



DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Mr Kuncho Kurtev

v

KCB Australia Pty Ltd, Toni Telfer
(C2024/6489)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT SLEVIN

SYDNEY, 21 JANUARY 2025

Appeal against decision [\[2024\] FWC 2374](#) of Commissioner Johns made in Melbourne on 26 August 2024 – Application under s 365 of the Fair Work Act 2009 (Cth) alleging contravention of Part 3-1 in relation to dismissal – Application out of time – Whether exceptional circumstances existed justifying further time being allowed for the application to be made – Appellant alleges he was dismissed because of the symptoms of Parkinson’s disease – Appellant diagnosed with Parkinson’s disease after expiry of time limit – Appellant submitted he could not formulate his application until he was aware of his medical condition – Commissioner did not engage with reason for delay advanced by appellant – Permission to appeal granted and appeal allowed – Application for extension of time determined – Full Bench satisfied there were exceptional circumstances warranting further time being allowed for application to be made.

Introduction

[1] Mr Kuncho Kurtev was employed by KCB Australia Pty Ltd (**KCB**) as a Numerical Modeller until his employment was terminated on 21 June 2024. The reason given for Mr Kurtev’s dismissal was an alleged lack of improvement in his performance in accordance with a performance improvement plan which had been implemented on 16 April 2024.

[2] Mr Kurtev had been experiencing a deterioration in his health in the period leading up to the termination of his employment. Shortly after his dismissal, Mr Kurtev consulted his general practitioner. The cause of the deterioration in his health, however, remained unclear and Mr Kurtev was referred to Neuroscience Queensland. Mr Kurtev attended an appointment with Neuroscience Queensland on 17 July 2024 and was diagnosed with Parkinson’s disease on that day. He immediately commenced treatment.

[3] On 24 July 2024, Mr Kurtev filed an application under s 365 of the *Fair Work Act 2009* (Cth) (the **Act**) in which he alleged that his dismissal was in contravention of Part 3-1. The last day of the 21-day time limit prescribed by s 366(1)(a) of the Act for the making of the application was 12 July 2024. Mr Kurtev’s application was filed 33 days after the dismissal took effect or 12 days out of time. Mr Kurtev’s application claims, amongst other factors, that

the reasons for his dismissal included physical or mental disability within the meaning of s 351(1) of the Act. More specifically, he alleged that the reasons given for dismissal “perfectly match symptoms of Parkinson’s disease”.

[4] The question of whether further time should be allowed for Mr Kurtev to make his application under s 365 of the Act was the subject of a hearing before Commissioner Johns on 26 August 2024. The Commissioner handed down an ex tempore decision at the conclusion of the hearing and made an order on the same day dismissing Mr Kurtev’s application under s 365 of the Act. The Commissioner was not satisfied that there were exceptional circumstances for the purposes of s 366(2) so as to permit the Commission to allow an extension of time. The Commissioner published reasons for his decision on 5 September 2024, largely by extracting the transcript of the reasons he gave orally at the conclusion of the hearing.¹

[5] The Commissioner considered the factors set out in s 366(2) of the Act in determining whether there were exceptional circumstances such as to warrant an extension of time for filing the application. The Commissioner’s findings on those factors were, in summary, as follows:

- (a) In relation to the reason for the delay, the Commissioner recorded that the reasons for the delay given by Mr Kurtev concerned him receiving a diagnosis of Parkinson’s disease. The Commissioner determined that “it was not necessary to receive that diagnosis in advance of making an application”, that Mr Kurtev was not “completely incapacitated and unable to complete an application” and was able to undertake tasks that suggested he was “cognitively able” to commence an application with the Commission within time. The Commissioner concluded that Mr Kurtev had “decided ... to attend to other affairs within the 21-day period and the delay period after 12 July” and that, whilst this was understandable, it did not provide an acceptable explanation for not filing the application within time.²
- (b) In relation to actions taken to dispute the dismissal, the Commissioner noted that it was not in dispute that Mr Kurtev did not take any action to dispute the dismissal prior to the filing of the application with the Commission and determined that this factor weighed against granting an extension of time.³
- (c) In relation to prejudice to the employer, the Commissioner accepted that the circumstances of this matter would not cause any prejudice to KCB if an extension of time were granted and determined that to be a neutral consideration in his decision.⁴
- (d) In relation to the merits of the application, the Commissioner concluded that the merits of the application would turn on contested points of fact if an extension of time was granted and that it was not possible for him to make any firm or detailed assessment of the merits of the claim. Mr Kurtev had an “apparent case” and KCB an “apparent defence” and, in those circumstances, the Commissioner concluded that this was also a neutral consideration. The Commissioner did observe, however, that Mr Kurtev alleges direct or indirect discrimination on the basis of a condition with which he was not diagnosed until after his dismissal.⁵
- (e) In relation to fairness as between Mr Kurtev and other persons in a like position, the Commissioner observed that no relevant matter was brought to his attention in relation to this factor and, in those circumstances, there was nothing to weigh in relation to the consideration.⁶

