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HAINING v DRAKE and Others

Wilcox, Moore and Marshall JJ

Victoria District Registry

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7, 17 September 1998

Industrial Law — Termination of employment — Application for extension of time — Factors to be considered by Australian Industrial Relations Commission — Acceptable explanation of delay — Whether acceptable explanation for delay should be considered in advance of other factors — Industrial Relations Act 1988 (Cth), s 170EA.

C

Administrative Law — Judicial review — Whether error of law made by Full Bench of Australian Industrial Relations Commission affected its exercise of power — Whether prerogative relief justified.

The applicant sought orders in the nature of mandamus and certiorari directed to members of a Full Bench of the Australian Industrial Relations Commission (the Full Bench). The Full Bench had heard an application by the applicant for leave to appeal against a decision of a single Commissioner, refusing the applicant an extension of time for the filing of an application under s 170EA of the *Industrial Relations Act* 1988 (Cth) in respect of the termination of his employment.

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Held, dismissing the application: (1) The Full Bench had fallen into error in stating that, when considering an application for extension of time, it was necessary to resolve the issue of whether the applicant had an acceptable explanation for the delay *before* other factors were considered. (251B-C, 252D)

Avian v Kleenmaid Pty Ltd (1996) 66 IR 67, distinguished.

(a) By Wilcox and Marshall JJ. The issue of acceptable explanation for delay is one of several matters for consideration in determining how the Commission's overall discretion ought to be exercised. (251D)

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(b) By Moore J. The discretion conferred by s 170EA(3)(b) to extend time to institute proceedings is a wide one. Circumstances can arise where no explanation or no adequate explanation is given for the delay in instituting proceedings but it is nonetheless in the interests of justice to extend time. (252C)

(2) However, while the Full Bench had erred in law, the error was not amenable to judicial review by way of prerogative relief. (252B-C, 252D-E)

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Per Wilcox and Marshall JJ. The error did not effect the substance of the Full Bench's decision, nor did it affect its exercise of power. (252B)

Craig v South Australia (1995) 184 CLR 163, applied.

CASES CITED

The following cases are cited in the judgments:

Avian v Kleenmaid Pty Ltd (1996) 66 IR 67.
Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298.
Comcare v A'Hearn (1993) 45 FCR 441.

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Craig v South Australia (1995) 184 CLR 163.
House v The King (1936) 55 CLR 499.
Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344.
Mooney v W & B Morieson Pty Ltd (1997) 145 ALR 224.
Vel v Human Rights and Equal Opportunity Commission (1997) 47 ALD 219.

A APPLICATION for prerogative relief.

P Burchardt, for the applicant.

T Ginnane, for the respondents.

Cur adv vult

B 17 September 1998

WILCOX AND MARSHALL JJ. This case was remitted to the Court by the High Court of Australia. The applicant, Damian Haining, seeks orders in the nature of mandamus and certiorari directed to members of a Full Bench of the Australian Industrial Relations Commission, Deputy President Drake, Deputy President Duncan and Commissioner Foggo. They are the first respondents to
C the application. The Full Bench heard an application by Mr Haining for leave to appeal against a decision of Commissioner Whelan refusing him an extension of time for the filing of an application under s 170EA of the *Industrial Relations Act* 1988 (Cth) (the Act) in respect of his dismissal from the teaching service of the State of Victoria. The State is second respondent to the application.

An application under s 170EA of the Act was filed on Mr Haining's behalf by his union, Australian Education Union. Unfortunately, it was out of time; it was filed 20 days (rather than the required 14 days) after the day on which
D Mr Haining received written notice of the termination of his employment. Having regard to the short delay and the evidence that it was occasioned by an oversight or error in the union office, it would not have been surprising if Commissioner Whelan had granted an extension of time. But she declined to do so, giving reasons for her decision. She thought the material put before her did not furnish an acceptable explanation as to why the application was not lodged within time. The Commissioner made reference to submissions about the merits
E but concluded she was "not satisfied that the merits of the case are such as to be a decisive factor in the question of an extension of time". The Commissioner accepted the employer was not prejudiced by the delay. Nonetheless, she concluded she was "not prepared to extend the time".

