative error

In *Clark* the Commission decided that the following general propositions should be taken into account in determining whether or not representative error constitutes an acceptable explanation for delay:

(i) 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.

(ii) 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.

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

(iv) 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.

While the above observations were made in the context of the exercise of a discretion under s 170CE(8) they apply with equal force to s 170CFA(8).

3. Unrepresented parties

In the context of the general court system the respective roles of the judge and of counsel have been discussed in many cases. Two cases in the English Court of Appeal are frequently cited: *Yuill v Yuill* [1945] 1 All ER 183 and *Jones v National Coal Board* [1957] 2 QB 55. In a famous passage in *Jones* Denning LJ expressed the traditional view in the following terms:

> ''. . . The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the point that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.' ''

However as Wilcox CJ observed in *Spiteri v Monocure Pty Ltd* (1995) 62 IR 359, the continuing relevance of the above statement needs to be re-evaluated in the light of contemporary circumstances. The statement assumes competent representation on each side. It takes no account of the problem of the unrepresented, or incompetently represented, litigant. Nor does it take into account the workload pressures which have caused most courts and tribunals to

adopt case management techniques. These and other features of modern litigation have had a profound effect on the role of judicial officers: see generally Ipp DA, 'Judicial Intervention in the Trial Process' (1995) 69 *The Australian Law Journal* 365-384.

Any consideration of the Commission's obligations to unrepresented parties must also have regard to the legislative context within which the Commission operates. Section 110(2) provides that in any proceedings before the Commission:

> ''(a) the procedure of the Commission is, subject to this Act and the Rules of the Commission, within the discretion of the Commission;
>
> (b) the Commission is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself of any matter in such manner as it considers just; and
>
> (c) the Commission shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms.''

It is also clear that members of the Commission are bound to act in a judicial manner and the principles of natural justice are applicable to hearings before the Commission: *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546; *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513; 29 IR 148.

The term ''natural justice'' in the context of administrative decision making has been essentially equated to an obligation to act fairly or to accord procedural fairness: *Kioa v Minister for Immigration & Ethnic Affairs* (1985) 62 ALR 321 at 347 per Mason J. The requirements of natural justice or procedural fairness are not prescribed in a fixed body of rules. What is required in one case may be quite different from what is required in another. In *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 Tucker LJ said: ''The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.''

Further in *Mobil Oil Australia Pty Ltd v Commissioner of Taxation (Cth)* (1963) 113 CLR 475 at 504 Kitto J said: ''What the law requires in the discharge of a quasi-judicial function is judicial fairness. This is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances.'' In our view the general approach to be taken in proceedings involving an unrepresented party is set out in the following passage from the judgment of Samuels JA in *Rajski v Scitec Corporation* (unreported, NSW Court of Appeal, 16 June 1986).

> ''... the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. But the court should be astute to see that it does not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent''. [cited with approval by Sackville J in *Morton v Mitchell Products* [1996] 828 FAC 1 (18 September 1996)].

What must be done to assist an unrepresented party depends on the nature of

the case and the party's intelligence and understanding of the case: *Abraham v Bank of New Zealand* (1996) ATPR 41-507.

A member has a responsibility to ensure that the proceedings are fair. This means that in some circumstances a member has an obligation to intervene, both for the benefit of an unrepresented party and more generally.

In a case involving an unrepresented party the Commission should endeavour to ascertain the true legal character of the claims made. As the High Court said in *Neil v Nott* (1994) 121 ALR 148 at 150: ''A frequent consequence of self-representation is that the court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy.''

Further as Kirby P noted in *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389:

> ''Some judicial officers are, by personality and disposition, more inclined to intervene in proceedings than others. The appearance of justice and fair procedures does not impose a monochrome uniformity upon judicial conduct such that only one style of conducting proceedings is permitted. There are special restraints in the conduct of criminal trials: cf *Titheradge v The King* (1917) 24 CLR 107, 116; *X v Y [No 2]* [1954] VLR 715 (SCV), 718; *R v Delaney* [1955] VLR 47 (FCV), 50. But in civil proceedings there is much greater room for variety and innovation. T D McCawley, 'Judicial Intervention in the Examination of Witnesses' (1957) 31 ALJ 529, 530;''

The assistance provided by a member may, depending on the circumstances, include:

