DECISION

Fair Work Act 2009
s.365—General protections

Samantha Jo Peters

v

Liquorland (Australia) Pty Ltd
(C2024/2823)

DEPUTY PRESIDENT BELL MELBOURNE, 20 AUGUST 2024

Application to deal with contraventions involving dismissal – application filed out of time – 1 minute late - circumstances not exceptional - application for extension of time dismissed.

[1] At 12.01am on 1 May 2024, Ms Samantha Peters applied under s 365 of the *Fair Work Act 2009* (the Act) for the Fair Work Commission (Commission) to deal with a general protections dispute involving dismissal.

[2] On 29 May 2024, Liquorland (Australia) Pty Ltd filed its F8A Response to the general protections application, raising a jurisdictional objection to the application on the ground that that it was made outside the 21-day time limit set out in s 366(1) of the Act.

[3] Section 366(1) requires an application under s 365 to be made within 21 days after the dismissal took effect. The Commission must therefore determine in the first instance whether a further time for lodgement of the application is required and, if so, whether it should be granted.

[4] Upon the matter being allocated to me, I issued directions for the filing of evidence and submissions. After conferring with the parties, I resolved to conduct the matter by way of a determinative conference.

[5] Ms Peters filed a witness statement with supporting documents, in addition to her 'Amended Form F8' application. The Respondent called Mr Brenton Fitzsimons, Assistant State Manager (Victoria and Tasmania) and relied on a witness statement and supporting documents by him. Each witness was cross-examined.

When did the dismissal take effect?

[6] Ms Peters' Amended Form F8 describes the notification of her dismissal as follows: "Discussion meeting on the 9th April 2024 and written notification on the 16th April 2024." In her witness statement, Ms Peters states that she did not receive "written notice" of the termination of her employment until 19 April 2024, which was recorded in a letter dated 16 April 2024.

[7] At the hearing before me, Ms Peters raised more squarely that her application was within time because of these events. In her witness statement, Ms Peters also states:

> "According to the Fair Work Act, an employer must not terminate an employee's employment unless the employer has given written notice of termination or made a payment in lieu of that notice. My final payment was on the 15th April 2024, and my written letter of termination is dated the 16th April 2024, therefor my application is within the asked time frame of 21-days."

[8] The employer states that the date of dismissal taking effect was 9 April 2024.

[9] On 9 April 2024, Ms Peters attended a disciplinary outcome meeting in response to a 'show cause' process undertaken the week before. In attendance at that meeting was Mr Fitzsimons, Ms Peters, Ms Rebekah Drake (for Ms Peters), and another company representative.

[10] Ms Drake was an Industrial Officer of the Victorian Branch of the Shop, Distributive & Allied Employees' Association (SDA), and was present in her capacity as Ms Peters' union representative. The material before me indicates Ms Drake was involved in representing Ms Peters in the disciplinary process prior to that date.

[11] Mr Fitzsimons' evidence is that he told Ms Peters at the meeting that her employment would be terminated, effective 9 April 2024, with one month's pay in lieu of notice. I accept his evidence. Consistent with Mr Fitzsimons' evidence is a 'Discussion Record' document, prepared by Mr Fitzsimons, which records the discussion outcome as 'Termination of employment'. A copy of the discussion record was sent by email to Ms Peters and Ms Drake at 4.56pm on 9 April 2024 (and a copy of that email was in Ms Peters' material).

[12] On 10 April 2024, Ms Peters received an email from People & Culture Advisory Services regarding an earlier 'Stopline' request Ms Peters had evidently made about the meeting on 9 April 2024 and noting that the date for the meeting had now passed. At 4.37pm on 10 April 2024, Ms Peters responded, copying Ms Drake, stating (with my emphasis) "Yes, that is correct. The meeting has taken place and consequently, my employment was terminated, effective immediately." I am satisfied that Ms Peters' email accurately reflected the position between the parties and also reflected Ms Peters' state of mind at the time.

[13] I record my finding that the date the dismissal took effect was 9 April 2024. The final day of the 21-day period for the purposes of s 366 of the Act was therefore 30 April 2024 and ended at midnight on that day. This period does not include the day on which the dismissal took effect.[1]

[14] The application was made at 12.01am on 1 May 2024. The application was made out of time, in this case by 1 minute.

[15] Under section 366(2) of the Act, the Commission may allow a further period for a dismissal dispute application to be made if the Commission is satisfied that there are "exceptional circumstances", taking into account:

(a) the reason for the delay; and

(b) any action taken by the applicant to dispute the dismissal; and

(c) prejudice to the employer (including prejudice caused by the delay); and

(d) the merits of the application; and

(e) fairness as between the Applicant and other persons in a similar position.