Counsel for the applicant, Mr Burchardt, contends the Commissioner erred in treating it as a mandatory requirement that his client demonstrate an acceptable reason for the delay, as distinct from merely treating this as a matter for consideration in conjunction with other factors. He also argues the Com-
F missioner allowed herself to be influenced by what she thought to be the lack of merit in the application; in particular, he says, she erected evidence that Mr Haining had admitted assaulting two pupils into a statement of established fact.

It is convenient to say immediately that we do not accept either of these criticisms. As to the former, we agree the Commissioner was influenced by her conclusion that the applicant had not provided an acceptable explanation for the
G delay but we do not understand her to have treated this as a mandatory requirement; and she certainly did not consider that factor in isolation from others. The case was argued before her on the basis of the collection of statements of principle set out by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 348-349. Omitting citations, the first paragraph in that collection reads:

> ''Although the section does not, in terms, place any onus of proof upon an applicant for extension an application has to be made.
> Special circumstances need not be shown but the court will not grant the application unless positively satisfied that it is proper so to do. The 'prescribed period' of twenty-eight days is not to be ignored . . . Indeed, it is the prima facie rule that proceedings commenced outside that period will not be entertained . . . It is a pre-condition to the exercise of discretion in his favour that the applicant for extension show an 'acceptable explanation of the delay' and that it is 'fair and equitable in the circumstances' to extend time.''

Of course, the matters referred to in that paragraph were not intended to be considered in isolation from other relevant matters. As Wilcox J pointed out, his collection was intended to be a mere guide, not stated in an exhaustive manner, as to the exercise of the discretion. At the end of the day, the person exercising the discretion has to make an overall judgment as to the appropriateness of extending the time. The extent and the cause of the delay will usually be factors relevant to that judgment; so also will other matters included in the summary, to the extent they apply to the instant case; and perhaps other matters as well. The acceptability of the applicant's explanation for delay cannot be divorced from the effect of that delay on the respondent or other people. If a case seems highly meritorious, that might legitimately persuade the decision maker to accept the adequacy of an explanation that would not pass muster in a case of little apparent merit.

We think Commissioner Whelan understood this. She looked at issues other than the acceptability of the explanation for the delay before concluding, as a matter of overall judgment, that she was ''not prepared'' to extend time.

As to the other matter, it is true that Commissioner Whelan commented ''it would appear from the material before me that the essential elements relating to the incident have been admitted by the applicant''. There was evidence of an admission. She was also informed by the union representative before her of certain matters that (justifiably) led her to believe Mr Haining's case would be that the penalty of dismissal was excessive. Notwithstanding all this, she said, in effect, that she did not regard the merits of the case as a decisive factor in the question of an extension of time. This cannot be said to constitute an error adverse to Mr Haining's interests.

The Full Bench treated the decision of Commissioner Whelan as a discretionary decision and considered whether the case fell within the principles enunciated by the High Court of Australia in *House v The King* (1936) 55 CLR 499. Towards the end of its reasons for decision, the Full Bench said:

> ''The Commissioner had sufficient material before her to enable an exercise of that discretion. She gave exhaustive consideration to all matters submitted to her and in particular the relevant principles. Her finding that there was no acceptable explanation for the delay was open to her.''

However, and this is Mr Burchardt's point of attack on the Full Bench decision, the Full Bench added its own comment about acceptable explanation for delay. At an earlier point in its reasons, the Full Bench had mentioned there had been five earlier cases in which a Full Bench of the Commission had been asked to grant leave to appeal against an extension of time decision. In one of those cases, *Avian v Kleenmaid Pty Ltd* (1996) 66 IR 67 at 69, the Full Bench had said:

> ''We find it unnecessary to examine the other elements of the submissions

A made on behalf of the employee as, in our view, the principles to be applied in matters such as this require this issue to be resolved in favour of any applicant *before* other factors are considered.''

In the subject case, the Full Bench followed their finding that Commissioner Whelan had not erred in the exercise of discretion by adopting what was said in *Avian* and adding: ''The principles, in our view, do require the issue of acceptable explanation to be resolved in favour of the applicant before other factors are considered.''

