FAIR WORK AUSTRALIA

McConnell v A & PM Fornataro (t/as Tony's Plumbing Service)

[2011] FWAFB 466

Lawler VP, O'Callaghan SDP and Bissett C

8 December 2010, 31 January 2011

Appeal — Appeal to Full Bench of Fair Work Australia — Permission to appeal — Whether matter of public interest — Relevant factors — No public interest attracted — Fair Work Act 2009 (Cth), s 604.

Practice and Procedure — Properly brought proceedings for unfair dismissal — Proceedings discontinued and general protections application made on expert legal advise — Application out of time — Application for extention of time — Whether exceptional circumstances existed — Fair Work Act 2009 (Cth), ss 365, 366(2).

Following the dismissal from his employment, a person lodged, within time, an application seeking an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009* (Cth) (the Act). However, following a suggestion from the Fair Work Ombudsman and the receipt of legal advice from a firm of solicitors, he discontinued that proceeding and applied to Fair Work Australia to extend the time for filing a general protections application he now wished to bring pursuant to s 365 of the Act.

That application was refused on the basis that the requirement set out in s 366(2) of the Act, that Fair Work Australia had to be satisfied that there were exceptional circumstances, had not been met.

The applicant sought permission to appeal against that decision.

Held (by majority, refusing permission to appeal): The requirement for granting permission to appeal against a decision of Fair Work Australia that such a grant was in the public interest was not satisfied as the appeal raised no issue of importance and of general application and there did not exist a diversity of decisions at first instance over extension of time application such that additional guidance was required, so that no public interest was attracted.

Consideration by Lawler VP of the extent to which the making of a prior application within time, that was discontinued on the basis of expert advice, could constitute an exceptional circumstance in relation to a subsequent application in relation to the same facts which had been filed out of time.

Cases Cited

Baker v The Queen (2004) 223 CLR 513.

Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298.

Cheval Properties Pty Ltd (t/as Penrith Hotel Motel) v Smithers (2010) 197 IR 403.

Clark v Ringwood Private Hospital (1997) 74 IR 413.

Davidson v Aboriginal and Islander Child Care Agency (1998) 105 IR 1.

GlaxoSmithKline Australia Pty Ltd v Makin (2010) 197 IR 266.

Ho v Professional Services Review Committee No 295 [2007] FCA 388.

House v The King (1936) 55 CLR 499.

R v Kelly (Edward) [2000] QB 198.

Application for permission to appeal and appeal

A Tayler, for the applicant.

J Glynn and *J Hams*, for the respondent.

Cur adv vult

O'Callaghan SDP and Bissett C.

1 Mr McConnell has appealed against a decision of Senior Deputy President Richards issued on 6 October 2010. In this decision, His Honour declined to extend the period for the filing of an application made pursuant to s 365 of the *Fair Work Act 2009* (Cth) (the FW Act). Section 366(2) provides for the extension of the 60-day time limit if Fair Work Australia (FWA) is satisfied that there are exceptional circumstances. The Senior Deputy President was not satisfied that such circumstances existed and dismissed the application. He provided his reasons for doing so on transcript.

2 Mr Tayler of Workers First Australia Pty Ltd (Workers First) was granted permission to appear on behalf of Mr McConnell. Workers First represented Mr McConnell in the proceedings at first instance. Ms Glynn and Ms Hams were granted permission to appear on behalf of A & PM Fornataro trading as Tony's Plumbing Service.

Background

3 We briefly summarise the background to this application.

4 The termination of Mr McConnell's employment took effect on 14 May 2010 following a resignation letter dated 13 May 2010.

5 Subsequent to the termination of the employment relationship, Mr McConnell contacted the Fair Work Ombudsman's office.

6 On 27 May 2010 Mr McConnell lodged an unfair dismissal application pursuant to s 394 of the FW Act. In this application, he asserted that the termination of his employment reflected a constructive dismissal. That unfair dismissal application was the subject of a telephone conciliation conference on 18 June 2010. Following this conference, Mr McConnell sought advice from Workers First. The unfair dismissal application was then listed for arbitration and directions relative to that hearing were issued on 8 July 2010.