[16] Each of the above matters must be considered in assessing whether there are exceptional circumstances.[2] I set out my consideration of each matter below.

Section 366(2)(a) - Reason for the delay

[17] For the general protections application to have been made within 21 days after the dismissal took effect, it needed to have been made by midnight on 30 April 2024. The delay is the period commencing immediately after that time until the time the application was lodged on being 12.01am on 1 May 2024, although circumstances arising prior to that delay may be relevant to the reason for the delay.[3]

[18] Given that the delay in the present case is 1 minute, I consider it necessary to take into account the circumstances arising prior to the filing deadline that may be relevant to the reason for the delay.

[19] Ms Peters' amended witness statement provides:

"1. On the 9th of April 2024, I attended a discussion meeting with my union (SDA) industrial officer, Rebekah Drake, where my employment was terminated, effective immediately, for reasons I'm still unsure of.

2. I did not receive written notice of my termination until the 19th of April 2024, with the letter dated 16th of April 2024.

3. My final payslip is dated 15th of April 2024.

4. I made direct communication to Coles' CEO, Leah Weckert, and to Stopline, on the 9th of April 2024, before my dismissal.

5. Coles acknowledged my communication on the 10th of April 2024.

6. I also made direct communication to Brenton Fitzsimons, after the dismissal, for clarification on the 22nd of April 2024.

7. Brenton Fitzsimons responded to my email for clarification on 24th of April 2024.

8. Industrial officer, Rebekah Drake, drafted an F8 form and sent this to me on the 26th of April 2024, following our phone discussion, where she informed me that she would

not be present by the time this goes to Fair Work commission, as she handed in her notice and found another job.

9. On the 29th of April 2024, I informed my industrial officer, Rebekah Drake, that I will not be using her draft F8 application, as I do not agree with what she had put in it. I gave clear instructions to delete/amend what she wrote. Rebekah responded, saying the words of; "no, I am not going to delete my work."

10. On 30th of April 2024, at 18:49, Rebekah Drake email me to confirm that she had not submitted any application and reminded me of the 21-day deadline, being that night."

[20] More generally, Ms Peters submits that factors supporting exceptional circumstances included:

- Her purportedly being within time, as her final payment was on 15 April 2024 and a written letter confirming termination was 16 April 2024.
- Alleged representative error.
- Her attempts to engage with the respondent asking for clarification about her termination and the relevant policies said to underpin it.
- The time spent dealing with her mother's coronial proceedings.
- The impact on Ms Peters' mental health associated with the loss of her job.
- The very short period of lateness of Ms Peters' application.

[21] While Ms Peters did not specifically rely upon each of the above matters as providing a reason for delay, I have treated them as such.

[22] Dealing with them in turn, I have already addressed the date of Ms Peters' dismissal. I found that she was dismissed, in clear terms, effective on 9 April 2024 and that Ms Peters was aware of those circumstances. So far as Ms Peters' asserts, as a reason for delay, that her state of mind was mistaken as to those circumstances (and potentially the commencement of the 21-day period under s 365(1) of the Act), I reject that claim. This is not a factor supportive of a satisfactory reason for delay.

[23] For the alleged representative error, Ms Peters' witness statement asserts:

"9. On the 29th of April 2024, I informed my industrial officer, Rebekah Drake, that I will not be using her draft F8 application, as I do not agree with what she had put in it. I gave clear instructions to delete/amend what she wrote. Rebekah responded, saying the words of; "no, I am not going to delete my work.""

And

"I would also like to include representative error, as my union representative wanted to lie in my application due to it sounding better. I refused to do that and ask that she delete it, she told me she would not delete her work."

[24] I reject any basis for a finding of representative error. First, Ms Peters' claim is an extremely serious allegation and her evidence – no more than the assertions stated above – falls

a long, long way short of establishing anything of the sort. Far from evidencing a lie, the evidence more likely demonstrates that Ms Drake was uncomfortable with making changes that Ms Peters was insisting upon and Ms Drake believed were incorrect (although I do not need to decide this matter). The first mention of a "lie" was Ms Peters' amended witness statement filed on 5 July 2024.

[25] The "lie" was not mentioned in Ms Peters' Amended Form F8 filed on 13 May 2024, although that document contained the equally serious (and equally unsubstantiated) allegation proffered for her late application that "I had been corresponding with Rebekah from the SDA, but have since cancelled my membership with them, as I have reasons to believe that they've been colluding with Coles." No allegation of collusion was put to Mr Fitzsimons.

