FAIR WORK AUSTRALIA

Robinson v Interstate Transport Pty Ltd

[2011] FWAFB 2728

Watson and Drake SDPP, Harrison C

4, 17 May 2011

Termination of Employment — Practice and procedure — Appeal — Whether Commissioner erred at first instance in refusing extension of time to bring proceedings — Delay attributable to solicitors for which appellant blameless — Fair Work Act 2009 (Cth), ss 365, 366, 586, 604.

At first instance the appellant's application pursuant to s 365 of the *Fair Work Act 2009* (Cth) (the Act) was dismissed as being filed three days out of time. The appellant's solicitor had inadvertently missed the deadline for the filing of the documents.

Held (allowing the appeal) (by Fair Work Australia): Representative error, in circumstances where the applicant was blameless, would constitute exceptional circumstances under s 366(2) of the Act, subject to consideration of the statutory considerations in ss 366(2)(b) to (e) of the Act. The Commissioner erred in his approach to representative error and his findings as to the appellant's conduct in that regard. This error led to an ultimate conclusion which was unsupported by the facts and which resulted in a decision which was plainly unjust to the appellant in circumstances where he had acted promptly to obtain legal representation and instructed his legal representative to file his application. As the appellant was blameless for the delay, exceptional circumstances to justify the extension of time existed.

Clark v Ringwood Private Hospital (1997) 74 IR 413; *Davidson v Aboriginal and Islander Child Care Agency* (1998) 105 IR 1; *McConnell v A & PM Fornataro (t/as Tony's Plumbing Service)* (2011) 202 IR 59, applied.

Cases Cited

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

Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; 99 IR 309.

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

House v The King (1936) 55 CLR 499.

Kyvelos v Champion Socks Pty Ltd (unreported, AIRC (FB), T2421, 10 November 2000).

La Rosa v Motor One Group Pty Ltd (unreported, AIRC (FB), PR924583, 12 November 2002).

McConnell v A & PM Fornataro (t/as Tony's Plumbing Service) (2011) 202 IR 59.

Robinson v Interstate Transport Pty Ltd [2011] FWA 696.

Shields v Warringarri Aboriginal Corp (2009) 202 IR 361.

Telstra-Network Technology Group v Kornicki (1997) 140 IR 1.

Ware v Elders Insurance Ltd (2003) 126 IR 352.

Application for permission to appeal and appeal

S Neaves, for the appellant.

JT Catlin, for the respondent.

Cur adv vult

Fair Work Australia

1 This is an appeal, pursuant to s 604 of the *Fair Work Act 2009* (Cth) (the Act), by Mr M Robinson against a decision[1] of Commissioner Simpson on 2 March 2011.

2 In his decision, Commissioner Simpson dismissed an application by Mr Robinson under s 365 of the Act, which was lodged beyond the time period specified in s 366(1)(a). Having considered the matters within s 366(2) of the Act, Commissioner Simpson declined to extend the period for lodgement of the application under s 366(1)(b) and dismissed the application.

Background

3 An application under s 365 of the Act was filed by Mr Robinson on 21 June 2010. The applicant was represented by Mr A Tayler of Workers First Australia Pty Ltd (Mr Robinson's original representative). The application named the first respondent to the application as Fred's Transport Pty Ltd, and the second respondent as Roads Corporation of Victoria trading as VicRoads.

4 Mr Robinson was dismissed from the employment of the first respondent on 19 April 2010.

5 Section 366(1) of the Act provides that an application under s 365 must be made:

> (a) within 60 days after the dismissal took effect; or
> (b) within such further period as FWA allows under subsection (2). The application was made 63 days after the dismissal took effect.

6 On 13 July 2010, Commissioner Simpson received correspondence from Sofra Solicitors[2] acting on behalf of a group of companies trading as "Fred's Interstate Transport" advising that the first respondent named in the proceedings was a company based in Prairiewood, New South Wales, and that the entity was not part of their client's group of companies. The correspondence was copied to Mr Robinson's original representative.