[6] Having referred to authorities in relation to the phrase “exceptional circumstances” as it appears in s 366(2) of the Act, the Commissioner stated his conclusion in the following terms:⁷

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.

[7] Mr Kurtev seeks permission to appeal, and to appeal, from the decision of the Commissioner to refuse to allow a further period for him to make an application under s 365 of the Act and to dismiss his application.

Grounds of Appeal

[8] Mr Kurtev represented himself in relation to the appeal. The notice of appeal and his appeal submissions are not framed in precise legal language. However, it is tolerably clear that the notice of appeal and Mr Kurtev's submissions on appeal seek to raise, in substance, three contentions.

[9] First, Mr Kurtev submits that the Commissioner failed to properly understand the relationship between his diagnosis with Parkinson's disease and the reason for the delay in making the application. Mr Kurtev argued that “the main point in my initial specific case is that my contract was terminated because the criteria used for contract termination were actually consequences/symptoms of Parkinson's Disease [sic]”. Mr Kurtev submits that he could not formulate his application to include that claim until he received a diagnosis of the medical condition with which he was suffering. Mr Kurtev submits that the approach adopted by the Commissioner put him in a position where he would have to file his application in time, but without his diagnosis, which would make his application “senseless in terms of reasons” or to wait for a diagnosis and then lodge his application with some delay.

[10] Second, Mr Kurtev contends that the Commissioner erred by finding that he could not make an assessment of the merits of the case and that this was a consideration which weighed against the applicant in s 366(2)(c). In particular, Mr Kurtev submits that the observation of the Commissioner that he alleges direct and indirect discrimination on the basis of a medical condition with which he was not diagnosed until after his dismissal overlooked his contention that the symptoms of Parkinson's disease had manifested themselves during his employment and constituted the reasons for his dismissal.

[11] Third, Mr Kurtev disputes the findings of the Commissioner that he did not suffer from any significant cognitive impairment or dysfunction that affected his ability to prepare his application. Mr Kurtev says that Parkinson's disease is a movement disorder which affected his capacity to prepare his application whether or not it resulted in cognitive incapacity. Mr Kurtev further suggests that the evidence that he participated in short telephone conversations with an outplacement service did not, as suggested by the Commissioner, provide evidence of his capacity to prepare an application to the Commission.

[12] For reasons which will be apparent from our reasoning below, it is only necessary for the Full Bench to consider the first contention advanced by Mr Kurtev.

Statutory scheme

[13] Part 3-1 of the Act is entitled “General protections” and, in summary, prohibits certain persons from taking “adverse action” against other persons for reasons, or reasons that include, those proscribed by the Act. The forms of “adverse action” which can result in a contravention of Part 3-1 include action by an employer to dismiss an employee.⁸ If an employer dismisses an employee for reasons which include reasons identified in Part 3-1, then a contravention of the Act will have occurred.

[14] The procedures applicable to an application alleging that an employer has contravened Part 3-1 of the Act by dismissing an employee differ from those which apply to contraventions occasioned by other forms of adverse action. Section 365 provides that if a person has been dismissed and the person (or a relevant industrial association) alleges the person was dismissed in contravention of Part 3-1, the person (or the industrial association) may apply to the Commission to deal with the dispute.

[15] Section 366 then provides:

366 Time for application

- (1) An application under section 365 must be made:
 - (a) within 21 days after the dismissal took effect; or
 - (b) within such further period as the FWC allows under subsection (2).
- (2) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:
 - (a) the reason for the delay; and
 - (b) any action taken by the person 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 person and other persons in a like position.