- identifying the issues which are central to the determination of the particular proceedings. For example, if a respondent to a s 170CE application is arguing that the applicant is excluded from the operation of the relevant provisions of the Act by virtue of reg 30B(1)(d) then the pertinent issues are:
  - was the applicant engaged as a casual;
  - had the applicant been employed by the respondent on a regular and systematic basis for a sequence of periods during a period of at least 12 months; and
  - did the employee have a reasonable expectation of continuing employment by the employer
- drawing a party's attention to the relevant legislative provisions and key decision(s) on the issue being determined. For example, in relation to a reg 30B(1)(d) matter — *Reed v Blue Line Cruises* (1996) 73 IR 420 (per Moore J);
- asking a party questions designed to illicit information in relation to the issues which are central to the determination of the particular proceedings;
- assisting a party to conform to the *Brown v Dunn* principle and other procedural rules designed to avoid unfairness; and
- drawing a party's attention to the relative weight to be given to Bar table statements as opposed to sworn evidence.

A member may also intervene, to an appropriate extent, by asking questions of witnesses. Such a role is appropriate in the following circumstances:

- to clear up a point that has been overlooked or left obscure;
- to obtain additional evidence to better equip the member to choose between the witnesses' versions of critical matters;

- to exclude irrelevancies and discourage repetition;
- to ask admissible questions which a party is unable, for the moment, to formulate; and
- to facilitate expedition in the progress of the proceedings: see generally *Government Insurance Office (NSW) v Glasscock* (1991) 13 MVR 521 at 534 per Handley JA; and *Spiteri v Monocure Pty Ltd* (1995) 62 IR 359.

The role of a Commission member in asking questions of a witness may be greater where a party is unrepresented or ineptly represented.

Sometimes it is necessary for the member to immediately intervene, to check what the witness just said or to clarify a point. Subject to that it is generally better for the member to save questions until the end of a stage in the evidence, preferably until the end of cross examination or at least until there is a natural break: see *Spiteri v Monocure Pty Ltd* (1995) 62 IR 359; *Government Insurance Office (NSW) v Glasscock* (1991) 13 MVR 521 and *Aardvark Security Services Pty Ltd v Ruszkowski* (unreported, NSW Court of Appeal, 19 March 1993).

Excessive intervention during the elucidation of evidence is undesirable and may lead to the appearance of bias or prejudice. And it may leave one or both the parties with the feeling that the proceedings have not been fair. In *Burwood Municipal Council v Harvey* Kirby P said:

> ''In *Grhovac v Government Insurance Office (NSW)* [1991] NSWJB 107, this Court allowed an appeal where it concluded that the judge of trial had undertaken 'an inquisitorial cross-examination of the plaintiff' and had made adverse comments reflecting on the plaintiff's credit without any evidentiary basis being shown.
>
> Questioning by an opponent is one thing. But so strong is our convention and expectation of judicial neutrality, that combative questioning by a judicial officer can intimidate a witness and affect his or her willingness to adhere to fact or opinion, as otherwise the witness might. This is one of the recognised reasons for judicial restraint in questioning. It is a reason why questions, when asked, should ordinarily be put in a manner designed to elicit information, not to score a point. Point-scoring can be left to the advocates or the parties, however convinced the judicial officer might be that he or she would be able to do better.''

See further: *Tousek v Bernat* (1959) 61 SR (NSW) 203 at 209 per Owen J in which it was held that the trial judge, by excessive interventions, had identified himself with the case before him and given the impression that he was the advocate for one party: *Galea v Galea* (1990) 19 NSWLR 263 and *Government Insurance Office (NSW) v Glasscock* (1991) 13 MVR 521.

In *Sullivan v Department of Transport* (1978) 20 ALR 323, Deane J, with whom Fisher J agreed, said:

> ''Ordinarily, however, in the absence of a request for assistance or guidance by a party who is appearing in person, a tribunal under a duty to act judicially should be conscious of the fact that undue interference in the manner in which a party conducts his case may, no matter how well intentioned, be counter-productive and, indeed, even overawe and distract a party appearing in person to the extent that it leads to failure to extend to him an adequate opportunity of presenting his case.''