7 On 5 August 2010 Mr McConnell engaged Workers First as solicitors.

8 On 8 August 2010 Mr McConnell foreshadowed, through Workers First, that if the unfair dismissal matter was not resolved, he would discontinue that application and pursue a new general protections application. Discussions between the parties to try to resolve the unfair dismissal application occurred between 9 and 11 August 2010.

9 On 11 August 2010 FWA issued a cancellation of the Notice of Listing for the unfair dismissal application hearing on the basis of advice that the s 394 application would be withdrawn and a general protections application would be lodged.

10 A Notice of Discontinuance was lodged on 6 September 2010 and the s 365 application was lodged on 15 September 2010.

11 Section 366 states:

> 366 Time for application
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> (1) An application under section 365 must be made:
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> (a) within 60 days after the dismissal took effect; or
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> (b) within such further period as FWA allows under subsection (2).
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> (2) FWA may allow a further period if FWA is satisfied that there are exceptional circumstances, taking into account:
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> (a) the reason for the delay; and
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> (b) any action taken by the person to dispute the dismissal; and
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> (c) prejudice to the employer (including prejudice caused by the delay); and
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> (d) the merits of the application; and
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> (e) fairness as between the person and other persons in a like position.

12 In his decision the Senior Deputy President noted and addressed the factors in s 366(2).

13 Specifically, with respect to the reasons for the delay, the Senior Deputy President noted Mr McConnell's evidence that the Fair Work Ombudsman did not direct him to take any given course of action.

14 The Senior Deputy President concluded that:[1]

> It was Mr McConnell's decision to act on the comments of the Fair Work Ombudsman that caused him to make an application under section 394 of the Act. As a claim that essentially his resignation was a constructive dismissal, Mr McConnell was reasonably assumed to be capable of falling within the jurisdiction, subject to other considerations, under section 394 of the Act and pursued the ordinary course in relation to an application made under that section of the Act: his file was allocated conciliation; he was a party to a conciliation; he subsequently, with the matter not being resolved, was issued with the directions for an arbitration. Shortly before or after there was noncompliance with the directions in relation to that arbitration, the applicant decided to act on the advice of his then representative to seek an application under section 365 of the Act.
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> The issue arises as to whether or not the conduct of Mr McConnell during the period from the time his dismissal took effect – which we have taken to be 14 May 2010 – at least up until the point in time being 5 August, when he engaged the services of Workers First Australia, whether or not his conduct during that period provided a reasonable explanation for the delay in making his application on the general protections provisions. As I said earlier in these proceedings, by the time the applicant engaged the services of Workers First Australia some 83 days had passed since Mr McConnell separated from his employment from the respondent and at that time, by 5 August 2010, his application was some approximately 23 days beyond the due date required by section 366(1)(a) of the Act.
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> It appears to me that in the course of these matters the applicant acted on a suggestion. As I said before, none of that suggested course of action had a

1 Transcript (6 October 2010) PN104-PN106.

> directive connotation nor did it purport to be legal advice. At all times the matter was left to the judgment of the applicant himself to consider as to what manner of approach he sought to take in relation to the circumstances into which he had fallen on 13 and 14 May 2010. Nothing in the action of the Fair Work Ombudsman was obligatory or directive in relation to the decision-making of the employee, that is, Mr McConnell. Mr McConnell was left with those comments. It was a matter for himself to seek legal advice or wider or deeper advice as to his circumstances and what the appropriate course he should take might be.

15 The Senior Deputy President concluded that, for a period of at least two weeks after the termination of his employment, Mr McConnell was actively pursuing a remedy of some kind, although this initially only related to a wages claim.

16 With respect to s 366(2)(c) the Senior Deputy President concluded that there was no substantive issue of prejudice to the employer.

17 Relative to the merits of the application, the Senior Deputy President stated that, on the limited material before him, he was only able to conclude that Mr McConnell's claim was not without merit.

18 Finally with respect to s 366(2)(e) the Senior Deputy President observed that there was no evidence before him which supported a direct comparison.