[26] The limited evidence before me shows numerous telephone calls between Ms Peters and Ms Drake from the date of dismissal to the time her Form F8 was due to be lodged. After the dismissal on 9 April 2024, a call log included with Ms Peters' evidence indicated calls between the two on 10 April 2024, 12 April 2024 (twice), 19 April 2024, 23 April 2024 (five times), 26 April 2024 (possibly four times), and 29 April 2024 (twice).

[27] The evidence also shows an email from Ms Drake to Ms Peters at 5.39pm on Friday, 26 April 2024. Ms Drake wrote:

> "Hi Samantha,
> As discussed, please find attached a rough draft for your review. Considering the time, I have not proof read this or confirmed the dates, however I will ensure that it is reviewed and updated appropriately on Monday. I will speak to you at 2pm on Monday."

[28] As the call log indicates, Ms Drake spoke again with Ms Peters on Monday, 29 April 2024 – the day before Ms Peters' application was due for filing. The documentary evidence shows that Ms Drake specifically reminded Ms Peters about the filing deadline. The same documentary evidence also shows that, during the same call, Ms Peters specifically instructed the SDA not to file Ms Peters' Form F8. Ms Drake confirmed this fact in writing at 6.49pm, Tuesday 30 April 2024, as well as taking the opportunity to again specifically remind Ms Peters of her filing deadline. Her email stated:

> "Good Evening Samantha,
>
> Following our conversation yesterday, I am writing to confirm that, as per your instruction, we have not drafted or submitted any application regarding your termination. I remind you that the 21 day deadline for an unfair dismissal or general protections application is today.
>
> Please let me know if you have any questions."

[29] Contrary to Ms Peters' allegations of representative error, the limited evidence discloses an instruction by Ms Peters to take responsibility for the application herself. While that was only taken the day before the application was due, there was no evidence to suggest that there was inadequate time even if there was a valid reason to terminate the SDA's role in assisting (which I do not find there was.) At this point in time, namely by 29 April 2024, Ms Peters was

plainly well aware of the filing deadlines, the forms to use, and had full benefit of access to the SDA in what residual steps were required.

[30] On the question of the alleged representative error, Ms Peters' claims are not factors that provide a satisfactory reason for delay.

[31] As to Ms Peters' attempts to engage with the respondent, I accept there were some communications to that effect. I also note, however, that by 24 April 2024, the respondent's position was clear and no further correspondence would be engaged in. In an email to Ms Peters on that day, it stated (among other matters) that:

> "Coles remains of the view that you were explained during the disciplinary meeting held on 9 April 2024, the reasons for your termination after being provided with the opportunity to show cause which was considered by the business at the time.
>
> Please note that Coles will no longer be engaging/corresponding with you on this matter."

[32] I do not consider any of the attempts by Ms Peters to engage with the respondent provide any satisfactory explanation for delay.

[33] Ms Peters states that time she spent dealing with her mother's coronial proceedings impacted her ability to file her application on time. I do not accept that proposition, and no evidence was drawn to my attention of any specific event that impacted Ms Peters' preparation, particularly in the final few days of the 21-day period when her application was being finalised. I do not consider the coronial proceedings provide any satisfactory explanation for delay.

[34] While I am prepared to accept that Ms Peters experienced distress and difficulty associated with the loss of her job, there was no specific evidence of any persuasive kind that Ms Peters was labouring under a particular mental health condition or how that condition impacted her capacity to finalise her application. It is well-established that stress that accompanies a dismissal will not, without more, favour a finding of exceptional circumstances.

[35] At its core, I find that the operative reason for delay was due to a change in responsibility for the completion of Ms Peters' application in the final few days before it was due. Ms Peters seeks to pin responsibility for that on alleged representative error by the SDA, which is a proposition I reject. But even noting the decision by Ms Peters to complete the application herself in circumstances where there was no representative error by the SDA, Ms Peters had plenty of time remaining to complete her application on time and she did not do so, albeit only just.

[36] As stated by Gostencnik DP in *Ozsoy v Monstamac Industries Pty Ltd* [2014] FWC 479, whose observations I agree with:

> "[21] The fact that the application was lodged only one day late does not take the matter further. Whether the delay is one day or one year, there must be an acceptable explanation for the delay. Whilst the length of delay may be relevant to questions of

> prejudice, it does not provide an explanation nor does it render the circumstances exceptional. The absence of an acceptable explanation for the delay weighs against the Applicant in this case."