[16] Section 368(1) provides that, if an application is made under s 365, the Commission must deal with the dispute (other than by arbitration). If the Commission is satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be unsuccessful, it is required to issue a certificate to that effect under s 368(3).

[17] If the Commission issues such a certificate, two avenues are available for the determination of the dispute. The parties may agree to the Commission arbitrating the dispute.⁹ Otherwise, the Commission can only deal with the dispute other than by arbitration. Alternatively, a general protections court application can be made. However, a person who is entitled to make an application under s 365 for the Commission to deal with a dispute, must not make a general protections court application in relation to the dispute unless a certificate has been issued under s 368(3) or the general protections court application includes an application for an interim injunction.¹⁰

[18] In that context, s 366 of the Act has the potential to prevent a person having the opportunity to establish that a contravention of Part 3-1 has occurred and to seek relief with respect to the contravention, including potentially by way of the imposition of a pecuniary penalty to deter such conduct in the public interest.¹¹ If the person fails to make an application under s 365 within 21 days after the dismissal took effect and a further period is not allowed by the Commission, the Commission cannot deal with the application under s 368(1) or issue a certificate under s 368(3). The person will be unable to make a general protections court application (unless an interim injunction is sought), and the dispute cannot be arbitrated by the Commission (even if the parties agree).

[19] The Parliament has nonetheless chosen to impose a “high hurdle”¹² to be satisfied before the Commission can allow a further period for an application to be made under s 365. Section 366(2) has two components. First, the Commission may allow a further period to make an application under s 365 if satisfied that there are exceptional circumstances. The phrase “exceptional circumstances” has been considered in a variety of statutory contexts. For example, in *Maan v Minister for Immigration and Citizenship* [2009] FCAFC 150; (2009) 179 FCR 581, the Full Court said in another context:¹³

Although the expression “exceptional circumstances” is not defined in the *Migration Regulations* it has been the subject of consideration in numerous cases. Assistance in interpreting the expression can be found in comments of Lord Bingham of Cornhill CJ in *R v Kelly* [2000] QB 198 at 208 as follows:

We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.

(cf *Baker v The Queen* (2004) 223 CLR 513 at 573, and *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [23]-[25]).

[20] Other authorities indicate that exceptional circumstances can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which when taken together are seen as exceptional and the assessment will require consideration of all relevant circumstances.¹⁴ Similar formulations have been used by this Commission to describe the proper approach to the phrase “exceptional circumstances” in the context of s 366(2) of the Act.¹⁵

[21] In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, it is appropriate to keep in mind the rationale of that particular statutory provision.¹⁶ In this context, although s 366(2) does not provide in terms that there must be exceptional circumstances “justifying” further time being allowed for an application to be made¹⁷, the context in which the assessment is to be conducted is that the Commission must be satisfied that there are exceptional circumstances to enliven the discretion to extend time. The purpose of the consideration is relevant to the type of circumstances that a member of the Commission may consider exceptional.

[22] The second component of s 366(2) is that the Commission’s assessment of whether there are exceptional circumstances is not at large. That assessment is required to be undertaken

having regard to the matters listed in subparagraphs (a) to (e). The obligation to take into account the matters set out at s 366(2)(a) to (e) means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.¹⁸ In *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd (t/as Richmond Oysters)* [2018] FWCFB 901; (2018) 273 IR 156, the Full Bench referred to the following comments of Wilcox J in *Nestle Australia Ltd v Federal Commissioner of Taxation* (1987) 16 FCR 167 at 184:¹⁹

To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant.

[23] However, a requirement to “have regard to” or “take into account” a set of considerations leaves open what weight or influence each of the particular matters is to have in the decision to be made.²⁰ It is for the decision maker to determine the weight to be given to each matter in assessing whether there are exceptional circumstances in any particular case.

