DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Mukesh Tomar
v
Swissport Pty Ltd
(C2024/3342)

DEPUTY PRESIDENT WRIGHT SYDNEY, 28 OCTOBER 2024

Application to deal with contraventions involving dismissal – application filed out of time - incorrect application form lodged - jurisdictional objection – whether applicant dismissed - – – application found to be made within prescribed time period – applicant found to be dismissed

[1] Mr Mukesh Tomar has made an application to the Fair Work Commission (Commission) under s.365 of the *Fair Work Act 2009* (Cth) (FW Act) for the Commission to deal with a dispute arising out of Mr Tomar's allegations that he was dismissed from his employment with Swissport Pty Ltd (Swissport) in contravention of Part 3-1 of the FW Act. Mr Tomar initially lodged a Form F1 application to the Commission on 7 May 2024 by email. Mr Tomar subsequently lodged a Form F8 application on 22 May 2024.

[2] Section 366(1) of the FW Act requires that the application be made within 21 days after the dismissal took effect, or within such further period as the Commission allows.

[3] In the Form F8A employer response form, Swissport claimed that the application was made out of time. Swissport also objected to the application on the grounds that Mr Tomar was not dismissed under s.386 because he resigned.

[4] In summary, I have found that Mr Tomar's employment ended on 18 April 2024 and that his employment was terminated at the initiative of Swissport. The application should have been made on 9 May 2024 to comply with s.366(1) of the FW Act. I have found that Mr Tomar made a valid application pursuant to s.365 when he filled out and sent a Form F1 application to the Commission on 7 May 2024 by email. In the event that the Form F1 application is not a valid application, I have found that the circumstances in which the application was made by the filing of the Form 8 application are exceptional, according to the factors in s.366(2) of the FW Act, and so I have granted an extension of time to file the application.

Directions and hearing

[5] The matter was listed for a Case Management Conference, by Microsoft Teams on 17 June 2024. Mr Tomar represented himself at the Case Management Conference. Swissport was represented by Ms Katie Foster, Manager – Human Resources and Employee Relations.

[6] On 6 June 2024, prior to the Case Management Conference, my Chambers issued draft directions to the parties which indicated that I proposed to deal with both the extension of time issue and whether Mr Tomar was dismissed at the same hearing.

[7] At the Case Management Conference on 17 June 2024, after hearing from the parties, I issued directions requiring the parties to file and serve evidence and submissions in relation to both the extension of time issue and whether Mr Tomar was dismissed. As the workplace was in Sydney, I also listed the matter for hearing in person in Sydney at 10am on 31 July 2024.

[8] On 8 and 30 July 2024, Mr Tomar filed evidence and submissions in relation to both the extension of time issue and whether Mr Tomar was dismissed.

[9] On 17 July 2024, Swissport filed submissions in relation to the extension of time issue only.

[10] At 4:34pm on 30 July 2024, my Associate advised the parties that a Digital Court Book had been created for 'the in-person matter at 10:00am tomorrow, Wednesday 31 July 2024.'

[11] At 8:59am on 31 July 2024, my Chambers received an email from Ms Foster querying whether the hearing would take place via Microsoft Teams.

[12] At 9:18am on 31 July 2024, my Associate sent the following email to Ms Foster:

> Dear Ms Foster,
>
> I refer to the above matter and below correspondence.
>
> As discussed during the Directions Hearing at **9:00am 17 June 2024,** and the attached Notice of Listing that was sent to you at **10:18am 17 June 2024,** the Hearing is scheduled in-person in Sydney.
>
> Kind Regards,
>
> [redacted]

[13] At 9:37am on 31 July 2024, Ms Foster sent the following response to my Chambers:

> Dear [redacted],
>
> Apologies I misread the directions, all other General Protection hearings in the FWC have been held via Teams. I will not be in attendance as I'm located in Brisbane.

Katie Foster
Manager – Human Resources & Employee Relations

[14] Ms Foster did not apply for an adjournment. In the circumstances, the hearing proceeded in the absence of Swissport. I note that Swissport did not file any evidence in relation to the extension of time issue or any material at all in relation to whether Mr Tomar was dismissed. I considered the submissions that Swissport filed in relation to the out of time issue and the Form F8A response in my determination of this matter. Mr Tomar represented himself and gave evidence at the hearing. Mr Tomar also provided a witness statement of Mr Abhishek Singh however Mr Singh did not attend the hearing so his witness statement was not tendered as evidence and has not been considered by me.

Factual Background

[15] Mr Tomar commenced employment with Swissport as a Cargo Duty Manager in December 2022. In this role, Mr Tomar was responsible for warehouse operations. He worked 8:00am to 4:00pm Monday to Friday pursuant to an Employment Agreement.[1] Although the Employment Agreement provides that Mr Tomar may be required to work reasonable additional hours, including on weekends and public holidays, Mr Tomar gave evidence that he ordinarily worked on weekdays only.

[16] Before joining Swissport, Mr Tomar worked in the aviation industry for over 18 years including 12 years with Emirates Airlines in Dubai which Mr Tomar said is one of the busiest cargo hubs in the world. He also worked for Dnata and All Nippon Airways. Mr Tomar said that he has worked in Sydney for over five years and understands the Cargo Terminal Operator workings very well.[2]

[17] Initially, Mr Tomar was one of three employees at Swissport who worked in Cargo Services. In October 2023, Cargo Services expanded to three supervisors, who reported to Mr Tomar, and 11 cargo agents who reported to the supervisors.

[18] Mr Tomar claimed that since he commenced employment with Swissport in December 2022, he experienced harassment from the Cargo Manager, Mr Goran Panovski, at work. Mr Tomar said that he is skilled in the cargo handling process, but Mr Panovski never took notice of his inputs and poorly planned the cargo warehouse, resulting in money being wasted. Mr Tomar said that whenever he made suggestions, he was ignored by Mr Panovski. If Mr Tomar disagreed with Mr Panovski or tried to correct him, Mr Panovski would punish Mr Tomar by instructing him to sweep the warehouse, vacuum the office and clean the car park as well. This made Mr Tomar feel humiliated. Mr Tomar did not have any issues with cleaning but objected to Mr Panovski directing him to perform such duties as a punishment.