7 On 22 July 2010, an application was received from Mr Robinson's original representative seeking leave to amend the application filed on 21 June 2010, pursuant to s 586 of the Act, by substituting the name of the previously first named respondent with Interstate Transport Pty Ltd ACN 124 185 575. Relying on the affidavit from Mr Robinson's original representative, Commissioner Simpson decided to grant the application.

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1 *Robinson v Interstate Transport Pty Ltd* [2011] FWA 696.

2 Original File, C2010/4106, correspondence of 13 July 2010.

8 On 22 November 2010, following an unsuccessful conciliation conference, Commissioner Simpson issued directions for the filing of submissions and any other material from Mr Robinson by 10 December 2010, Interstate Transport Pty Ltd by 17 December 2010 and Mr Robinson's reply material by 20 December 2010. The directions order stated that the matter would be determined on the papers unless a party requested a hearing by Friday, 26 November 2010. No request was received.

9 The Commissioner determined the extension of time issue on the papers.

The Commissioner's decision

10 The Commissioner set out the submissions advanced by each party.

11 In outlining *Mr Robinson's case*, the Commissioner recorded the reason for the delay relied upon by him: representative error in the form of Mr Robinson's original representative, overlooking a reminder on his firm's case management system to lodge an application on behalf of Mr Robinson. The Commissioner noted in setting out *Mr Robinson's case* that "The affidavit of Mr Tayler states that the applicant first made contact with Mr Tayler on 22 April 2010."[3]

12 The Commissioner set out the terms of s 366 of the Act and addressed each of the statutory matters within s 366 against the submissions and documentary evidence and affidavit material filed.

13 In addressing the reason for the delay, the Commissioner considered and distinguished two first instance decisions of Fair Work Australia. He then set out the approach to representative error in *Clark v Ringwood Private Hospital* (*Clark's Case*)[4] as endorsed in *Davidson v Aboriginal and Islander Child Care Agency* (*Davidson's Case*)[5] and summarised in *McConnell v A & PM Fornataro (t/as Tony's Plumbing Service)* (*McConnell's Case*).[6] The Commissioner observed that one of the considerations within those authorities, namely that the conduct of the applicant is a central consideration in deciding whether representative error provides an acceptable explanation for delay in filing an application, indicates an expectation that the applicant must make some effort to ensure the claim is lodged.

14 Commissioner Simpson then found:

> Mr Tayler in his affidavit refers to his "inadvertence" in overlooking a bring up reminder to file the application by 18 June 2010. Is such "inadvertence" on the part of a representative an exceptional circumstance? I am inclined to believe it is more likely to be in a situation where there is evidence of active preparation underway but less so where a matter is simply left for an extended period with little or no activity in preparation for filing by either the applicant or his representative as appears to be the case in this instance.[7]

15 The Commissioner then addressed action taken by Mr Robinson to dispute the dismissal, finding that:

> [30] The applicant took prompt action to seek legal advice within two days of termination. However there is little further evidence to suggest that the applicant took an active interest in pursuing the application.

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3 *Robinson v Interstate Transport Pty Ltd* [2011] FWA 696 at [13].

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

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

6 *McConnell v A & PM Fornataro (t/as Tony's Plumbing Service)* (2011) 202 IR 59.

7 *Robinson v Interstate Transport Pty Ltd* [2011] FWA 696 at [29].

> [31] Following the initial meeting with Mr Tayler on 22 April the applicant attended a further meeting with Mr Tayler on 13 May 2010 where a client agreement was signed and instructions to proceed were given. From the material provided there is no further evidence of any steps taken by the applicant between 13 May 2010 and the 18 June 2010 when the application was required to be filed.[8]

16 The Commissioner then addressed prejudice to the employer, finding that the delay was short and would not have caused significant further prejudice to the employer if an extension was granted than it would ordinarily otherwise have suffered.[9]

17 In addressing the merits of the application, the Commissioner found that "the applicant's case appears weak, although I cannot say it has no possibility of success."[10]

18 The Commissioner found no relevant circumstances which arose in relation to fairness as between Mr Robinson and other persons in a like position.[11]

