



REASONS FOR DECISION

Fair Work Act 2009

s.365 - Application to deal with contraventions involving dismissal

Mr Kuncho Kurtev

v

KCB Australia Pty Ltd, Ms Toni Telfer

(C2024/5145)

COMMISSIONER JOHNS

MELBOURNE, 5 SEPTEMBER 2024

Application to deal with contraventions involving dismissal – whether to extend time for lodging the application – application dismissed

Introduction

[1] On 26 August 2024, the Fair Work Commission (**Commission**) as presently constituted issued an Order ([PR778663](#)) dismissing an application for an extension of time by Mr Kuncho Kurtev (**Applicant**).

[2] On 27 August 2024, the Applicant requested reasons for that decision.

[3] I had already provided reasons for my decision (ex tempore) recorded in transcript¹ on 26 August 2024.

[4] What follows are those reasons:²

PN132

THE COMMISSIONER: I've had an opportunity to consider all the materials which have been filed in relation to the extension of time application and the matters that I've heard today by way of evidence and submissions, and the Commission, as presently constituted, is in a position to announce its decision.

PN133

Mr Kuncho Kurtev, whom I will refer to as 'the applicant', applied to the Fair Work Commission under section 365 of the Fair Work Act for the Commission to deal with a dispute arising out of the applicant's allegation that he had been dismissed from his employment with KCB Australia Pty Limited, whom I will refer to as 'the respondent', in contravention of part 3-1 of the Fair Work Act.

PN134

Before dealing with the dispute, the Commission must be satisfied that the application was not made out of time. Having heard from the parties, these are my reasons for decision. Subsection 1 and subsection 366 of the Fair Work Act provides that an application under section 365 must be made within 21 days after the dismissal took effect or within such further period as the Commission allows.

PN135

The parties agree, and I so find, that the dismissal took effect on 21 June and that the application was made on 24 July, some 33 days after the dismissal took effect. I'm, therefore, satisfied that the application was not made within 21 days after the dismissal took effect. It remains to be considered whether it was made within such further period as the Commission allows.

PN136

Under subsection (2) of section 366 of the Fair Work Act, the Commission may allow a further period for a dismissal application to be made if the Commission is satisfied that there are exceptional circumstances. Taking into account the matters listed in subsection 366(2), those matters are:

PN137

- (a) the reason for the delay;*
- (b) any action taken by the applicant to dispute the dismissal;*
- (c) prejudice to the employer (including prejudice caused by the delay);*
- (d) the merits of the application; and*
- (e) fairness as between the applicant and other persons in a similar position.*

PN138

*As the full bench has confirmed in the decision of *Stogiannidis v Victorian Frozen Foods Distributors*, which is published at [\[2018\] FWCFB 901](#), each of these matters must be considered in assessing whether there are exceptional circumstances. I now turn to each of those matters. The first is the reason for the delay. For the application before me to have been made within 21 days after the dismissal took effect, it needed to have been made by midnight on 12 July. It was not.*

PN139

*As the majority of the full bench noted at paragraph 12 of its decision in *Shaw v ANZ Bank*, which is published at [\[2015\] FWCFB 287](#), the delay is the period commencing immediately after that time, i.e. 12 July, and when the application was lodged, that is 24 July, although circumstances arising prior to that delay may be relevant to the reasons for the delay. That is to say the primary consideration is the reason for the delay, in the 12 days between when the application should have been lodged on 12 July and when it was lodged on 24 July.*

PN140

As stated by the full bench at paragraph 39 of the decision in Stogiannidis, the reason for the delay is not in itself required to be an exceptional circumstance. It is one of the factors that must be weighed in assessing whether, overall, there are exceptional circumstances. As the full bench went on to say at paragraph 40 of that decision, an applicant does not need to provide a reason for the entire period of the delay.

PN141

Depending on the circumstances, an extension of time may be granted where the applicant has not provided any reason for any part of the delay.

PN142

In this matter, the applicant states that the reasons for the delay were concerned with him receiving a diagnosis for what, ultimately, was diagnosed as [a medical condition]. The applicant also points to suffering from [another medical condition].

PN143

As I understand it, it seems to me that the applicant prioritised, very understandably, obtaining a diagnosis for medical conditions that he was experiencing. However, it was not necessary to receive that diagnosis in advance of making an application pursuant to section 365 of the Fair Work Act. That application could have been made prior to the diagnosis. It could have been made within the 21-day period following the dismissal on 21 June. I'm not satisfied that, in that period, the applicant was completely incapacitated and unable to complete an application.

PN144

I'm further not satisfied that in the 12 days after the effective date of 21 July, the applicant was unable to file an application in the Fair Work Commission. I accept that his diagnosis means ... that tasks that would ordinarily be completed more quickly by people without his diagnosis might be completed with a longer period of time by someone with his diagnosis.

PN145

But 33 days after the dismissal is a very long period of time. Even if I accept that the diagnosis that the applicant has caused him some inability to act quickly, I do not accept that he could not have, in the 33 days after the dismissal, have filed an application more promptly or that he could not have filed it within time by 12 July.