[19] Mr Tomar said that he was consistently treated less favourably compared to his colleagues that despite his expensive experience and knowledge, Mr Panovski always prioritised their input over Mr Tomar's. Mr Tomar said that Mr Panovski undermined his authority by allowing warehouse supervisors to bypass Mr Tomar and report directly to Mr Panovski.[3]

[20] Mr Tomar addressed these concerns directly with Mr Ravinder Bolangdy, Cargo Head for the APEC region, who conveyed these concerns to Mr Dean Durban, Business Head. Mr Tomar had a meeting with Mr Durban in June 2023 and received assurance that Mr Panovski would be moved out of Cargo Services to Ramp Services and would not be back. This occurred, however Mr Panovski returned to Cargo Services in October 2023 and started causing issues for Mr Tomar which Mr Tomar said affected his job performance and overall well-being. On 18 December 2023, Mr Tomar sent an email about his concerns to Swissport Human Resources, including to Ms Foster, asking that Swissport investigate Mr Tomar's concerns as he feared for his job. Mr Tomar was particularly concerned about a colleague whose employment had been terminated and was worried that he would be next.[4]

[21] On 20 December 2023, Ms Sheenal Prasad, HR Business Partner called Mr Tomar to acknowledge his email. Ms Prasad told Mr Tomar that his concerns would be escalated to Mr Durban.

[22] At 6:18pm on Sunday 24 December 2023, Mr Tomar received an email from Mr Panovski while Mr Tomar was off duty. The email was copied to all of Mr Tomar's colleagues. The email stated:

> Hi Mukesh,
> What is your plan to support our Sydney Cargo Operations tomorrow as Todd & Stanley have covered most of this weekend ?
> Please advise further today in readiness for tomorrow.
> Regards
> Goran Panovski
> Cargo Manager– Sydney[5]

[23] Mr Tomar responded 30 minutes later at 6:48pm as follows:

> Hi Goran,
> It's a bit inequitable to receive an email on Sunday evening to ask for readiness for Monday's work, I have got personal commitments which were planned well before last month. My in-laws are here from New Zealand and Fiji however I will make myself available for tomorrow by 0800 hrs.
> Mukesh Tomar[6]

[24] Mr Panovski then sent a further email to Mr Tomar as follows which again was copied to all of Mr Tomar's colleagues:

> Hi Mukesh,
> Thankyou for your reply & advising your availability from 8:00am onwards tomorrow.
> Could you please advise on the following;
> Who will provide operational support tomorrow morning between 5:00am to 8:00am ?
> Who will provide operational support on Boxing Day ?
> Have you submitted an annual leave form for your time off for this Christmas period as I have not received any leave applications from you ?

> Additionally, Joseph Meli sent you an email yesterday at 1:36pm asking for your guidance regarding staffing during the Christmas period which you did not reply to his email ?
> In relation to your personal commitments, you did not brief your team as well as Anthony Lutterschmidt & myself.
> Noone was aware of your personal movements & no planning / operational adjustments were made by you.
> Additionally, your out of office auto email reply has been activated advising that you will not be able to respond to emails until Wednesday, 27 December 2023.
> Please advise further.[7]

[25] Mr Tomar responded 30 minutes later at 8:09pm as follows:

> Hi Goran,
>
> Thanks for your email. Do I need to apply for leaves on public holidays and rostered day offs. And I don't really need to share my personal plans or personal life at work. My roster says off days on 25th and 26 according to how I plan my family me. My out of office reply set til 27th 0700 hrs as I will be starting my day from 0800 hrs on 27 December[8]

[26] On Christmas Day at 6:22am, Mr Panovski sent a further email to Mr Tomar as follows:

> Hi Mukesh,
> You haven't fully replied to all points noted in my email ?
> I'm not too sure how your roster has changed to have Monday 25/12 & Tuesday 26/12 off work when you work a fixed roster which is Monday to Friday 8:00am to 4:00pm ?
> I was not notified of this roster change.
> You also did not advise of your non availability for those dates during the working week last week so a roster coverage plan could be put into place.
> Overall, our Cargo operations & Sydney Airport operate 365 days per year which we need to work together to plan & cover public holidays & weekends etc. If we all decided to take public holidays off, then we would not have any customers left & no Cargo business. Our RAMP teams have been operating 365 days per year for many years now & I expect the same from my Cargo operations.
> I look forward to your reply.[9]

[27] On 10 January 2024, Mr Tomar sent an email to Ms Prasad. Mr Tomar indicated in the email that he had not received any formal acknowledgement or response to his email of 18 December 2023 except Ms Prasad's phone call of 20 December 2023. Mr Tomar requested that Swissport Human Resources provide a support person in any meeting with Mr Durban as Mr Durban had brought Mr Panovski back to Cargo Services. Ms Prasad agreed to this request in a further conversation later that day.[10]

[28] In his email, Mr Tomar referred to an email which he sent to Ms Prasad on 24 December 2023 in relation to being forced to work on a public holiday at very short notice and confirmed Ms Prasad's advice that this had been escalated to Mr Durban. Mr Tomar noted that he had been advised that Mr Durban would be in touch with him on 28 December 2023 but that this

had not occurred and that he expected that Ms Foster and Ms Prasad would be part of the discussion as advised by Ms Prasad. The email concluded:

> I understand that resolving workplace issues can take time, but the persistence of these challenges is affecting my ability to perform at my best and is impacting my overall job satisfaction. In view of times laps from our last conversation please advise if I need to seek help from external sources
>
> I would appreciate any updates or insights you may have regarding the status of the investigation.
>
> I value my role within the company and want to ensure that I can contribute effectively to the team. I believe that resolving these issues will not only benefit me but also contribute to a healthier work environment.
>
> Thank you for your attention to this matter. I look forward to hearing from you soon.[11]

[29] Mr Tomar said during the hearing that he did not receive a response to this email, however on 15 or 16 January 2024, he had a meeting with Mr Durban. During that meeting, Mr Durban said to Mr Tomar that he should not be working on weekends and public holidays because he was employed pursuant to an Employment Agreement. Mr Durban also said that he would move Mr Panovski from Cargo Services to Transport Services. However Mr Durban moved to New Zealand and the transfer did not take place.

[30] Mr Tomar said that Mr Panovski and the supervisors were running the Cargo operations and excluding Mr Tomar from decisions on an ongoing basis. On 13 March 2024, the situation came to a head when Mr Tomar gave one of the supervisors an instruction in relation to work which was ignored. The supervisor subsequently denied that Mr Tomar had issued the instruction and was supported by Mr Panovski. Mr Tomar felt insulted and humiliated in front of all the staff in the warehouse, and walked out of the office, deciding that enough is enough.[12]

[31] On 14 March 2024, Mr Tomar sent an email to Mr Bolangdy and Mr Sam Panagiotopoulos (who had replaced Mr Durban) requesting to meet to discuss some personal work-related issues pertaining to his role and responsibilities within the company. Mr Tomar indicated that he felt that having this meeting would be beneficial in finding solutions. Mr Tomar advised that he left work on 13 March 2024 and needed to discuss his concerns with Mr Bolangdy and Mr Panagiotopoulos before returning to work.[13] At the hearing, Mr Tomar said he then attended a meeting with Mr Panovski, Mr Bolangdy and Mr Panagiotopoulos. At the meeting, Mr Tomar said that he was finding the work environment hostile and that he did not want to work in these conditions. Mr Bolangdy then offered Mr Tomar a new role of Operations Manager, Customer Service. Mr Tomar asked who he would report to if he accepted the new role and was advised it would be Mr Panovski. Mr Tomar was told to take some time off and advise Swissport Management what he wanted to do. Mr Tomar then took three days off work.