19 His conclusion was that:[2]

> It therefore falls to me, upon considering and taking into account the various requirements and the various matters and the relevant evidence related to the requirements of s 366(2)(a) through to (e) of the act, I must then consider that evidence and taking all that evidence into account, I must then consider whether or not that evidence assists me in being satisfied that there are exceptional circumstances relating to the delay in lodging the application.
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> The meaning of "exceptional circumstances" I do no think requires any in depth consideration. I think there is a general common understanding of what is meant; that is, the circumstances must be exceptional. They must be unusual in some sense and be able to be characterised as such. So in this case am I able to characterise the evidence that is before me by way of the matters that I have taken into account; am I able to character all of those matters as satisfying me that there are exceptional circumstances?
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> I should say there are other decisions I have made in relation to advice given by public parties to bodies in which I have come to the view that that advice has been given in such circumstances that they do constitute exceptional circumstances. In other matters before me over the course of this year I have found circumstances in which the Fair Work Ombudsman has intervened in a the progress and the direction of an application and caused other delays. I have also found subsequently in other decisions other public bodies have also been active and intervened in the progress of an application. In some circumstances I have found that the relevant circumstances were such that they constituted exceptional circumstances in the impact that they had upon the employee's judgment and decision-making as to the course of action that they had embarked upon.
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> However, in this case I am not able to identify the same exceptional circumstances. As I said earlier, the reason for the delay in my view cannot be laid exclusively at the feet of the Fair Work Ombudsman. The Fair Work Ombudsman gave advice or suggested a course of action. It did not purport to give legal advice. Its action was not directive. Mr McConnell was not obliged to take that course of action. At all times the matter was set at the feet of Mr McConnell to investigate

2 Transcript (6 October 2010) at PN111-PN115.

> his claim still further and to come to a conclusion as to the appropriate course of action that he should take.
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> I am not able to discern, in the reasons for the delay or any other of the circumstances that I have considered, that Mr McConnell ought to be relieved of the obligation to apply himself to the requirements of the act, to the time lines and to a proper judgment about the courses in which he intended to take in order to seek the relief that he did. That said, as a consequence of that decision having been reached, I am not able to accept the application that is before me. It is not an application that is within the jurisdiction of Fair Work Australia and therefore the application that is before me is dismissed.

The appeal

20 Section 604(1) provides that a person who is aggrieved by a decision made by FWA may appeal that decision with the permission of FWA. Clearly, Mr McConnell is aggrieved by the decision.

21 Section 604(2) provides that, without limiting when FWA may grant permission, it must grant permission if it is satisfied that it is in the public interest to do so.

22 Mr McConnell's submission is that the circumstances of this matter are important and are likely to be raised again. Further, that the decision at first instance represented an injustice or was counter intuitive given the findings made by the Senior Deputy President with respect to the considerations listed in s 366(2). Mr McConnell argued that permission to appeal should be granted to allow the pursuit of his application in so far as it was not without merit.

23 Mr McConnell also argued that the decision at first instance was in error with respect to the conclusion reached by the Senior Deputy President about the information provided by the Fair Work Ombudsman and the extent to which Mr McConnell could have sought legal advice about his circumstances and the actions open to him. It was argued that the scheme of the FW Act was such that legal representation is not a right and that Mr McConnell was entitled to rely on the information provided to him by the Fair Work Ombudsman.

24 The employer position was that there was no basis upon which permission to appeal should be granted in that the decision was not affected by error.

Our decision

25 Permission to appeal a decision made by FWA can only be granted if this is in the public interest.

26 In *GlaxoSmithKline Australia Pty Ltd v Makin*[3] a Full Bench summarised the concept of public interest in the following terms:

> Although the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters, it seems to us that none of those elements is present in this case.

27 We are not satisfied that the appeal raises issues of such importance and of general application or that there exists a diversity of decisions at first instance such that additional guidance is required. Extension of time decisions pursuant to the FW Act have generally been founded on the discrete circumstances which

3 *GlaxoSmithKline Australia Pty Ltd v Makin* (2010) 197 IR 266 at [27].

apply in each case. There is nothing of the character of this matter which suggests the need for the application of a generally applicable approach.

28 A decision to grant or refuse an application for an extension of time is a discretionary matter to which, on appeal, the principles set out by the High Court in *House v The King*.[4]

29 In terms of the decision itself, we are satisfied that the Senior Deputy President considered, as is required, each of the circumstances set out in s 366(2).

30 The Senior Deputy President's findings with respect to the reasons for the delay are particularly significant in this respect. We see no basis for a conclusion that the decision was in error relative to his conclusion that the Fair Work Ombudsman did not provide advice, or that it was Mr McConnell's actions that substantially contributed to the delay.