[37] While the period of delay for Ms Peters' application is very short – it could not feasibly be shorter – that does not change my conclusion that any of her proffered reasons provide an adequate or satisfactory reason for delay, whether considered individually or cumulatively.

Section 366(2)(b) - action taken by the Applicant to dispute the dismissal

[38] Where an Applicant takes action to contest a termination, it will put the employer on notice that its decision to terminate the Applicant's employment is actively contested and may, depending on all the circumstances, favour the granting of an extension of time.[4]

[39] While I acknowledge that Ms Peters took steps with the employer prior to 24 April 2024 to broadly dispute her dismissal, I do not consider that those matters are supportive of a finding of exceptional circumstances.

Section 366(2)(c) - the prejudice to the employer (including prejudice caused by the delay)

[40] In all the circumstances, I do not find that any material prejudice would be suffered by the respondent if an extension of time were granted and the respondent did not contend otherwise.

[41] In *Jovcic v Coopers Brewery Limited* [2023] FCA 797, Besanko J stated that "The mere absence of prejudice to the respondent is not enough to justify the grant of an extension." While his Honour's observations were made in the context of an application to extend time for an appeal (in which exceptional circumstances were not required), I nonetheless consider that they are generally informative for an application to extend time under s 366.

[42] The mere absence of prejudice is not, of itself, a matter supportive of a conclusion that exceptional circumstances exist such that time should be extended. I do not consider that this factor is supportive of a finding of exceptional circumstances but neither does it point against it. I treat the factor neutrally.

Section 366(2)(d) - the merits of the application

[43] The competing contentions of the parties in relation to the merits of the application are set out in the filed materials, although at a relatively high level.

[44] It is well established that, "it will not be appropriate for the Tribunal to resolve contested issues of fact going to the ultimate merits for the purposes of taking account of the matter in s.366(2)(d)"[5]. A Form F8 application is also not a pleading.

[45] With that having been noted, Ms Peters' substantive claim (which is primarily articulated in her Form F8) appears to require significant work for it to clearly conform with, or at least articulate, a cogent general protections claim.

[46] The employer states it dismissed Ms Peters for repeatedly breaching established company policies that deal with how staff should (not) interact with shoplifters. In essence, the employer's position is that the policy specifically precludes an employee following or engaging with suspected shoplifters, for the purpose of ensuring that the situation does not escalate into violence on the shoplifter's behalf. The employer states Ms Peters breached this policy in February 2024, upon which she received coaching. The employer states Ms Peters breached it again in March 2024, which was the event that led to her dismissal in light of her alleged breach only a few weeks earlier.

[47] Ms Peters' Amended Form F8 sets out a collection of grievances about her employment about various matters. Some are routine – such as a payroll complaint – but others are simply far-fetched, such as her allegations that "Coles and Coles Liquor have been falsifying employee data records in order to pay workers less and committing fraud by money laundering through their supply chains." The latter is a remarkable allegation, utterly unsupported by any credible basis, and undermines the credibility of Ms Peters' other grievances.

[48] However, even taking the events that Ms Peters says were adverse action against her, it is unclear how she connects those matters to any credible claim grounded in a prohibited reason or action. In Ms Peters' Amended Form F8, the provisions of the Act that she asserts are contravened are sections 340 (workplace rights protections), 343 (workplace rights coercion), 346 (industrial activities protections), 348 (industrial activities coercion), 351 discrimination (Ms Peters identifies "Disability – ADHD and my criminal history"), and 352 (temporary absence for illness or injury). The only provision of the Act on her Amended Form F8 that she does not claim was breached is s 358 (dismissing an employee to be engaged as an independent contractor).

[49] In the Amended Form F8, Ms Peters' response to the question asking her to explain how the impugned actions of the employer she has described contravene the relevant provisions of the Fair Work Act she has identified, Ms Peters states as follows:

> "Coles have breached the Protecting Vulnerable Workers laws because of the deliberate and systematic conduct Fair Work Ombudsman v DTF World Square Pty Ltd (in liq) (No 3) [2023] FCA 201.
>
> **Section 325** of the Fair Work Act provides that it is a contravention of the Act for an employer to directly or indirectly require an employee to spend any part of an amount payable to an employee in relation to the performance of work if the requirement is unreasonable in the circumstances. I've had multiple deductions taken from my wage, without consent.
>
> **Section 327A** of the FW Act1 (sic), an employer commits an offence if it engages in intentional conduct which results in wage theft, namely the employer fails to pay a 'required amount' to an employee in full, on or before the date that the required amount is due to be paid.
>
> **Section 323** of the Act requires employers to pay employees the full amount owed for work performed.