[32] On 21 March 2024, Mr Tomar sent an email to Mr Bolangdy and Mr Panagiotopoulos in the following terms:

> Dear Ravi/Sam

> I hope this email finds you well. It is with a heavy heart that I must tender my resignation from my position as Cargo Duty Manager at Swissport Cargo - Australia, effective 18th Apr-2024. This decision has been one of the most difficult I have ever had to make, but recent circumstances beyond my control have left me with no choice but to take this step.
>
> Over my tenure at Swissport Cargo - Australia, I have had the privilege of working alongside incredible colleagues and tried to contribute to projects that I am truly passionate about. The support and camaraderie within the team have made my time here truly rewarding, and it is not without great regret that I must depart from this role.
>
> However, due to unforeseen and unavoidable circumstances, I find it necessary to step down currently. Please know that this decision was not made lightly, and I have explored all possible avenues to continue in my role to the best of my ability.
>
> I am committed to ensuring a smooth transition during my notice period. I am more than willing to assist in training a replacement, documenting processes, or providing any other assistance necessary to facilitate a seamless handover of responsibilities.
>
> I hope that our paths may cross again in the future under different circumstances. Please feel free to reach out to me if there are any further discussions needed or if I can be of any assistance during this transition period.
>
> Thank you once again for the understanding and support you have shown me during this challenging time.
>
> Best Regards
>
> Mukesh Tomar
> Cargo Duty Manager[14]

[33] The following day, on 22 March 2024, Mr Panagiotopoulos sent an email to Mr Tomar advising that he would like to catch up with him to understand his reasons for the resignation, particularly in light of proposing the customer service role.[15]

[34] On 23 March 2024, Mr Tomar advised Mr Panagiotopoulos that the main reason that he was resigning was because of the treatment he experienced at work from Mr Panovski. Mr Tomar summarised the past complaints that he had made about Mr Panovski which included concerns that he had experience racial discrimination and concluded the email as follows:

> Given the background, it is unfair to expect me to let bygones be bygones. I have lost trust in the assurances I received from the management earlier and believe that working for Swissport is a lost cause, which is the main reason why I want to move on. As mentioned, I have all my hopes and passion about Swissport Cargo business and deeply believe in its bright future.

> It's very difficult and heart breaking to see the Sydney operation is spending unnecessary time and energy into playing office politics rather than concentrating on work quality and generate revenue for Swissport.
>
> Please also see all the attached emails that I sent to HR.[16]

[35] Mr Panagiotopoulos did not respond to the email and did not make any attempt to discuss Mr Tomar's reasons for resigning with him.

[36] On 4 April 2024, Mr Panagiotopoulos issued a memorandum to Cargo Employees with the subject heading 'Workplace Investigation'. The memorandum relevantly provided:

> At Swissport we are committed to maintaining a safe, respectful, and productive work environment for all employees. Over the past few weeks, I have received several formal complaints from within the cargo team that contain serious allegations. The decision has been made and I want to inform you of an upcoming workplace investigation.
>
> This investigation is part of our ongoing efforts to ensure our workplace remains an environment where everyone feels valued and respected. I have engaged in external company who will assist us with conducting a thorough investigation.[17]

[37] On Mr Tomar's last day of work, he received a phone call from the external HR company who had been engaged to carry out the investigation, Work Logistics Australia. He provided Work Logistics Australia with a statement on 22 April 2024.

[38] Mr Tomar gave evidence that after he ceased employment with Swissport, he sought advice about commencing proceedings by posting a message on the website 'Airtasker'. In response to the message, a human resources professional provided some advice to Mr Tomar for a nominal fee and sent Mr Tomar a 'Form F1'. Mr Tomar completed the Form F1 and lodged it with the Commission by email on 7 May 2024.[18] Mr Tomar produced an email which he sent to the Commission enclosing the Form F1 at 1:33 on 7 May 2024 which stated:

> Dear Fair work Commission,
> I am writing to formally lodge a complaint against my employer, Swissport Australia PTY LTD, for alleged violations of fair work standards. I believe these violations undermine the principles of fairness and equity in the workplace, and I seek your assistance in addressing them.
> Best regards
> Mukesh Tomar[19]

[39] Mr Tomar produced an acknowledgement from the Commission which he received one minute later which relevantly provided:

> Thank you for your email to the Fair Work Commission.
>
> If you have lodged an application we will endeavour to contact you with your case number within 7 business days. Normally we would contact you within 3 business days, but we are currently receiving a large number of applications.

> If you have a question we will get back to you as soon as we can. In the meantime you can visit our website www.fwc.gov.au to get the information you need.
>
> If you have been dismissed and you think it's unfair or discriminatory, you may be able to start a case at the Commission. There is a 21 day time limit to make those applications. Please don't wait for us to respond if it means your application will be late. You can find out more about job loss and dismissal on our website.[20]

[40] As Mr Tomar did not receive the case number referred in the Commission's email, he called the Commission on 22 May 2024 and was informed that he had lodged the incorrect form. He immediately filed a Form F8.

When must an application for the Commission to deal with a dismissal dispute be made?

[41] Section 366(1) of the FW Act provides that such an application must be made:

(a) within 21 days after the dismissal took effect; or

(b) within such further period as the Commission allows.

When did the dismissal take effect?

[42] The letter of resignation provided by Mr Tomar stated that his resignation would be effective from 18 April 2024. Swissport did not dispute that Mr Tomar's employment ended on 18 April 2024 in the Form F8A Response. On the basis of the material before me, I find that the termination of Mr Tomar's employment took effect on 18 April 2024.

Was the application made within 21 days after the dismissal took effect?

[43] As the Full Bench has stated, "[t]he 21 day period prescribed… does not include the day on which the dismissal took effect."[21]

[44] As I have found above, the dismissal took effect on 18 April 2024. The final day of the 21 day period was therefore 9 May 2024 and ended at midnight on that day.

[45] As noted above, Mr Tomar initially filed a Form F1 on 7 May 2024 which was within the 21 day time period prescribed by s.366(1). Previous decisions of this Commission have considered applications for an extension of time under ss.366(2) and 394(3) where initially blank, incomplete or incorrect forms have been filed.