PN146

I note, as was evidenced before me today, that the applicant was able to undertake other ordinary tasks, such as shopping and the like. I note his evidence that he has a computer at home and could have completed the application online which, I understand, he did. I also note that the evidence indicates that the applicant attended a medical appointment on 26 June and 1 July. The remainder of the days as between 21 June and 12 July are unexplained. Further, the remainder of the days between 12 July and 24 July are unexplained.

PN147

The respondent, through Ms Telfer, led evidence that the applicant attended outplacement sessions by Outplacement Australia Pty Limited following the termination of his employment. While accepting the evidence that a number of phone calls occurred in the relevant period, the applicant indicates that those telephone calls were very short.

PN148

He formed the view that those outplacement services would not be of use to him. That is entirely a matter for him, but the evidence is he was at least cognitively able to receive and deal with those phone calls and to communicate that he was not interested in the outplacement service. If he was able to do that, he was also able to commence an application within time before the Fair Work Commission.

PN149

Accordingly, I accept the reasons advanced by the applicant for the reasons for the delay, but I do not accept that, in toto, it meant that the applicant could not have completed an application within time or more promptly after 12 July when the application needed to be filed within time. The fact that the applicant decided, very understandably, to attend to other affairs within the 21-day period and the delay period after 12 July is, as I say, very understandable but does not provide an acceptable excuse for why he did not file an application in the Fair Work Commission.

PN150

There is simply no evidence before me that the applicant suffered from any significant cognitive impairment or dysfunction that affected his ability to prepare his application. His application was prepared and his application is extensive. It demonstrates a cognitive ability that he could have demonstrated more promptly. Having accepted the reasons advanced by the applicant, I find that those reasons weigh against granting an extension of time.

PN151

The next matter I must consider is any action taken by the applicant to dispute the dismissal. It is not in dispute, and I so find that the applicant did not take any action to dispute the dismissal prior to the making of the present application before me on 24 July 2024. This matter weighs against granting an extension of time.

PN152

I must now consider the prejudice to the employer including prejudice caused by the delay. It is not in dispute, and I so find, that the circumstances in this matter would not cause any prejudice to the respondent if an extension of time was granted. This factor is a neutral consideration in deciding whether to grant an extension of time.

PN153

I will now turn to the merits of the application. There are competing contentions of the parties in relation to the merits of the application as set out in the filed materials. Having examined those materials, it is evident to me that the merits of the application turn on contested points of fact, evidence in respect of which there would need to be a hearing and a weighing of those matters at the hearing to determine the merits of the matters if an extension of time were granted.

PN154

It's not my job to hear evidence about the substantive matters relative to merit. In the absence of a hearing of the evidence in this matter, it is simply not possible for me to make any firm or detailed assessment of the merits of the claim, although I do note the applicant advances an argument about either direct or indirect discrimination in respect of matters which the respondent says it was simply unaware of prior to the dismissal. The facts are that the diagnosis occurred after the dismissal.

PN155

In any case, it seems to me that the applicant has an apparent case to which the respondent has an apparent defence. In the circumstances, I find that it is not possible for me to make an assessment of the merits of the application. This, therefore, is a neutral consideration in deciding whether to grant an extension of time.

PN156

The last matter I will turn to is a consideration of the fairness as between the applicant and other persons in a similar position. Neither party brought to my attention any relevant matter concerning this consideration and I'm unaware of any relevant matter. In relation to this factor, I, therefore, find that there is nothing for me to weigh in the assessment of whether or not to grant an extension of time or whether there are exceptional circumstances.

PN157

Having considered all of the matters I'm required to consider, I must now consider whether the Commission is satisfied that there are exceptional circumstances taking into account each of those matters I have just considered and expressed views about.

PN158

As set out by the full bench at paragraph 13 in the decision of Nulty v Blue Star Group, which is reported at [\[2011\] FWAFB 975](#), exceptional circumstances are circumstances that are, 'Out of the ordinary course, unusual, special or uncommon', but the circumstances themselves do not need to be:

PN159

...unique or unprecedented or even very rare. Exceptional circumstances may include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually are of no particular significance, when taken together can be considered exceptional.

PN160

In this matter, the applicant, quite understandably, gave preference to obtaining medical reports and a diagnosis as to his medical condition. Whilst I'm not unsympathetic to the experience of the applicant, those matters are not out of the ordinary. They are, in fact, not unusual or uncommon. Consequently, having regard to all the matters listed in subsection (2) of section 366 of the Fair Work Act, I am not satisfied that there are exceptional circumstances.

Conclusion

[5] Not being satisfied that there are exceptional circumstances, there was no basis for the Commission to allow an extension of time. The Applicant's application for an unfair dismissal remedy was therefore dismissed. An order ([PR778663](#)) to that effect was issued on 26 August 2024.



COMMISSIONER

Appearances:

Mr Kuncho Kurtev for himself

Ms Toni Telfer for the First and Second Respondent

Hearing details:

2024

Melbourne (video using Microsoft Teams)

26 August 2024

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¹ Transcript, 26 August 2024, PN132- 161.

² Edited to correct any typographical, grammatical or other minor errors and to protect the privacy of the Applicant including the specifics of his medical condition.