[24] The considerations listed in s 366(2) are matters which the Commission must take into account rather than conditions to be satisfied. Section 366(2)(a), for example, requires the Commission to take into account the “reasons for the delay”. The relevant delay is the period between the expiry of the time limit imposed by s 366(1)(a) and the filing of the application and does not include the period from the date the dismissal took effect to the end of the 21-day period.²¹ The circumstances and events from the time of the dismissal, and perhaps earlier, may be considered but only for the purposes of determining or assessing the reason for the delay beyond the 21 day period and ultimately whether that reason supports a finding that there are exceptional circumstances.²²

[25] The reason for the delay in a particular case might, in itself, suggest that there are exceptional circumstances or that there are not. There may be no reasonable explanation for the delay in the making of the application, but the Commission might nonetheless be satisfied that there are exceptional circumstances having regard to the other matters listed in s 366(2), for example, because the merits of the application are strong. On the other hand, it might be that a reasonable explanation for the delay is provided but the Commission is not satisfied that there are exceptional circumstances once each of the considerations is taken into account. In any case, the assessment of whether there are exceptional circumstances must be undertaken by taking into account each matter listed in s 366(2) at least to the extent it is relevant. It would be an error to impose a test of whether the reason for the delay itself represents an exceptional circumstance.

Permission to appeal

[26] An appeal under s 604 of the Act is by way of rehearing and the Commission’s powers on appeal are only exercisable if there is error on the part of the primary decision maker.²³ There is no right to appeal, and an appeal may only be made with permission. The Full Bench is required to grant permission if a rehearing is shown to be in the public interest pursuant to s 604(2). Determining whether the granting of permission to appeal is in the public interest is a discretionary decision involving a broad value judgment.²⁴ Public interest may arise, for example, in matters of importance and general application, or where the decision manifests an injustice or counterintuitive result.²⁵ Other than the special case in s 604(2), the grounds for granting permission to appeal are not specified.

[27] We are satisfied it is in the public interest to grant permission to appeal in this matter and, in any event, we would exercise our discretion to grant permission to appeal. For the reasons which follow, the Commissioner failed to address a key aspect of the reason advanced by Mr Kurtev to explain the delay in the filing of his application. The effect of the decision is to prevent Mr Kurtev pursuing court proceedings, should he wish to do so, in which he proposes to allege that KCB contravened Part 3-1 of the Act. The decision, to the extent it departs from a proper application of s 366 of the Act, causes potential injustice to Mr Kurtev.

[28] Furthermore, the circumstances experienced by Mr Kurtev are novel. He has filed an application out of time in which he alleges, among other things, that he was dismissed because of symptoms of a serious illness, but in circumstances in which he did not receive a diagnosis of the illness from which he was in fact suffering until after the expiry of the time for filing. Part of the reason given by Mr Kurtev for the delay in the filing of the application was that he could not formulate that claim until he knew the medical condition from which he was suffering. It is, in our opinion, in the public interest for these particular and perhaps unprecedented circumstances to be considered by the Full Bench.

Consideration

[29] As we have foreshadowed, it is only necessary for the Full Bench to consider the first contention advanced by Mr Kurtev. Section 366(2)(a) of the Act requires the Commission to take into account the reason for the delay in deciding whether there are exceptional circumstances. As we have explained, that requires that the Commissioner identify the reason for the delay and treat that matter as one of significance in the decision-making process. In our opinion, the Commissioner failed to correctly identify the reason for the delay in the filing of Mr Kurtev's application and to take that reason into account in assessing whether there were exceptional circumstances for the purposes of s 366(2).

[30] In Mr Kurtev's case, the period of the delay is the period between 12 July 2024 (when the time prescribed by s 366(1)(a) expired) and 24 July 2024 (when his application was filed). In the proceedings at first instance, Mr Kurtev sought to explain the delay by reference to his medical condition. He contended that his medical condition provided the reason for the delay for two reasons. Mr Kurtev said that the symptoms of Parkinson's disease he was experiencing caused him difficulties in preparing and filing his application. Separately, Mr Kurtev said that he wished to advance a claim that his dismissal involved a contravention of s 351(1) of the Act because the reasons for his dismissal were manifestations or symptoms of his medical condition and, importantly, he could not formulate or prepare his application to include that claim until he knew what medical condition he was suffering from.