[46] Although Mr Tomar did not submit that the Form F1 lodged on 7 May 2024 was a valid application under s.365 of the FW Act, it is appropriate that I consider whether this is the case, having regard to the requirements in ss.577(1)(a) and (b) of the FW Act that the Commission perform its functions and exercise its powers in a manner that is fair and just; and is quick, informal and avoids unnecessary technicalities.

[47] Full Bench decisions of this Commission have distinguished between situations where:

a. an applicant has sought to convert an application made under one type of statutory provision so that it becomes an application under a fundamentally different provision and
b. a specific application has been made using the wrong form.

[48] In *Ioannou v Northern Belting Services Pty Ltd*,[22] the Full Bench considered whether the Commission has power to amend an application made under s.394 of the FW Act so that it may proceed as an application under s.365 of the FW Act. The Full Bench concluded:

> [22] Having regard to these considerations, we have serious reservations whether the power in s.586 of the Act can be relied upon to convert an unfair dismissal application into a general protections application. Section 586 does not provide a source of power to revoke or set aside an application. Neither does it, in our view, enable the Commission to "correct" or "amend" an application made under one type of statutory provision so that it becomes an application under a fundamentally different provision.
> [23] The other reason for our conclusion relates to the provisions of Division 3, Subdivision B of Part 6-1 (Multiple Actions) of the Act. These provisions deal with cases involving a dismissal where more than one cause of action might be available for the same conduct or circumstances.
> [24] We consider that the use of any power under s.586(a) of the Act to allow an unfair dismissal application to be converted into a general protections application is not permissible having regard to the multiple actions provisions of the Act. The exercise of the power under s.586 for the benefit of the applicant would achieve for the applicant indirectly that which is directly prohibited by the multiple actions provisions.[23]

[49] In contrast, the Full Bench in *Liam Hambridge v Spotless Facilities Services Pty Ltd*[24] considered an appeal by an applicant who had intended to lodge an unfair dismissal application. The applicant initially lodged a general protections claim and realised that he filed an incorrect form while attending a conciliation. He then withdrew the general protections application and filed an unfair dismissal claim outside of the 21 day time period. The Full Bench considered that the initial application was an unfair dismissal application as it was intended to be one, it was described as one in Mr Hambridge's covering email, and its contents were concerned with contentions of unfairness in the dismissal rather than any cause of action for a contravention of Part 3-1 of the FW Act.[25] The Full Bench concluded that Mr Hambridge's error in using the wrong form for his first application, in non-compliance with s.585, could have been dealt with by either correction, amendment or waiver by the Commission under s.586, by dismissal of the application under s.587(1)(a), or by Mr Hambridge discontinuing the application under s.588.[26]

[50] To determine whether the Form F1 lodged by Mr Tomar on 7 May 2024 was a valid application under s.365 of the FW Act, it is necessary to examine the contents of that application as well as the Form F8 and the requirements of the *Fair Work Commission Rules 2013* (FWC Rules) which applied at the time that Mr Tomar filed the application. Rule 6(1) provides that the Commission may dispense with compliance with any provision of the FWC Rules, either before or after the occasion for compliance arises. Rule 8(2) provides that if the President approves a form for a particular purpose, then subject to the FWC Rules, the approved form must be used for the purpose. Rule 8(3) provides that if there is no form approved for a particular application, approved form F1--Application (no specific form provided) must be used for the

application. Rule 8(5) provides that if the FWC Rules require that an approved form be used, it is sufficient compliance if a document is substantially in accordance with the approved form.

[51] The effect of these rules when read together is that although Mr Tomar was required to use Form F8 to lodge the application, as this is the form that the President had approved for the making of applications under s.365, it was sufficient if the F1—Application was substantially in compliance with the Form F8.

[52] Sections 585 and 586 are also relevant to my consideration of this matter. They provide:

> **585 Applications in accordance with procedural rules**
> An application to the FWC must be in accordance with the procedural rules (if any) relating to applications of that kind.
>
> Note 1: Certain provisions might impose additional requirements in relation to particular kinds of applications (see for example subsection 185(2)).
> Note 2: The FWC may, under section 587, dismiss an application that is not made in accordance with the procedural rules.
>
> **586 Correcting and amending applications and documents etc.**
> The FWC may:
> (a) allow a correction or amendment of any application, or other document relating to a matter before the FWC, on any terms that it considers appropriate; or
> (b) waive an irregularity in the form or manner in which an application is made to the FWC.

[53] Both the Form F1 and Form F8 make provision for the applicant to fill out their name, postal address, phone number, email address, the respondent's name and contact details and whether the applicant has a representative. Mr Tomar completed all of these details for the Form F8. Mr Tomar completed the details for the 'applicant' in the Form F1 but not for the 'respondent'. Mr Tomar recorded 'Swissport Australia Pty Ltd' in response to paragraph 3 of the Form F1 which is headed 'The employer', followed by a subheading at paragraph 3.1 which is 'What is the industry of the employer'

[54] The Form F8 has specific questions about the dismissal from paragraphs 1.1-1.6 which are not provided in the Form F1. These questions deal with the start date, dismissal notification date, effective dismissal date, timeframe to apply and other claims. Mr Tomar completed responses to these questions in the Form F8 but did not refer to these matters in the Form F1.

[55] The F1—Application asks the applicant at paragraph 1.1 to set out the provision(s) of the FW Act (or any other relevant legislation) under which the application is made. At paragraph 1.1, Mr Tomar wrote:

> Sect. 351 - Discrimination
> Sect 114 - Entitlement to be absent from employment on public holiday.

[56] Paragraph 2.1 of the Form F8 asks the applicant whether they allege that they were dismissed in contravention of the general protections provisions in part 3-1 of the FW Act. Mr Tomar responded 'yes' to this question. Paragraph 2.2 asks the applicant to provide the

reason(s) that the applicant believes apply to their dismissal. In response, Mr Tomar wrote 'Race (s.351)' and listed a series of reasons under the following six subheadings:

1. Discriminatory Treatment
2. Racial Discrimination
3. Unjust termination [in reference to the termination of a colleague]
4. Failure to address complaints
5. Forced to work during public holidays
6. Breach of Fair Work Act

[57] Mr Tomar's response to paragraph 2.2 of the Form F8 is in identical terms to his response to paragraph 2.2 of the Form F1 which asks the applicant to set out the grounds for the order or relief sort.

[58] The Form 1—Application asks the applicant at paragraph 2.1 to set out the relief sought. Similarly, paragraph 3.1 of the Form F8 asks what outcome the Applicant wants from the case. In response to both of these questions, Mr Tomar wrote:

> 1. I am requesting that the Fair Work Commission (FWC) issue an order requiring the Respondent to provide me with a written apology for the undue stress endured.
> 2. I am seeking compensation for the mental distress suffered, amounting to $45000.