An unrepresented, or ineptly represented party, may be assisted by the

granting of an adjournment. As the Full Court of the Federal Court noted in *Titan v Babic* (1994) 126 ALR 455 at 464:

> ''Where it is apparent that a party who does not have legal representation has misunderstood procedural requirements so that he or she is not in a position to complete the presentation of evidence, an adjournment might be considered in the interests of justice provided that no irreparable substantive or procedural injustice is done to the other party involved. In any such case the granting of an adjournment will be a matter of discretion. . . . It may be that in some cases a tribunal should, to avoid possible injustice, inquire of an unrepresented person the reason for the failure properly to prepare his or her case. Again, that is a matter of discretion limited by the necessity that the tribunal be, and appear to be, impartial as between the parties.''

However the assistance to be provided to an unrepresented party is necessarily limited. It is plainly necessary to balance the interests of litigants who represent themselves with the need to afford procedural fairness to other parties. [See *Abram v Bank of New Zealand* (1996) ATPR 42,340, affirmed on appeal (1998) ATPR 41-507.]

Decision

Section 170JF deals with appeals from orders arising from the determination of whether a termination was harsh, unjust or unreasonable. It states:

> ''(1) An appeal to a Full Bench under section 45 may be instituted by any person who is entitled under section 170JD to apply for the variation or revocation of an order under this Part.
>
> (2) For the avoidance of doubt, an appeal to a Full Bench under section 45 in relation to any order made by the Commission under Subdivision B of Division 3 may be made only on the grounds that the Commission was in error in deciding to make the order.''

Section 45(2) provides that a Full Bench shall grant leave to appeal if ''in its opinion, the matter is of such importance that, in the public interest, leave should be granted''. Having regard to the terms of s 170JF(2) leave to appeal should generally not be granted unless the appellant satisfies the Commission that there is an arguable case that the member at first instance had either made a legal error or had acted upon a wrong principle, given weight to irrelevant matters, failed to give sufficient weight to relevant matters or made a mistake as to the facts or that the decision was plainly unreasonable or unjust.

In the context of the discretion within s 170CE(8) a Full Bench in *Kornicki* stated:

> ''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.''

In our view that observation applies equally to an appeal in relation to the exercise of the discretion within s 170CFA(8).

Did Commissioner Gay err in exercising his discretion?

The appellant argued that in deciding the matter at first instance the Commissioner erred in that he focused unduly on the issue of an acceptable

explanation of the delay in making the election and, in doing so failed to place adequate weight on the other relevant factors namely:

- merit of the applicant's claim;
- the absence of prejudice to the respondent arising from the late election; and
- the extent of the delay.

We are satisfied that the Commissioner did not err in the manner suggested by the appellant. In the proceedings below, the respondent did not submit that the applicant's claim was so lacking in merit as to act against the late acceptance of the election. Nor was it submitted that the respondent had suffered any prejudice from the late lodgment. In the absence of such submissions by the respondent it was proper for the Commissioner to focus on the issue of an acceptable explanation for the delay in exercising his discretion in the circumstances of the matter before him.

We are also satisfied that the Commissioner had proper regard to the length of the delay in the making of the election. It needs to be emphasised that the length of the delay should not be considered in isolation, but in the context of the matter as a whole. In the circumstances of this case it was appropriate for the length of the delay to be considered in the context of the explanation for the delay: ie is there an acceptable explanation of the particular delay? A lengthy delay may have an acceptable explanation, a short delay may not. In this regard it is common in the exercise of the discretions under s 170CE(8) and s 170CFA(8) for the Commission to find that whilst there is an acceptable explanation for a delay, there is no acceptable explanation for the whole of the delay.

Having regard to the manner in which the Commissioner conducted the proceedings, we are satisfied that he did have proper regard for the length of the delay in the current matter.

A related submission by the appellant was that the Commissioner misdirected the applicant, who was unrepresented, unduly toward the need to provide an explanation for the delay in lodgment. This submission is related to the issue considered immediately above. For the same reasons, we are satisfied that the Commissioner did not misdirect the appellant.

The appellant also submitted that the Commissioner erred in not accepting and acting upon her submissions, upon the resumption of the hearing, which established that she was blameless in the delayed lodgment, with responsibility resting solely with her legal representative.

This argument requires a consideration of the role of an Appeal Bench in relation to findings of fact made by a member at first instance.