[31] Once he had prepared it, Mr Kurtev's application under s 365 of the Act alleges that his dismissal occurred for reasons which included his physical or mental disability for the purposes of s 351(1) in that the difficulties identified by KCB in his work performance were symptoms or manifestations of Parkinson's disease. For example, his application alleged:

Please note these 'so-called reasons' perfectly match symptoms of Parkinson's Disease, such as slowness of performance, slowness in planning, slow writing & typing, low organization, slow navigation in computer environment, slow learning of new things, etc. on which I have no control, as noted by my Neurologist Dr Richard White.

...

I feel that they used my Parkinson's Disease symptoms to define the criteria for non-performance and reasons to fire me, and I cannot agree this could be considered acceptable.

[32] In advance of the extension of time hearing, Mr Kurtev prepared a document on a Commission form entitled "Applicant's outline of argument: out of time general protections application". In outlining the reasons for the delay, Mr Kurtev said:

There are exceptional medical circumstances, reasons and factors impacting my health and which caused a delay in preparation and lodging of this my application. Straight after organizing a first and only Performance Improvement Meeting on 16th of April 2024 with Dr. Brent Usher and Mr Andrew Hovey, and especially after my employment termination on 21st of June 2024, I began to experience serious health deterioration and was urged to seek medical advice. After passing along all the path from General Practitioner, medical examinations like full blood analysis and MRI, and in the end on 17 July 2024 in Neuroscience Queensland I was diagnosed with Parkinson's Disease Phase II (attached is certificate) and started treatment immediately. ***All this does not diminish the severity of this specific case when symptoms of Parkinson, such as slowness of performance, slowness in planning, slow writing & typing, low organization, slow navigation in computer environment, slow learning, etc. were intentionally made required work performance criteria and used as reasons to terminate my contract.***

Here below is some chronology of events which show my timely actions, and I hope would explain my delay of submitting the application within 21 days prescribed term.

1. My contract termination took place on Friday, 21/06/2024 noon time and on 26/06/2024 I had my first appointment with Dr. Welson Jao at Albert St CBD Medical Centre. The doctor initially suspected Alzheimer's disease and directed/arranged for me a MRI (Magnetic Resonance Imaging) scan and Full Blood Test to be done asap.
2. The results of the scan were ready in few days and my second appointment with my GP Dr. Welson Jao was on 1/07/2024. The scan did not confirm that I had Alzheimer's disease or brain cancer, but after further examination and testing he directed me to neurologist. As seen in the GP referral letter (attached) it is clearly stated "Parkinson's" followed by a question mark.

It is obvious from the stated above that I have taken quickest possible action to clarify the story, but unfortunately the required medical tests and diagnose procedures, which are out of my control, last longer than prescribed term of application in 21 days after contract termination.

3. Neuroscientists Queensland did not have available slots before mid of July, the first available date was 17/07/2024. Before them my GP (Dr. Welson Jao) and I contacted Brisbane Neurology but they currently don't take new clients and refused to see me.
4. On 17/07/2024 I met Dr. Richard White who after examining and testing confirmed with confidence that I have Parkinson's disease second stage. Late on the same day I started taking medication Levadopa as scheduled by my neurologist and I understand that I will have to take it for life.

The time it took for my diagnosis to be confirmed is the reason for my delay in application. Furthermore, a part of PD is the suffer of bradykinesia (slowness of movement and action),

simple tasks which used to take minutes to complete now require hours and even days. The tremors in my right hand are a serious obstacle – I type/write with difficulty and very slow. The preparation of the application took few days – my wife (and my carer) had to go to work and wasn't able to help. [emphasis added]

[33] During the hearing before the Commissioner, Mr Kurtev endeavoured to point out that he needed to know the nature of this medical condition to set out why the reasons for his dismissal involved a contravention of the Act. The following exchange occurred between the Commissioner and Mr Kurtev:

THE COMMISSIONER: But you didn't need to understand your diagnosis before you made the application to the Fair Work Commission?

MR KURTEV: Didn't need? I don't understand, sir, your statement.

THE COMMISSIONER: What I'm trying to understand is you're going off, understandably, to get your medical condition diagnosed.

MR KURTEV: Yes.

THE COMMISSIONER: Why, at the same time, when you weren't at the doctors – only doctors – two appointments, when you weren't at the doctor, why couldn't you fill out your section 365 application and submit it to the Fair Work Commission?