[59] Mr Tomar submitted the Form F1 to the Commission by email. Rule 14 deals with lodging documents by email and provides:

> **14 Lodging documents by email**
>
> (1) A document that is required or permitted to be lodged with the Commission under these Rules may be lodged by emailing the document to an email address approved by the General Manager for the lodgment of documents by email.
>
> Note: The email addresses approved for lodgment of documents are available at www.fwc.gov.au.
>
> (2) However, if a matter has been allocated to a Commission Member, a document lodged by email in relation to the matter must be emailed to the email address of the Commission Member's chambers approved by the General Manager.
>
> Note: The approved email addresses for Commission Members' chambers are available at www.fwc.gov.au.
>
> (3) If a document is lodged by email:
>
> (a) the document must be attached to the email:
>
> (i) for a statutory declaration—as a PDF or other image format approved by the General Manager; and
>
> (ii) for any other document—as an attachment in Word, RTF or PDF format or another format approved by the General Manager; and
>
> (iii) without any security restrictions; and
>
> (b) the covering email must state:
>
> (i) the name, address, telephone number and fax number (if any) of the natural person sending the email; and
>
> (ii) an email address to which the Commission can send notices or other documentation; and
>
> (iii) if the document is an application commencing a matter—that fact; and

(iv) if the document relates to an existing matter—the matter number given to the matter by the Commission.

Note: For subparagraph (a)(i), the statutory declaration must be signed and witnessed.

(4) If a document lodged in accordance with this rule is an application commencing a matter:

(a) the General Manager must send an acknowledgment of lodgment, by email, to the person lodging the document; and

(b) the application is not taken to have been lodged until the acknowledgment of lodgment mentioned in paragraph (a) has been sent; and

(c) once the acknowledgment of lodgment mentioned in paragraph (a) has been sent, the application is taken to have been lodged at the time it was received electronically by the Commission.

(5) A person who lodges a document by email must:

(a) retain a paper copy of the document; and

(b) retain a paper copy of either:

(i) a receipt indicating the document was delivered to the Commission; or

(ii) the email as a "sent item" showing the transmission address and the date and time of transmission; and

(c) produce the paper copies of the documents retained under paragraphs (a) and (b) if directed to so by the Commission.

[60] The Form F1 lodged by Mr Tomar complied with Rules 14(1) and (3)(a) as it comprised of a PDF document which was sent to a Commission email address approved by the General Manager for the lodgment of documents by email. The covering email did not comply with all of the requirements of Rule 14(3)(b) in that it did not state Mr Tomar's address and telephone number as required by Rule 14(3)(b)(i). However, it complied with Rule 14(3)(b)(ii) as it contained an email address and referred to the lodging of a 'complaint' against Swissport 'for alleged violations of fair work standards', which in very general terms, could describe an application made pursuant to s.365.

[61] Section 367 of the FW Act requires an application brought under s.365 to be accompanied by any fee prescribed by the regulations. It appears that the Form F1 was not accompanied by any fee however the Form F8 which was lodged 15 days later was accompanied by the required fee.

[62] The Form F1 filed by Mr Tomar on 7 May 2024 was in almost identical terms to the Form F8 filed 15 days later. Both forms referred to alleged breaches of s.351 of the FW Act. The Form F1 also referred to an alleged breach of Sect 114 - Entitlement to be absent from employment on public holiday which was not referred to in the Form F8. Both forms referred to identical grounds and remedy. The Form F1 did not refer specifically to dismissal.

[63] The issue which arises for my consideration is whether the Form F1 can be regarded as a valid general protections claim under s.365 particularly as it does not claim that Mr Tomar was dismissed or forced to resign.

[64] Both applications referred to s.351 of the FW Act. Section 351(1) is in Part 3-1 of the FW Act and provides:

> **351 Discrimination**
>
> (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin.
>
> Note: This subsection is a civil remedy provision (see Part 4-1).

[65] Adverse action is defined in s.342 of the FW Act and includes dismissal. Section 365 of the FW Act permits a person to apply to the Commission to deal with a dispute if a person has been dismissed and they allege that the dismissal was in contravention of Part 3-1 of the FW Act which includes s.351. If a person alleges a contravention of Part 3-1 but they are not entitled to apply to under s.365 for the Commission to deal with the dispute, they may apply to the Commission under s.372 to deal with the dispute. The effect of these provisions is that if an applicant alleges that a dismissal has occurred in contravention of s.351, the applicant must make an application under s.365 and cannot make an application under s.372 even if the applicant alleged that the employer took other forms of adverse action in contravention of s.351 prior to the dismissal.

[66] In both the Form F1 and the Form F8 filed by Mr Tomar, the reference to s. 351 indicates that the application was being made either pursuant to s.365 or s.372. The Form F1 refers to discriminatory treatment before the conclusion of the employment relationship and does not claim that Mr Tomar was dismissed or forced to resign.

[67] On one view, this indicates that Mr Tomar was intending to make an application pursuant to s.372 of the FW Act when he lodged the Form F1. However, at the time that Mr Tomar submitted the Form F1, he was no longer employed by Swissport and had claimed in his email to Swissport on 23 March 2024 that the main reason that he was resigning was because of the treatment he experienced at work from Mr Panovski, that he had lost trust in the assurances that he had received from Swissport management and that working for Swissport is a 'lost cause'. This email also referred to racial discrimination. The language used by Mr Tomar when viewed objectively suggests that Mr Tomar's complaints about Swissport were not confined to Swissport's conduct before the termination but involved claims that Swissport's conduct caused the termination of the employment relationship. Taking all of these matters into account, I find that Mr Tomar intended to make an application under s.365 rather than s.372 when submitting the Form F1. Mr Tomar's intentions are also confirmed by the fact that Mr Tomar then lodged a Form F8 rather than a Form 8C (which is the required form for lodging an application pursuant to s.372) when advised by the Commission on 22 May 2024 that he had lodged the wrong form.

[68] The email which Mr Tomar received in response to lodging the application on 7 May 2024 from the Commission was consistent with Rule 14(4) and as such can be regarded as an acknowledgement of lodgement that the Form F1 was taken to be lodged on 7 May 2024. There was no evidence to the contrary or indication that the Commission regarded the Form F1 as an inquiry or anything other than a valid application until Mr Tomar called the Commission on 22 May 2024.

[69] In all of the circumstances, I consider that that the Form F1 submitted by Mr Tomar on 7 May 2024 constituted an application made within the meaning of s.365 of the FW Act. Pursuant to s. 586, I allow a correction or amendment of the Form F1 and waive compliance with the FWC Rules to the extent necessary.