19 The Commissioner ultimately found:

> [37] Having considered the facts of this application, I am not persuaded that exceptional circumstances exist that warrant the granting of an extension of time.
>
> [38] I adopt the views expressed by Senior Deputy President Kaufman in *Shields v Warringarri Aboriginal Corporation* [[2009] FWA 860] regarding the distinction between the current Act and its predecessor in such cases. There appears to have been little or no activity in progressing the application between 13 May 2010 and 18 June 2010. There is a lack of evidence that the applicant was active in pursuing the claim following the finalisation of a client agreement with Mr Tayler on 13 May 2010. I do not accept that the respondents would suffer any significant degree of prejudice if the claim was granted. I have however formed a view that the applicant's case appears weak, although I cannot say it has no possibility of success. For the combination of reasons set out above I am persuaded not to grant the application for an extension of time. On that basis I dismiss the application under section 365 on jurisdictional grounds.[12]

Consideration

20 An appeal under s 604 of the Act is conditioned by the grant of permission to appeal by the Full Bench. Section 604(2) of the Act provides that a Full Bench must grant permission to appeal if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted. The principles outlined in *House v The King* (*House*)[13] and *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission*[14] apply to this appeal. When a decision involves the exercise of a discretion, an appeal cannot succeed unless error of the sort identified in *House* is shown. Section 366 of the Act involves

8 *Robinson v Interstate Transport Pty Ltd* [2011] FWA 696 at [30]-[31].

9 *Robinson v Interstate Transport Pty Ltd* [2011] FWA 696 at [32].

10 *Robinson v Interstate Transport Pty Ltd* [2011] FWA 696 at [38].

11 *Robinson v Interstate Transport Pty Ltd* [2011] FWA 696 at [36].

12 *Robinson v Interstate Transport Pty Ltd* [2011] FWA 696 at [37]-[38].

13 *House v The King* (1936) 55 CLR 499.

14 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; 99 IR 309.

the exercise of such a discretion. Essentially, Mr Robinson must establish error in the exercise of Commissioner Simpson's discretion in order to succeed in the appeal.

21 Section 366(2) of the Act provides that:

> 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.

22 The task before Commissioner Simpson was to determine whether there were exceptional circumstances in this case having regard to the matters identified within s 366(2) of the Act.

23 The Commissioner's approach to the representative error relied upon by Mr Robinson to explain the late lodgement of his application was the central ground advanced by Mr Robinson in the appeal. In this regard, Mr Robinson argued that the Commissioner did not give full and proper consideration to the reason for the delay in the filing of the application and did not properly apply the principles regarding representative error.[15]

24 The approach to representative error as an acceptable explanation for late lodgement has been considered by Full Benches of Fair Work Australia and its predecessors in the context of various Acts. The approach followed was first set out by a Full Bench in *Clark's Case*[16] in the context of the exercise of a discretion to extend time under s 170CE(8) of the *Workplace Relations Act 1996* (Cth) (the WR Act). It was followed by a Full Bench in *Davidson's Case*[17] in relation to s 170CFA(8) of the WR Act. More recently, a majority of the Full Bench in *McConnell's Case*[18] found that the approach remained apposite to the exercise of the discretion in s 366(2) of the Act.[19] We too think that the approach in *Clark's Case* provides appropriate guidance for consideration of representative error in the context of the exercise of the discretion within s 366(2) of the Act. We think that representative error, in circumstances where the applicant was blameless, would constitute exceptional circumstances under s 366(2), subject to consideration of the statutory considerations in ss 366(2)(b) to (e) of the Act.

25 The approach in *Clark's Case* was summarised in *Davidson's Case* as follows:

> 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:
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> (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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15 Exhibit A1 Appellant written submissions in the Appeal.

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

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

18 *McConnell v A & PM Fornataro (t/as Tony's Plumbing Service)* (2011) 202 IR 59.

19 *McConnell v A & PM Fornataro (t/as Tony's Plumbing Service)* (2011) 202 IR 59 at [35].