B Mr Burchardt argues it was erroneous for the Commission to say that, in considering an application for extension of time, it was necessary to resolve the issue of acceptable explanation *before other factors are considered.* He says the issue of acceptable explanation is simply one of several matters for consideration, on the way to determining how the Commission's overall discretion ought to be exercised.

We agree with that submission. To the extent the Commission held, in this C case or in *Avian*, that the issue of acceptable explanation must be resolved in advance of, and isolation from, consideration of other relevant factors, it fell into error. The Commission's discretion was conferred by s 170EA(3)(b). That provision read: ''within such further period as the Commission allows on an application made during or after those 14 days.''

The Act specified no criteria for the exercise of the discretion; they were left to be discerned from the scope and purpose of the Act, read as a whole. It D seems to have become customary for those concerned with extensions of time under the Act to refer to *Hunter Valley Developments* and to a material adoption of it set out in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298. There can be no objection to this so long as it is remembered that the principles there collected are a mere guide to the exercise of an open-textured discretion. It is incorrect to treat them as if they were statutory criteria; and still more to pick out one of them for consideration in isolation from other relevant factors.

However, it is one thing to say the Full Bench erred in law; it is another to E say the error was such as to justify prerogative relief. The High Court summarised the law concerning jurisdictional error in a recent decision, *Craig v South Australia* (1995) 184 CLR 163. In that case (at 176-177), the Court distinguished between the amenability to prerogative relief of inferior courts and administrative tribunals; the Commission, of course, is one of the latter. In relation to administrative tribunals, the Court said (at 179):

> ''If such an administrative tribunal falls into an error of law which causes F it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, *and the tribunal's exercise or purported exercise of power is thereby affected*, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.''

We emphasise the words ''and the tribunal's exercise or purported exercise G of power is thereby affected''. It is not enough that the tribunal has fallen into an error of law, even one that causes it to misidentify an issue or reach a mistaken conclusion; the error must affect the exercise of power. It is argued in the present case, by counsel for the second respondent, Mr T Ginnane, that the Commission's erroneous view that it was necessary to determine the issue of acceptable explanation of delay in advance of considering other matters did not

affect its decision on the application to grant leave to appeal. That application was made under s 45 of the Act, as (he says) the Full Bench well understood. Section 45(1) provides a right of appeal to a Full Bench from a variety of decisions, including an order made by a member of the Commission. Subsection (2) says a Full Bench shall grant leave to appeal under subs (1) "if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted".

We see no reason to doubt the Full Bench correctly appreciated the nature of its jurisdiction. The Full Bench understood the Commissioner had exercised a statutory discretion and therefore applied *House v The King*. Correctly, we believe, the Full Bench found the Commissioner's decision free of appealable error. It was only after it reached that conclusion that the Full Bench fell into the error, based on *Avian*. That error did not affect the substance of the Full Bench decision. It certainly did not affect its exercise of power.

In our opinion the applicant has failed to show jurisdictional error. Accordingly, the application for prerogative relief must fail. The application will be dismissed.

MOORE J. I have read the joint judgment of Wilcox and Marshall JJ in a draft form. I agree that the application should be dismissed. The discretion conferred by s 170EA(3)(b) to extend time to institute proceedings is a wide one. Circumstances can arise where no explanation or no adequate explanation is given for the delay in instituting proceedings but it is nonetheless in the interests of justice to extend time: see *Comcare v A'Hearn* (1993) 45 FCR 441; *Vel v Human Rights and Equal Opportunity Commission* (1997) 47 ALD 219; *Mooney v W & B Morieson Pty Ltd* (1997) 145 ALR 224.

In saying that it was necessary for an acceptable explanation to be provided before time could be extended, the Full Bench in the present case misstated the nature of the discretionary power. The Full Bench based its remarks on an earlier decision of a Full Bench in *Avian v Kleenmaid Pty Ltd* (1996) 66 IR 67 at 69. However this misstatement of principle does not result in error amenable to judicial review by way of prerogative writ.

Orders accordingly

Solicitors for the applicant: *Galbally & O'Bryan.*

Solicitors for the respondent: *Maddock Lonie & Chisolm.*

KATRINA MORRIS