[70] However, in the event that the Form F1 lodged on 7 May 2024 was not a valid application, I have also considered whether there are exceptional circumstances and if so, whether it is appropriate to grant additional time for Mr Tomar to make the application.

Was the application made within such further period as the Commission allows?

[71] Under section 366(2) of the FW 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.

[72] Each of the above matters must be considered in assessing whether there are exceptional circumstances.[27]

[73] I set out my consideration of each matter below.

Reason for the delay

[74] For the application to have been made within 21 days after the dismissal took effect, it should have been made by midnight on 9 May 2024. The delay is the period commencing immediately after that time until 22 May 2024, when the Form F8 was filed, although circumstances arising prior to that delay may be relevant to the reason for the delay.[28]

[75] 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.[29]

[76] An applicant does not need to provide a reason for the entire period of the delay. Depending on all the circumstances, an extension of time may be granted where the applicant has not provided any reason for any part of the delay.[30]

[77] Mr Tomar submitted that his delay in filing the Form F8 was due to procedural confusion. He said that on 7 May 2024, his intention was to lodge a claim with the Commission

about his resignation/dismissal and the unfair treatment that he had received during the course of his work and that he should not be penalised due to completing the incorrect form.

[78] Swissport submitted that Mr Tomar's unfamiliarity with the law or processes of the Commission are not exceptional circumstances for the purposes of s.366(2) of the FW Act and that consideration in s.366(2)(a) of the FW Act must weigh against an extension of time.

[79] In my view, Mr Tomar's circumstances are different to a person who delays filing an application due to ignorance of the 21 day time limit. Mr Tomar does not submit that he was ignorant of the time limit but rather that he did not realise that he had submitted an incorrect form until after the time limit expired. The email response from the Commission which Mr Tomar received appears to indicate that a person in Mr Tomar's position will receive a further response if an application has been lodged or if the person has asked a question. On the basis of this email, it was reasonable for Mr Tomar to believe that he would be contacted by the Commission if there were any issues with his application, however this did not occur.

[80] Mr Tomar gave evidence at the hearing about the steps that he took in lodging the Form F1 and calling the Commission when he did not receive a case number. Based on this evidence, I accept that Mr Tomar lodged the incorrect form based upon incorrect advice that he received from a human resources professional, that he genuinely believed on 7 May 2024 that he had made a general protections application within the time required, that this was a reasonable belief based upon the email response he received from the Commission and that this belief constituted a reasonable explanation for the delay in making his application.

[81] In the circumstances I am satisfied that the reasons for the delay advanced by Mr Tomar weigh in favour of a finding that there were exceptional circumstances.

What action was taken by Mr Tomar to dispute the dismissal?

[82] Mr Tomar submitted that he disputed the dismissal by initiating a workers compensation claim, then lodging the Form F1, followed by the Form F8 and that his actions demonstrate a continuous effort to dispute the dismissal through appropriate channels.

[83] Swissport submitted that Mr Tomar's Form F1 lodged on 7 May 2024 does not allege constructive dismissal or otherwise contest his resignation and that Mr Tomar provided no submission or evidence that he contested his resignation at any time prior to filing his Form F8 on 22 May 2024. Swissport submitted that the consideration in s.366(2)(b) of the FW Act must weigh against an extension of time.

[84] In my view, Swissport was put on notice by Mr Tomar's email to Swissport on 23 March 2024 that Mr Tomar was holding Mr Panovski, and therefore Swissport, responsible for the cessation of his employment. In the absence of any other explanation from Swissport, it appears to me that the only reason that Swissport initiated an investigation on 4 April 2024 was in response to that email and for the purpose of defending any claims subsequently made by Mr Tomar. Although the Form F1 lodged on 7 May 2024 does not refer to the dismissal, I accept Mr Tomar's evidence that he initiated this action in response to the forced resignation.

[85] In the circumstances I am satisfied that action taken by Mr Tomar to dispute the dismissal weighs in favour of a finding that there were exceptional circumstances.

What is the prejudice to the employer (including prejudice caused by the delay)?

[86] Mr Tomar submitted that the delay in filing the application has caused minimal, if any, prejudice to Swissport. Swissport has been aware of Mr Tomar's grievances in the circumstances leading to his resignation through ongoing correspondence and mediation processes. Any procedural delay has not materially affected Swispport's ability to respond to the claims.

[87] Swissport submits that this is a neutral consideration. I accept this submission.

What are the merits of the application?

[88] Mr Tomar made detailed submissions in relation to this matter. In summary, Mr Tomar claims that the merits of his application are strong. Mr Tomar says that he resigned due to a hostile work environment of persistent unfair treatment, which included racial discrimination and unaddressed grievances, despite multiple reports to Human Resources. Mr Tomar claims that his resignation was a direct result of Swissport's actions, constituting a constructive dismissal. Mr Tomar said that his evidence including emails and witness statements supported his claims of being forced to resign due to intolerable working conditions.

[89] Swissport submitted that no submission is made or evidence provided that Mr Tomar was subjected to conduct by Swissport that was intended to force his resignation, or which would have that probable outcome. Swissport submitted that no submission or evidence is provided as to how any constructive dismissal, if determined to have occurred, would be contrary to Part 3-1 of the FW Act and that Mr Tomar refers repeatedly to unfair dismissal, and appears under the misapprehension that he has filed an application under Part 3-2 of the FW Act.

[90] I accept Mr Tomar's submissions that his evidence including emails and witness statements support his claims of being forced to resign and have considered this matter in detail later in this decision.

[91] In relation to Mr Tomar's substantive claim that Swissport contravened s.351 of the FW Act, I note that there is limited material before me from both parties about this matter. I am not required to undertake a detailed analysis of the substantive merits for an extension of time application. It is sufficient for Mr Tomar to establish that the substantive application is not without merit and I am satisfied that this is the case.[31] I therefore find that the merits of the case is a neutral consideration in this matter.

Fairness as between Mr Tomar and other persons in a similar position

[92] Mr Tomar submitted that allowing his application to proceed despite the delay promotes fairness, considering the circumstances leading to the delay were beyond his control. It ensures that employees in similar situations, who might face procedural challenges due to

misinformation or complex circumstances, are not unjustly deprived of their right to seek redress.

[93] Swissport submits that this is a neutral consideration. I accept this submission.

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

[94] I must now consider whether I am satisfied that there are exceptional circumstances, taking into account my findings regarding:

(a) the reason for the delay; and

(b) Mr Tomar taking action to dispute the dismissal; and

(c) no issue of prejudice to the employer being identified; and

(d) the merits of the application; and

(e) no issue of fairness arising as between Mr Tomar and other persons in a similar position.