(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 carryout 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.

26 Commissioner Simpson was not persuaded that exceptional circumstances existed that warranted the granting of an extension of time in the circumstances of this matter. In reaching that view, the Commissioner identified several matters in s 366 of relevance:

- There appears to have been little or no activity in progressing the application between 13 May 2010 and 18 June 2010.
- There is a lack of evidence that the applicant was active in pursuing the claim following the finalisation of a client agreement with Mr Tayler on 13 May 2010.
- I do not accept that the respondents would suffer any significant degree of prejudice if the claim was granted. I have however formed a view that the applicant's case appears weak, although I cannot say it has no possibility of success.[20]

27 The Commissioner's conclusion as to merit is, in effect, that the application was not entirely without merit, reflective of the view expressed in *Telstra-Network Technology Group v Kornicki*[21] that "It would be sufficient for the applicant to establish that the substantive application was not without merit." In circumstances where the allegations as to Mr Robinson's conduct made by Interstate Transport Pty Ltd and Roads Corporation of Victoria were contested by Mr Robinson[22] and where there was limited evidence as to the conduct, the Commissioner could not have found otherwise and was right not to undertake a full hearing of evidence as to the merit of Mr Robinson's application.[23]

28 Accordingly, the Commissioner declined to accept the application out of time on the basis that there had been little or no activity in progressing the application between 13 May 2010 and 18 June 2010 and a lack of evidence that Mr Robinson was active in pursuing the claim after instructing his legal representative to lodge the application on 13 May 2010.[24] To the extent that

20 *Robinson v Interstate Transport Pty Ltd* [2011] FWA 696 at [38].

21 *Telstra-Network Technology Group v Kornicki* (1997) 140 IR 1.

22 Appeal Book at p 121.

23 *Kyvelos v Champion Socks Pty Ltd* (unreported, AIRC (FB), T2421, 10 November 2000) at [14] and [15].

24 *Robinson v Interstate Transport Pty Ltd* [2011] FWA 696 at [31].

these observations were directed to the issue of representative error, the Commissioner's ultimate conclusion suggests he attributed little, if any, weight to the explanation for the delay advanced by Mr Robinson on the basis that Mr Robinson was inactive after 13 May 2010.

29 We find that the Commissioner erred in diminishing the significance of the representative error on the basis that Mr Robinson was inactive between 13 May 2010 and 18 June 2010.

30 Mr Robinson arranged legal advice three days after the termination of his employment. At that time Mr Robinson requested that Mr Tayler prepare a client agreement for his consideration and upon receiving the agreement, he executed the agreement on 13 May 2010, within a week of its receipt. On the day he executed the agreement, Mr Robinson instructed Mr Tayler to file a general protections application on his behalf. It is unsurprising that Mr Robinson, having instructed his representative to lodge his application, relied upon the representative to give effect to his instructions. To suggest the failure of Mr Robinson to take any action in relation to the lodgement of his application, after instructing his legal representative to do so and having complied with all of the representative's requirements for accepting instructions, represents inaction on his part, unreasonably imposes a further responsibility upon him beyond his action of providing clear instructions to Mr Tayler to lodge his application.[25]

31 As noted by a Full Bench in *La Rosa v Motor One Group Pty Ltd*, in the context of s 170CE of the WR Act:

> As is evident from *Clarke*, little might be required to satisfy the Commission that the applicant was blameless in the delay. In the context of a relatively short delay, it may simply be a matter of establishing that the applicant gave instructions to lodge [in this case] a Notice of Election and thereafter left matters in the hands of his or her representative.[26]

32 For these reasons we are satisfied that Commissioner Simpson erred in his approach to representative error and his findings as to Mr Robinson's conduct in that regard. This error led to an ultimate conclusion which was unsupported by the facts and which resulted in a decision which was plainly unjust to Mr Robinson in circumstances where he had acted promptly to obtain legal representation and instructed his legal representative to file his application. We are satisfied that the Commissioner erred in the sense of *House*.