31 In the hearing at first instance, the Senior Deputy President sought clarification about the circumstances of the delay in the following terms:[5]

> THE SENIOR DEPUTY PRESIDENT: Can I just ask you, Mr McConnell, what is the essential reason your claim in your application under the general protection provisions is late? --- As it says in my affidavit, originally I was just pursuing a wages claim until I received a letter from Fair Work and they told – in that letter it stated that, "If you feel you've been treated unfairly, to call this number," and I did and when I spoke to a gentleman on the phone there, I told him my story and he said to me – like, he couldn't give me any specific legal advice but if I feel I'd been untreated fairly, to lodge an unfair dismissal complaint, which I did. After speaking to Workers First, they told me that my case was more a general protections and there was a few factors involved with – as I was out of work and when I got offered some work, I had to take it.
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> If I can just ask you a bit more about this. By the time you contacted Workers First Australia on or about 18 June 2010, your application for a general protections application was already some approximately 23 days out of time. So at that point you were already some 23 days out of time by 18 June. Assuming your dismissal took effect on 14 May 2010 and you engaged Workers First Australia on 5 August 2010, then there are some 83 days between those two dates, that is, between 14 May and 5 August 2010. At that date on 5 August 2010, when you engaged Workers First Australia, you were then approximately 23 days beyond the due date for a general protections application, given that some 83 days had passed. As I understand you argument as it is put within paragraph 26, you say the only reason you didn't make a general protections application in the first instance is because the Fair Work Ombudsman directed you to do something else, which was to make an application for unfair dismissal under section 394 of the act. Is that correct? --- He didn't so much direct me, your Honour; he only advised me that it was within my rights to lodge an unfair dismissal claim. He did not advise me that
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> He didn't direct you was your word – he didn't tell you to do that? --- No, he said that, you know, "If you feel you've been treated unfairly, you can" – but also he never mentioned that I could possibly have a general protections claim.
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> And he, from your statement, also said – apart from not directing you as such to make an application, he also said, from your evidence in paragraph 13, that he wasn't giving you legal advice. Is that right? --- That's correct, your Honour.

32 Consequently, we consider that the Senior Deputy President was entitled to

4 *House v The King* (1936) 55 CLR 499 at 505.

5 Transcript (6 October 2010) PN54-PN57.

conclude that the Fair Work Ombudsman had not directed Mr McConnell to lodge an unfair dismissal application and that Mr McConnell's tardiness in seeking advice was a significant factor explaining the delay.

33 In the course of the appeal hearing, the extent to which the decision to discontinue the initial unfair dismissal application and to initiate the s 365 application when it was already out of time, involved representative error, was the subject of some discussion. The issue of representative error was not argued to us as the basis of the appeal and nothing of this nature was put to Senior Deputy President Richards at the initial hearing.

34 We do not consider that the Senior Deputy President fell into error by failing to consider the possibility of representative error as a factor contributing to the delay. Not only was this not argued before him, but, at the initial hearing Mr McConnell was represented and his evidence confirmed his understanding of, and acquiescence to, the advice provided to him by Workers First. In these circumstances, a conclusion that Mr McConnell had been poorly represented and that this representation explained the delay would have been unfounded.

35 Even if representational error was accepted, we consider that the application of the approach set out in *Clark v Ringwood Private Hospital*[6] remains apposite. We have adopted that approach in so far as it was summarised by a Full Bench of the Australian Industrial Relations Commission in *Davidson v Aboriginal and Islander Child Care Agency*[7] in the following terms:

> (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.
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> (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.
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> (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 carryout those instructions, through no fault of the applicant and despite the applicant's efforts to ensure that the claim is lodged.
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> (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.

36 In this matter the Senior Deputy President was required to consider the conduct of Mr McConnell as the applicant irrespective of the issue of representative error.

37 We do not consider that the Senior Deputy President's conclusions with respect to the remaining considerations set out in s 366(2) are attended by error. In each instance these findings were available to him. We consider that the

6 *Clark v Ringwood Private Hospital* (1997) 74 IR 413.

7 *Davidson v Aboriginal and Islander Child Care Agency* (1998) 105 IR 1 at 6.

Senior Deputy President was entitled, on the evidence before him, to reach his conclusion that the circumstances of the delay were such that they could not be described as exceptional for the purposes of s 366(2).