[95] 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.[32] 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.[33]

[96] In Mr Tomar's case, the application was filed on 22 May 2024 because of a combination of ordinary factors which when taken together can be considered exceptional. These factors comprised of Mr Tomar receiving incorrect advice about the appropriate form to use, receiving an acknowledgement email from the Commission which appeared to indicate that he had made a valid application, and not receiving any further correspondence from the Commission before calling the Commission on 22 May 2024. If one of these events had not occurred, it is highly likely in my view that the application would have been filed within the required period.

[97] The reasons for the delay and Mr Tomar taking action to dispute the dismissal weigh in favour of a finding of exceptional circumstances. The matters in ss.366(2)(c)-(e) are neutral considerations.

[98] Having regard to all of the matters at s.366(2) of the FW Act, I am satisfied that there are exceptional circumstances.

[99] Being satisfied that there are exceptional circumstances, the Commission may consider whether to allow a further period for the application to be made. Having regard to those exceptional circumstances, I am satisfied that it is appropriate to extend the period for the application to be made to 22 May 2024.

Was Mr Tomar dismissed?

[100] The next issue between the parties which the Commission has been asked to determine is whether Mr Tomar was dismissed by Swissport. The dictionary at clause 12 of the FW Act refers to s. 386 for the definition of 'dismissed'.

[101] Section 386 of the FW Act provides:

> **386 Meaning of *dismissed***
>
> (1) A person has been ***dismissed*** if:
>
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
>
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.
>
> (2) However, a person has not been ***dismissed*** if:
>
> (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
>
> (b) the person was an employee:
>
> (i) to whom a training arrangement applied; and
>
> (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;
>
> and the employment has terminated at the end of the training arrangement; or
>
> (c) the person was demoted in employment but:
>
> (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
>
> (ii) he or she remains employed with the employer that effected the demotion.
>
> (3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

[102] Mr Tomar alleges that he was terminated by Swissport in contravention of s.351 of the FW Act. However, this claim cannot be determined until the Commission deals with the matter under s.368, and only if the Commission issues a certificate of attempted conciliation under s.368(3). Under s.368, the Commission may deal with the matter in numerous ways including by mediation or conciliation, or by making a recommendation or expressing an opinion.

[103] If there is a dispute as to whether the alleged dismissal the subject of the application has occurred, this is a preliminary issue which, according to the Federal Court Full Court decision in *Coles Supply Chain Pty Ltd v Milford*,[34] 'must be resolved before the powers conferred by s.368 can be exercised at all'.[35]

[104] In this regard, the Full Bench in *Lipa Pharmaceuticals Ltd v Mariam Jarouche*[36] stated,

> Where the respondent to a s. 365 application contends, in its response to the application or otherwise, that the application was not validly made because the applicant was not dismissed, this must be determined prior to the Commission 'dealing' with the dispute under s 368 including by conducting a conciliation conference.[37]

[105] As Swissport has claimed that Mr Tomar was not dismissed, I must find that a dismissal occurred before conducting a conciliation conference or otherwise dealing with this matter under s.368.

[106] The Full Bench in *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Tavassoli*[38] stated the following in relation to the proper construction of s.386(1) of the FW Act with respect to resignation:

(1) There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the "heat of the moment" or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although "jostling" by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.

(2) A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element.[39]

[107] Mr Tomar relied upon the second limb. There is no dispute that Mr Tomar resigned from his employment. What is in dispute is whether that resignation was 'forced' by the conduct of Swissport. The test to be applied is an objective one.

[108] In the Form F8A, Swissport denied that Mr Tomar experienced discriminatory treatment during his employment or that Swissport received any formal complaints of Mr Tomar being treated unfairly because of his race. Swissport noted that on 18 December 2023, Mr Tomar sent an email to Ms Foster and Mr Hayes with the subject 'Concerns Regarding Job Threat from Manager'. Swissport said that Mr Tomar's email addressed his experience within cargo and concerns that he should not be performing such functions as sweeping the warehouse or

cleaning the carpark. Swissport claimed that the cargo team was a small team that required such job functions to be completed regardless of the role held.

[109] Swissport contended that on 20 December 2023 a Swissport HR Business Partner contacted Mr Tomar to go through his email. The email was escalated to the Head of Business Support who planned a trip to Sydney to discuss it with Mr Tomar sometime after 28 December 2024. Swissport noted that on 10 January 2024, Mr Tomar sent an email to the HR Business Partner stating he had not received a response from Ms Foster or Mr Hayes. Swissport claimed that the HR Business Partner had made contact with Mr Tomar to discuss his concerns in lieu of a response from Ms Foster or Mr Hayes.

[110] Swissport contended that in early March 2024 it was identified that the cargo team were not functioning effectively and that in mid-March an external provider was engaged to conduct a workplace investigation. Swissport claims that Mr Tomar was informed of the investigation, and advised he would participate, however he decided to resign.

[111] Mr Tomar denies that he was advised of an investigation before he tendered his resignation and says that the first occasion that he became aware of the investigation was when he saw the memorandum issued by Mr Panagiotopoulos on 4 April 2024 to Cargo employees with the subject heading 'Workplace Investigation'

[112] Swissport did not file evidence however most of the factual findings in this matter can be made on the basis of email correspondence exchanged between Mr Tomar and Swissport. Swissport was aware that Mr Tomar was relying on this material and did not at any time submit that the material was incomplete or claim that the matters raised by Mr Tomar in his email correspondence were incorrect, apart from where it did so in the Form F8A.

[113] I have considered all of the material before me and make the following factual findings based upon the documentary evidence and Mr Tomar's oral evidence at the hearing:

1. Mr Tomar made complaints about Mr Panovski's treatment of him to Mr Bolangdy and Mr Durban which led to Mr Panovski being transferred out of Cargo Services in June 2023.
2. In October 2023, Mr Panovski returned to Cargo Services.
3. On 18 December 2023, Mr Tomar wrote to Ms Foster and Mr Hayes raising 'serious concerns' about his current work situation including in relation to Mr Panovski's conduct.
4. Mr Tomar did not ordinarily work on weekends and public holidays, however was required to do so on Christmas Day by Mr Panovski without notice. This requirement was communicated by Mr Panovski by email and was unnecessarily broadcast to colleagues of Mr Tomar.
5. Mr Tomar raised concerned about being required to work on public holidays with Swissport by email on 24 December 2023 and 10 January 2024.
6. The outcome of Mr Tomar's emails to Swissport dated 18 December 2023 and 10 January 2024 is that Mr Durban met with Mr Tomar in January 2024 and assured Mr Tomar that Mr Panovski would be moved out of Cargo Services but this did not occur. There was no formal investigation of Mr Tomar's concerns.