As noted in *Pham v Taubmans Pty Ltd* (unreported, Print P2322, 27 June 1997 per Ross VP, Drake DP and Cargill C), an Appeal Bench would be very reluctant to reverse a finding of fact made by a member at first instance and would only do so if satisfied that any advantage enjoyed by the member below as a result of hearing the relevant evidence was not sufficient to justify the findings made. As his Honour Mr Justice McHugh said in *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178:

> ''... where a trial judge had made a finding of fact contrary to the evidence of a witness but has made no reference to that evidence, an appellate court cannot act on that evidence to reverse the finding unless it is satisfied 'that any advantage enjoyed by the trial by reason of having

seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.''

Further, a finding of fact made by a member at first instance based, even partly, on credibility should not be set aside on appeal even where the Appeal Bench thinks that the probabilities of the case are strongly against that finding of fact. If a finding made by a member at first instance depends to any substantial degree on credibility, that finding must stand, unless it can be shown that the member at first instance:

- acted on evidence inconsistent with facts incontrovertibly established by the evidence;
- acted on ''glaringly improbable'' evidence; or
- failed to use or palpably misused the advantage the member at first instance enjoyed in hearing the evidence: see *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479; *Elitegold Pty Ltd v CM Holdings Pty Ltd* [1995] ATPR 40,753 at 47,759.

It does not necessarily follow that because a member at first instance makes no express reference to demeanor and credibility that such factors played no part in any findings of fact made: *Martin v Option Investments (Aust) Pty Ltd [No 2]* [1982] VR 464 at 468; *Abalos v Australian Postal Commission* (1988) 171 CLR 167 at 179. As Lord Sumner put it in *SS Honestroom v SS Sagaporack* [1927] AC 37 at 47:

> ''. . . not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility for reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone.''

We propose to apply these observations to the matter before us.

In the proceedings below the appellant submitted — upon the resumption of the proceedings after the adjournment — that she had twice followed up the filing of the election with her legal representative and both occasions were within the time period prescribed in s 170CFA(6).

It is apparent from the transcript that the Commissioner doubted the veracity of these submissions. He stated: ''I have questioned you closely about when you spoke to your advisors over that week — how could it be that you did not remember that — you had recourse to your diary?'' The appellant explained that the diary entries referred to another person's hearing.

Commissioner Gay subsequently noted that the new information was ''very very much at odds with what you had earlier told me'' and stated that it did not change his conclusion. He then handed down his decision. In his decision, the Commissioner also noted a conflict in the position of the appellant in respect to another date and said:

> ''Ms Davidson, from the Bar table, as no evidence was led today, told me after questioning, that she asked Ms Short on both the Tuesday and the

Friday — that is 30 September and 3 October whether the claim had been lodged. I had understood Ms Davidson to have said that she did not ask on Tuesday 30 September whether the election had been lodged. This aspect of Ms Davidson's submissions was not convincing. I have however, accepted that Ms Davidson sought, in an apparently unhappy consultation with Ms Short on Friday, 3 October, to confirm whether the application had been lodged.'' [Print P7711 at 2]

We are satisfied that the Commissioner rejected the submissions advanced by the appellant after the resumption of the hearing. In this regard we note that in the event of an inconsistency between a witness' evidence and a member's findings of fact the member must be taken to have rejected that evidence: *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178-179. It is clear to us from the transcript of the proceedings below and the decision subject to appeal that the Commissioner did not accept the additional information advanced by the appellant on the basis that it was not credible. We are satisfied that such a conclusion was reasonably open to him.

In summary we are of the view that contrary to the appellant's submissions the Commissioner did not err in the exercise of his discretion. In particular we have decided that:

- the Commissioner correctly applied *Kornicki* to the matter before him;
- the Commissioner correctly applied the principles relating to representative error, as set down in *Clark*; and
- the Commissioner had regard to the fact that Ms Davidson was unrepresented and acted in a manner consistent with his obligation to ensure that the proceedings were fair.

Conclusion

We are not satisfied that the appellant has established an arguable case that the Commissioner made a legal error, acted upon a wrong principle, gave weight to irrelevant matters, failed to give sufficient weight to relevant matters, made a mistake as to the facts or that his decision was plainly unreasonable or unjust.

Leave to appeal is refused.

(Q0784.)