38 Quite aside from the issue of representative error as a basis for the granting of permission to appeal, we find Mr Tayler's explanation of why it was that the s 365 application was initiated, and his explanation of the Workers First deliberations relative to the extension of time necessary for the pursuit of that s 365 application to be substantially deficient, and indicative of very poor advice provided to Mr McConnell. While this is a matter which Mr McConnell may elect to take up with Workers First, it does not indicate error in the decision under appeal.

39 Having considered all of Mr McConnell's submissions with respect to the application of the public interest, we are not persuaded that the public interest is enlivened in this situation.

40 We decline to grant permission to appeal.

Lawler VP.

41 I have had the advantage of reading the reasons for decision of the majority. I am unable to agree with their reasons or conclusion. These are the reasons for my dissent.

42 Mr McConnell was employed by the respondent in November 2002. He tendered a letter of resignation on 13 May 2010. He contends that this letter of resignation was procured by the respondent on the basis of false promises and inducements that Mr McConnell would continue working for the respondent as a subcontractor only earning more money. The letter of resignation was accepted by the respondent by letter dated 14 May 2010. Over the weekend of 15-16 May 2010 the respondent advised the Mr McConnell that it had no work for him. Mr McConnell, naturally enough, contends that these facts involve a constructive dismissal. The Senior Deputy President found that the dismissal occurred on 14 May 2010.

43 Mr McConnell acted immediately to challenge his dismissal. He spoke with a staff member of the Fair Work Ombudsman (FWO) who suggested that Mr McConnell consider making an application for an unfair dismissal remedy. Mr McConnell candidly acknowledged in evidence that the FWO staff member emphasised that it was not his role to give advice and that Mr McConnell should seek his own advice. Mr McConnell nevertheless acted on the suggestion and filed an application for an unfair dismissal remedy on 27 May 2010, that is, *within* the 14 day time limit for the filing of such applications.

44 A conciliation of the unfair dismissal claim was held on 18 June 2010. The matter did not settle. Mr McConnell spoke to Workers First on that day. Workers First holds itself out as a firm of workplace lawyers and industrial advocates specialising in only representing workers in industrial relations matters. Mr McConnell did not engage Workers First at that time.

45 On 8 July 2010 the Tribunal issued a notice of listing for the arbitration of the matter on 15 September 2010 with directions requiring Mr McConnell to file his evidence and written submissions by 9 August 2010.

46 On 5 August 2010, four days before his evidence and written submissions were due to be filed, Mr McConnell engaged Workers First to represent him. Mr McConnell is an ordinary citizen with no legal or industrial training. It may readily be inferred that, as the deadline for the filing of evidence and

submissions approached, Mr McConnell felt more and more acutely his lack of skill to prepare witness statements and written submissions and that it was this that caused him to finally engage Workers First.

47 No evidence or submissions were filed by the due date, 9 August 2010.

48 On 10 August 2010 the Tribunal issued a notice of listing for a non-compliance hearing on 12 August 2010. Also on 10 August 2010 a staff member of the Tribunal had a conversation with Mr McConnell who advised that he was now represented by Workers First and provided the name and contact number of Mr Newman, the Workers First agent who was representing him. The following day, a staff member of the Tribunal spoke to Mr Newman. The entry in the Tribunal's case management system reads: "Spoke to Brian Newman who is lodging a [s 365] General Protections dispute & wont need the Arb hearing. NOD [Notice of Discontinuance] to be filed with FWA on 12/8/10 and non-comp listing to be cancelled."

49 Workers First filed Mr McConnell's s 365 general protections application on 15 September 2010. It is clear from the transcript before the Senior Deputy President that the decision to discontinue the s 394 application and make a new s 365 application was made on the express advice of Mr Newman that Mr McConnell should take such a course.[8]

50 Both an application for an unfair dismissal remedy under s 394 and an application for FWA to deal with a general protections dispute involving dismissal under s 365 are subject to time limits (14 days in the case of a s 394 application and 60 days in the case of a s 365 application). In each case FWA has power to extend time, expressed in identical terms. For example, s 366(2) provides:

> (2) FWA may allow a further period if FWA is satisfied that there are exceptional circumstances, taking into account:
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> (a) the reason for the delay; and
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> (b) any action taken by the person to dispute the dismissal; and
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> (c) prejudice to the employer (including prejudice caused by the delay); and
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> (d) the merits of the application; and
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> (e) fairness as between the person and other persons in a like position.