7. On 13 March 2024, Mr Tomar walked out of the workplace following an incident with Mr Panovski and a supervisor where the supervisor undermined Mr Tomar and was supported by Mr Panovski in doing so. The following day, Mr Tomar sought a meeting with Mr Bolangdy and Mr Panagiotopoulos to discuss this matter. A meeting took place between Mr Tomar, Mr Bolangdy, Mr Panagiotopoulos and Mr Panovski during which Mr Tomar was offered the new role of Operations Manager, Customer Service reporting to Mr Panovski.
8. On 21 March 2024, Mr Tomar tendered his resignation.
9. On 22 March 2024, Mr Panagiotopoulos sent an email to Mr Tomar advising that he would like to catch up with him to understand his reasons for the resignation, particularly in light of proposing the customer service role.
10. On 23 March 2024, Mr Tomar sent an email to Mr Panagiotopoulos advising that the main reason he was resigning was because of the treatment he experienced at work from Mr Panovski and included allegations of racial discrimination.
11. Mr Panagiotopoulos did not respond to the email, seek to meet Mr Tomar or to talk Mr Tomar out of resigning.
12. On 4 April 2024, cargo staff were advised of an upcoming workplace investigation following receipt of complaints that contained serious allegations.
13. At no time, was Mr Tomar advised that Swissport had investigated his concerns and/or believed there was no substance to these concerns.

[114] I found Mr Tomar to be a genuine and credible witness.

[115] In the Form F8A, Swissport advised that it has more than 3,500 employees. It is therefore reasonable to expect that Swissport would have robust human resources policies explaining the processes for dealing with complaints or grievances from employees. At the very least, Mr Tomar should have received a written response to his emails dated 18 December 2023, 10 January 2024 and 13 March 2024, explaining what Swissport proposed to do in response to his concerns, and advising Mr Tomar directly if Swissport needed more information to investigate the concerns or believed that there was no substance to them. The fact that Mr Tomar received no correspondence dismissing his concerns indicates to me that Swissport accepted that there was some legitimate basis for Mr Tomar to be complaining about Mr Panovski's conduct.

[116] Mr Tomar's correspondence showed that at all times, Mr Tomar was trying to deal with the difficulties he was experiencing at work in a constructive and cooperative manner. Despite this, Mr Panovski's behaviour towards Mr Tomar escalated, causing Mr Tomar to leave the workplace on 13 March 2024. This should have alerted Swissport to the fact that Mr Tomar was finding the workplace untenable. Instead of taking steps to investigate Mr Tomar's concerns, Swissport offered him an alternative position reporting to the person he was complaining about. In my view, Mr Tomar's subsequent resignation was an objectively reasonable response to Swissport's continuing failures to investigate Mr Tomar's concerns and take steps to curtail Mr Panovski's behaviour towards Mr Tomar. In this regard, I find that Mr Panovski's conduct toward Mr Tomar in relation to requiring Mr Tomar to work Christmas Day and copying other employees into email correspondence with Mr Tomar about his leave unreasonable and unacceptable behaviour. I also find that Mr Panovski's conduct in supporting a supervisor to undermine Mr Tomar unreasonable and unacceptable behaviour. Contrary to Swissport's claim in the Form F8A, there is no evidence that Swissport commenced an

investigation about Mr Tomar's concerns before Mr Tomar's resignation. The evidence establishes that Swissport did not commence any investigation until after Mr Tomar tendered his resignation and took no steps to meet with Mr Tomar to discuss his reasons for resigning, which Mr Tomar explained in detail, or to persuade Mr Tomar to reconsider his resignation.

[117] Taking into account all of the evidence before me, I find that Mr Tomar's resignation was the probable result of Swissport engaging in a course of conduct such that Mr Tomar had no effective or real choice but to resign. This conduct included Swissport failing to investigate the matters raised in Mr Tomar's emails dated 18 December 2023, 10 January 2024 and 13 March 2024 prior to Mr Tomar's resignation, not acting on commitments to move Mr Panovski out of Cargo Services, and permitting Mr Panovski to engage in unreasonable and unacceptable behaviour towards Mr Tomar. I therefore find that Mr Tomar was dismissed by Swissport within the meaning of s.386(1)(b) the FW Act.

Conclusion

[118] I have found that Mr Tomar made a valid application pursuant to s.365 when he filled out and sent a Form F1 application to the Commission on 7 May 2024 by email and that this application was made within the period prescribed by s.366(1)(a) of the FW Act. In the event that the Form F1 application is not a valid application, I have found that the circumstances in which the application was made by the filing of the Form F8 are exceptional, according to the factors in s. 366(2) of the FW Act, and have extended the time for making the application to 22 May 2024.

[119] I have found that Mr Tomar was dismissed by Swissport within the meaning of s.386(1)(b) the FW Act. The termination took effect on 18 April 2024.

[120] There is no evidence that establishes, and the parties have not submitted, that the exemptions in s.386(2)(a)-(c) apply. Accordingly, I find that Mr Tomar has been dismissed within the meaning of s.365 of the FW Act.

[121] The jurisdictional objections raised by Swissport are dismissed and I order accordingly.

[122] The matter will shortly be listed for Conference so that the Commission can deal with the matter as required by s.368 of the FW Act.

DEPUTY PRESIDENT

Appearances:

M *Tomar*, for the Applicant
No appearance for the Respondent

Hearing details:

2024
31 July
In person, Sydney

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[1] Digital Hearing Book (DHB), 65
[2] DHB, 26
[3] DHB, 89
[4] DHB, 26
[5] DHB, 93
[6] DHB, 93-94
[7] DHB, 94-95
[8] DHB, 95
[9] DHB, 99
[10] DHB, 28
[11] Ibid.
[12] DHB, 61

[13] DHB, 39

[14] DHB, 30

[15] DHB, 62

[16] DHB, 60-61

[17] DHB, 64

[18] DHB, 7

[19] DHB, 51

[20] DHB, 52

[21] *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.

[22] [2014] FWCFB 6660

[23] Ibid, [22]-[24]

[24] [2017] FWCFB 2811

[25] Ibid, [26]

[26] Ibid, [31]

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

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

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

[30] *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFB 901, [40].

[31] *Kornicki v Telstra-Network Technology Group Print* PR3168, 22 July 1997 (Ross VP, Watson SDP, Gay C).

[32] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [13].

[33] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [13].

[34] [2020] FCAFC 152.

[35] Ibid, [67].

[36] [2023] FWCFB 101.

[37] Ibid, [23].

[38] [2017] FWCFB 3941.

[39] Ibid, [47].