33 Accordingly, we grant permission to appeal, uphold the appeal and quash the decision of Commissioner Simpson in [2011] FWA 696.

Rehearing

34 We proceed to determine ourselves, under s 366(2) of the Act, whether there are exceptional circumstances which would warrant extension of the time for the making of the application by Mr Robinson.

35 We need to deal first with a preliminary point raised by Interstate Transport Pty Ltd in the appeal. It submitted that the application was lodged eight months late, not three days late on the basis that it was first appraised of the amended

25 See *Ware v Elders Insurance Ltd* (2003) 126 IR 352.

26 *La Rosa v Motor One Group Pty Ltd* (unreported, AIRC (FB), PR924583, 12 November 2002) at [24].

application, directed to it as the first respondent, on 16 November 2010.[27] This submission was advanced notwithstanding the fact that Interstate Transport Pty Ltd acknowledged receipt of the original application[28] and it raised the issue of the correct identification of the first respondent on 13 July 2010.[29] In our view the contention of Interstate Transport Pty Ltd that the date of lodgement of the application was 16 November 2010 is without substance. The application, as later amended by the Commissioner, was lodged on 21 June 2010. It was lodged three days out of time.

36 We find that there was an acceptable explanation of the reason for the delay in lodgement of the application — representative error resulting from the oversight of Mr Robinson's original representative of the electronic reminder whilst the filing of the application was within his care and responsibility. In circumstances where Mr Robinson had promptly sought legal advice following his termination, promptly executed a client agreement prepared on his instructions and, upon doing so, immediately instructed his original representative to lodge a general protections application, we find that he was entitled to rely upon his representative to act on his clear instructions to file an application and was blameless for the delay in lodgement of the application.

37 There is no evidence that Mr Robinson took any action to dispute the dismissal, other than instructing his legal representative to make a s 365 application under the Act. We consider this to be of limited significance in the circumstances of this matter, given the short delay in filing the application. In any event, we are satisfied that there is nothing further Mr Robinson could have been reasonably expected to do.

38 There is no evidence of prejudice to Interstate Transport Pty Ltd arising from the short delay in the lodgement of Mr Robinson's application.

39 In circumstances where there is a dispute as to the conduct of Mr Robinson which was relied upon for the termination of his employment, we are unable to find that Mr Robinson's application is without merit on the submissions and evidence before us.

40 There is no evidence in this matter which raises the question of fairness as between Mr Robinson and other persons in a like position.

41 Having considered all of the matters within s 366(2) of the Act, we are satisfied that there are exceptional circumstances to allow a further period of time for the making of the application by Mr Robinson. Given the other statutory considerations neither support nor detract from the acceptance of the late application in the circumstances of this case, the short delay involved and the existence of an acceptable explanation of the reason for the delay, as found above, we are satisfied us that we should allow a further period for the making of the application. In our view, the error by Mr Robinson's original representative, in circumstances in which Mr Robinson is blameless for the delay, constitutes an exceptional circumstance in which the application should be accepted late.

42 We will make an order extending the period for making the application in C2010/4016 until 21 June 2010.

43 We note that on 22 November 2010, Commissioner Simpson undertook a

27 Exhibit R1 Respondent written submissions in the Appeal, at paras 9-11.

28 Original file C2010/4106, correspondence of 16 November 2010.

29 Original file C2010/4106, correspondence of 13 July 2010.

conference under s 368 of the Act but the matter was not resolved.[30] It appears that because the issue of the late application was raised and the Commissioner refused to extend the time for lodgement and dismissed the application in his decision of 2 March 2011, a s 369 certificate was not issued. Given our decision in the appeal, the file will be returned to Commissioner Simpson to allow him to complete the outstanding processes under ss 369 and 370 of the Act associated with the 22 November 2010 conference.

Permission to appeal granted; appeal allowed; decision at first instance quashed; order made for extension of time to make application; matter referred back to Commissioner to deal with outstanding processes; orders accordingly

ALEX LAZAREVICH

30 *Robinson v Interstate Transport Pty Ltd* [2011] FWA 696 at [9].