51 In each case the power to extend time depends upon FWA being satisfied that there are "exceptional circumstances". The introduction in the FW Act of this "exceptional circumstances" requirement involved a significant limiting of the discretion to extend time in relation to unfair dismissal claims: prior to the FW Act, the discretion to extend time for filing an unfair dismissal claim did not require special circumstances to be shown. In *Brodie-Hanns v MTV Publishing Ltd*,[9] the leading authority on the discretion to extend time for such claims, Marshall J held:[10]

> 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.

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8 Transcript at PN81.

9 *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298.

10 *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 at 299-300.

52 His Honour then listed favour factors that should be considered, which are largely replicated in ss 394(3)(a)-(e) and 366(2)(a)-(e).

53 In *Cheval Properties Pty Ltd (t/as Penrith Hotel Motel) v Smithers*[11] a Full Bench of Fair Work Australia considered the meaning of the expression "exceptional circumstances" in s 394(3) and held:

> [5] The word "exceptional" is relevantly defined in *The Macquarie Dictionary* as "forming an exception or unusual instance; unusual; extraordinary." We can apprehend no reason for giving the word a meaning other than its ordinary meaning for the purposes of s 394(3) of the FW Act.

54 The ordinary meaning of the expression "exceptional circumstances" was considered by Rares J in *Ho v Professional Services Review Committee No 295*,[12] a case involving in s 106KA of the *Health Insurance Act 1973* (Cth). His Honour observed:[13]

> 23. I am of opinion that the expression "exceptional circumstances" requires consideration of all the circumstances. In *Griffiths v The Queen* (1989) 167 CLR 372 at 379 Brennan and Dawson JJ considered a statutory provision which entitled either a parole board or a court to specify a shorter non-parole period than that required under another section only if it determined that the circumstances justified that course. They said of the appellant's circumstances:
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> > Although no one of these factors was exceptional, in combination they may reasonably be regarded as amounting to exceptional circumstances.
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> 24. Brennan and Dawson JJ held that the failure in that case to evaluate the relevant circumstances in combination was a failure to consider matters which were relevant to the exercise of the discretion under the section (at 379). Deane J, (with whom Gaudron and McHugh JJ expressed their concurrence on this point, albeit that they were dissenting) explained that the power under consideration allowed departure from the norm only in the exceptional or special case where the circumstances justified it (at 383, 397).
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> 25. And, in *Baker v The Queen* (2004) 223 CLR 513 at [173] Callinan J referred with approval to what Lord Bingham of Cornhill CJ had said in *R v Kelly (Edward)* [2000] QB 198 at 208, namely:
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> > We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.
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> 26. Exceptional circumstances within the meaning of s 106KA(2) can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional. Thus, the sun and moon appear in the sky everyday and there is nothing

11 *Cheval Properties Pty Ltd (t/as Penrith Hotel Motel) v Smithers* (2010) 197 IR 403.

12 *Ho v Professional Services Review Committee No 295* [2007] FCA 388.

13 *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [23]-[27].

> exceptional about seeing them both simultaneously during day time. But an eclipse, whether lunar or solar, is exceptional, even though it can be predicted, because it is outside the usual course of events.
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> 27. It is not correct to construe "exceptional circumstances" as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural "circumstances" as if it were only a singular occurrence, even though it can be a one off situation. The ordinary and natural meaning of "exceptional circumstances" in s 106KA(2) includes a combination of factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon. And, the section is directed to the circumstances of the actual practitioner, not a hypothetical being, when he or she initiates or renders the services.

55 Given that s 366(2) is in relevantly identical terms to s 394(3), this statement of principle is equally applicable to s 366(2).