Section 104 Equal opportunities Act 2010.

Section 342 of the Fair Work Act 2009.

Section 3 (a) of the Equal Opportunity Act 2010.

Section 351 of the FWA prohibits employers from taking adverse action against employees on a range of grounds including disability.

Section 7 of the DDA makes it unlawful to discriminate against a person because of a disability or the disability of an associate, such as a friend, partner, carer or family member of the person.

Division 2 of the Crimes Act 1958."

[50] While the steps Ms Peters needs to take to articulate a conceptually coherent general protections claim might be capable of being addressed in the future, the initial picture is far from compelling. I consider that the merits of the application tend against a finding of 'exceptional circumstances', albeit not strongly, even taking into account the fact that Ms Peters is unrepresented and the early stage of her claim.

Section 366(2)(e) - fairness as between the Applicant and other persons in a similar position

[51] Neither party brought to my attention any relevant matter concerning this consideration and I am unaware of any relevant matter. In relation to this factor, I therefore find that there is nothing for me to weigh in my assessment of whether there are exceptional circumstances.

Is the Commission satisfied that there are exceptional circumstances, taking into account the matters above?

[52] Briefly, exceptional circumstances are circumstances that are out of the ordinary course, unusual, special or uncommon but the circumstances themselves do not need to be unique nor unprecedented, nor even very rare.[6] Exceptional circumstances may 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 can be considered exceptional.[7]

[53] I have set out my findings of each of the statutory factors in s 366(2)(a) – (e) above. None of those factors are supportive of a finding of exceptional circumstances. Two of those factors specifically point against a finding of exceptional circumstances. There was no other matter drawn to my attention, including the very short period of lateness in Ms Peters' application before it was filed, that I consider warrant a finding of exceptional circumstances.

[54] As to the short period of lateness relied upon by Ms Peters, I respectfully agree with the observation of the Full Bench in *Johnstone v Scotch College* [2022] FWCFB 179 at [31] where the bench stated "We note that the statutory requirement as to the time in which an unfair

dismissal application may be filed is not a mere technicality. Such time limits are a fundamental part of the statutory framework and must be properly considered by decision makers."

[55] A very short delay may, in a general sense, provide an applicant with a greater opportunity to demonstrate overall 'exceptional circumstances'. Again in a general sense, an applicant with a long delay would expect to have greater difficulty demonstrating 'exceptional circumstances' because one of the statutory criteria – reasons for delay – is likely to weigh more heavily against an overall finding of exceptional circumstances[8].

[56] That said, "It is not a pre-condition to the grant of an extension of time that the applicant provide a credible explanation for the entire period of the delay. Indeed, depending on the circumstances, an extension of time may be granted where the applicant has not provided any explanation for *any* part of the delay"[9] (original emphasis).

[57] But to assert that merely because a delay is very short that a finding of exceptional circumstances should be made is to ignore the time limit Parliament has set for making such applications and the statutory framework Parliament has required to be considered if applications are not made within that time.

[58] Having regard to all of the matters listed at s 366(2) of the Act, I am not satisfied that there are exceptional circumstances.

Conclusion

[59] Not being satisfied that there are exceptional circumstances, there is no basis to allow an extension of time. Ms Peter's application for the Commission to deal with a dismissal dispute is therefore dismissed. An Order[10] to this effect will be issued in conjunction with this decision.

DEPUTY PRESIDENT

Appearances:

S Peters on her own behalf
R Karakinos from the Respondent

Hearing details:

2024.
Melbourne (by video link via Microsoft Teams):
July 18.

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[1] *Singh v Trimatic Management Services Pty Ltd* [2020] FWCFB 553, [10]. See also *Acts Interpretation Act 1901* (Cth) s 36(1) as in force on 25 June 2009; *Fair Work Act 2009* (Cth) s 40A.

[2] *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFB 901, [39].

[3] *Shaw v Australia and New Zealand Banking Group Ltd* [2015] FWCFB 287, [12] (Watson VP and Smith DP).

[4] *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298.

[5] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [36].

[6] *Ibid* [13].

[7] *Ibid*.

[8] *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd (t as Richmond Oysters)* (2018) 273 IR 156 at [39].

[9] *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd (t as Richmond Oysters)* (2018) 273 IR 156 at [40].

[10] PR777078.