56 In considering the matter in s 366(2)(a) – "the reason for the delay" – the Senior Deputy President observed:[14]

> The issue arises as to whether or not the conduct of Mr McConnell during the period from the time his dismissal took effect – which we have taken to be 14 May 2010 – at least up until the point in time being 5 August, when he engaged the services of Workers First Australia, whether or not his conduct during that period provided a reasonable explanation for the delay in making his application on the general protections provisions. As I said earlier in these proceedings, by the time the applicant engaged the services of Workers First Australia some 83 days had passed since Mr McConnell separated from his employment from the respondent and at that time, by 5 August 2010, his application was some approximately 23 days beyond the due date required by section 366(1)(a) of the act.
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> It appears to me that in the course of these matters the applicant acted on a suggestion. As I said before, none of that suggested course of action had a directive connotation nor did it purport to be legal advice. At all times the matter was left to the judgment of the applicant himself to consider as to what manner of approach he sought to take in relation to the circumstances into which he had fallen on 13 and 14 May 2010. Nothing in the action of the Fair Work Ombudsman was obligatory or directive in relation to the decision-making of the employee, that is, Mr McConnell. Mr McConnell was left with those comments. It was a matter for himself to seek legal advice or wider or deeper advice as to his circumstances and what the appropriate course he should take might be.

57 This treatment of the explanation for delay is curious when it was obvious that the reason for the delay was that Mr McConnell had proceeded in good faith with a unfair dismissal claim filed within time for almost the whole of the relevant period and had only sought to "switch" to a s 365 application filed out of time on the basis of "expert" advice, which advice Mr McConnell obviously acted on in good faith.

58 In relation to the criterion in s 366(2)(c), the Senior Deputy President did not find any material prejudice to the respondent.[15] In relation to the criterion in s 366(2)(d), the Senior Deputy President noted that the facts were contested and

14 Transcript (6 October 2010) at PN105.

15 See transcript at PN108.

he clearly, and correctly, did not regard the merits of the application as counting against Mr McConnell. The Senior Deputy President noted that there was no evidence rendering the factor in s 366(2)(e) relevant in this case.

59 The Senior Deputy President's ultimate conclusion was expressed as follows:

> It therefore falls to me, upon considering and taking into account the various requirements and the various matters and the relevant evidence related to the requirements of section 366(2)(a) through to (e) of the Act, I must then consider that evidence and taking all that evidence into account, I must then consider whether or not that evidence assists me in being satisfied that there are exceptional circumstances *relating to the delay in lodging the application*.

(Emphasis added.)

60 Of course, s 366(2) in not concerned only with exceptional circumstances relating to the delay in lodging the application. Rather, it is concerned with whether there are "exceptional circumstances, taking into account" all of the matters specified in s 366(2)(a) to (e).

61 Before the Senior Deputy President, Mr Newman of Workers First advanced an argument that proceeded on an *assumption* that an unfair dismissal claim was an inappropriate vehicle for Mr McConnell's case and that a s 365 application was in fact the appropriate vehicle. It was on this basis that Mr Newman sought to develop a variant of the "representative error" argument contending that Mr McConnell had been poorly advised by the FWO and that this reason for delay was an exceptional circumstance. Mr Newman contended in effect that the requisite exceptional circumstances were constituted by erroneous advice given by the FWO. That contention was open to attack on two counts. First, as Mr McConnell candidly acknowledged, the FWO expressly refrained from giving advice and did no more than invite Mr McConnell to consider making an unfair dismissal application. Moreover, it was far from clear that that suggestion was wrong. In those circumstances, it was unsurprising that the Senior Deputy President should have rejected Mr Newman's contention that the FWO's intervention constituted an exceptional circumstance.

62 However, that is not the end of the matter. In this case the unfair dismissal claim was *filed within time* and could have been pursued.[16] The s 365 application that Workers First advised Mr McConnell to pursue instead of his unfair dismissal claim was always going to be filed out of time. The 60 day period for filing a s 365 claim in this case expired on 13 July 2010. Mr McConnell was always going to have to show exceptional circumstances if he was to be able to pursue his s 365 claim.

63 To the extent that Mr McConnell's unfair dismissal claim faced the difficulty of establishing that he was "forced" to resign within the meaning of s 386, he faced that same difficulty in relation to his s 365 application: on that application Mr McConnell needed to demonstrate that he had been "dismissed" (s 365(a)) and that word is defined in s 12 by reference to s 386. Mr Tayler, the principal of Workers First, who appeared for Mr McConnell on the appeal, did not advance any plausible rationale for the discontinuance of Mr McConnell's unfair dismissal claim *filed within time* in order to file a s 365 application *out of time.* For my part, I can see none.

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16 It may be noted that there was no suggestion that Mr McConnell was not protected from unfair dismissal. As an employed plumber working for a company it is clear that he was not protected from unfair dismissal.

64 Given the broad factual context that Mr McConnell was asserting, I struggle to see how it was even remotely possible for Mr McConnell to succeed on a s 365 general protections application but fail on a s 394 unfair dismissal application in relation to the same facts. In other words, if he was able to succeed in establishing on the facts a breach of the General Protections in Pt 3-1 of the FW Act, I am wholly unable to see how he could have failed to also establish that the termination was also harsh, unjust or unreasonable. There is a real question mark over the competence of the advice that Mr McConnell received from Workers First, which advice saw him discontinue an apparently viable claim filed within time to commence a fresh claim out of time (in respect of which there was a risk that time would not be extended), for no clear benefit.

65 More importantly for present purposes, the Senior Deputy President took account of the fact of an unfair dismissal claim filed within time *only* in relation to the matters specified in s 366(b), that is, in making a finding that Mr McConnell took action to dispute the dismissal. The Senior Deputy President said:[17]

> In relation to section 366(2)(b) of the act, it is necessary to consider any action taken by the applicant in the matter to dispute the dismissal. We know as a matter of evidence that Mr McConnell made an application under section 394 of the act on the date that he did, which I think was 27 May 2010. In that sense, there is evidence that at least from a period of approximately two weeks after the dismissal took effect Mr McConnell was actively pursuing a remedy of a kind in relation to the circumstances in which he had fallen. I think it was also Mr McConnell's evidence that up until he had contacted the Fair Work Ombudsman he was seeking a wages claim only. I think that approach was an approach he had adopted up until correspondence he received from the Fair Work Ombudsman in approximately the middle of May or at least in the second half of May, perhaps somewhere between the 15th and the 24th approximately. It would appear somewhere around that period.

66 It needs to be born in mind that, on the material before us, it is more likely than not that Mr McConnell was personally blameless. He commenced his s 394 within time in good faith and pursued it in good faith. His decision to discontinue his s 394 application and bring a s 365 application was likely done by him in good faith on the basis of expert advice. Lay persons should not be regarded as acting in a blameworthy fashion when they act on the advice of an expert that they retain for the purpose of giving expert advice.

67 The Senior Deputy President failed to consider whether the fact of the filing of a viable application under s 394 (and at least as viable as an application under s 365) within time, which application was on foot until Mr McConnell received what he undoubtedly regarded as expert advice to discontinue it, was more than merely evidence that Mr McConnell had contested the dismissal and whether it was, in and of itself, an exceptional circumstance. As a member of the Tribunal I am familiar with the general nature of the flow of applications under ss 394 and 365. On any view, this circumstance that is an exceptional circumstance within the ordinary meaning of that expression, that is, a circumstance that "form[s] an exception or unusual instance; unusual; extraordinary". It is, at the very least, unusual for this circumstance to present itself. Accordingly, the decision is affected by error.

68 Pursuant to s 604(1) of the Act an appeal lies only with the permission of Fair

17 Transcript (6 October 2010) at PN107.

Work Australia. Pursuant to s 604(2) *Fair Work Australia* must grant permission to appeal if it considers that it is in the public interest to do so. I adopt the approach to determining the public interest set out by the Full Bench in *GlaxoSmithKline Australia Pty Ltd v Makin*.[18] As far as my researches have shown, this is the first occasion that a Full Bench of Fair Work Australia or the Australian Industrial Relations Commission has had to consider the extent to which the making of a prior application within time that is discontinued on the basis of expert advice can constitute an exceptional circumstance in relation to a subsequent application in relation to the same facts but filed out of time. Although exceptional in the ordinary meaning of that word, this is a circumstance that is likely to arise from time to time in the future. Given the terms of s 725, the issues raised by this appeal are of sufficient practical importance to attract the public interest. I would grant permission to appeal and, for the reasons given, allow the appeal, quash the Commissioner's decision and, on the rehearing, grant an extension of time. Given that I am in dissent, the order of this Full Bench will be order proposed by the majority, namely that permission to appeal be refused.

Permission to appeal refused

DR RJ DESIATNIK

18 *GlaxoSmithKline Australia Pty Ltd v Makin* (2010) 197 IR 266 at [27].