MR KURTEV: I look at the website. *I wanted to understand - because it's new thing for me, I wanted to understand what exactly I have to do, and I have some thoughts and some plans that I didn't start to – to write my complaint because actually what's - what is missing in all the – the story for me, sorry, is the reason for which this happened. I wasn't sure that I'm really in such a condition that I cannot deliver, if you want, but in the same time, I wanted to hear the opinion of the doctors in order to understand what is the reason behind I cannot perform.* And, you see, it's a matter of fact that even the write – so one of the tests I was asked to do by the doctors is to write a sentence, for example, and they notice that I'm writing – the difficult – in hand. And so the other test was typing on a computer. They count mistakes and they count the number of the mistakes you do per sentence. This a test of diagnosis task. I – I wasn't sure why I actually do these mistakes. I – there was no reason and no explanation for me which I can point out. Usually, when they do these – these things in these conditions, you – you do it very slowly. Things which normally take minutes, they can take hours - - - [emphasis added].

[34] It is apparent that Mr Kurtev believed that the reasons for his dismissal were related to the symptoms of his medical condition and that the reason for the delay in his application was the time it took for his diagnosis to be confirmed so that the claim could be formulated. It was not possible for Mr Kurtev to articulate a claim that he had been dismissed because of a physical or mental disability until he knew whether he was in fact suffering from a disability and whether the symptoms he was experiencing, and believed contributed to his dismissal, were actually manifestations of a disability. Mr Kurtev explained the period it took for him to prepare the application after he had received the diagnosis on 17 July 2024, in part, by reference to the physical symptoms he was then experiencing.

[35] The reasons of the Commissioner indicate that he regarded the reason for the delay advanced by Mr Kurtev to be that he had decided to prioritise seeking medical treatment and

that the physical limitations caused by the symptoms of Parkinson's disease prevented him preparing the application within time. The Commissioner's consideration of the reason for the delay concentrated on whether Mr Kurtev was "completely incapacitated and unable to complete the application" or "unable to file the application". The Commissioner, for example, accepted that the diagnosis "has caused him some inability to act quickly", but did not accept that Mr Kurtev could not have acted more quickly.²⁶ The Commissioner's conclusion in relation to the reason for the delay is as follows:²⁷

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.

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.

[36] These conclusions, in our opinion, demonstrate that the Commissioner understood the "reasons advanced by [Mr Kurtev] for the delay" were that he decided to attend to other affairs and that his medical condition affected his ability to prepare the application.

[37] The only aspect of the reasons of the Commissioner which might suggest that the Commissioner understood that Mr Kurtev said he could not formulate his claim that his dismissal was because of a physical or mental disability until he had a diagnosis is the following passage:²⁸

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.

[38] Read as a whole and in the context of the Commissioner's reasons set out above, we consider that this aspect of the reasons was similarly directed at whether Mr Kurtev was physically incapacitated from preparing the application. To the extent that the Commissioner considered Mr Kurtev's desire to await a diagnosis prior to filing his application, he regarded that as a choice to give priority to obtaining medical reports rather than understanding that, Mr Kurtev believed, he needed to know whether he was suffering from a diagnosed condition before he could formulate an allegation that his dismissal involved a contravention of Part 3-1.

[39] For these reasons, we consider that the Commissioner erred in misconstruing the reason for the delay and, as a result, failed to take into account the mandatory consideration in s 366(2)(a) of the Act. The Commissioner erred in regarding the reason for the delay as being solely that Mr Kurtev was preoccupied seeking treatment and a diagnosis for his illness and

was physically incapacitated by the symptoms of Parkinson's disease from preparing his application. The reasons for delay given by Mr Kurtev included that he required a diagnosis in order to determine whether he could properly formulate a claim of disability discrimination in his application. That matter was not taken into account.

[40] If, contrary to that view, the Commissioner did understand that the reasons for delay included that Mr Kurtev needed a diagnosis to formulate his claim, we consider the Commissioner erred in finding the "application could have been made prior to the diagnosis". For the reasons given above, Mr Kurtev could not be expected to have prepared a claim that he had been dismissed because of the symptoms of a disability without knowing whether he was, in fact, suffering from a medical condition or what that medical condition was. Without a diagnosis, Mr Kurtev could not have formed a view as to whether the asserted deficiencies in his work performance which provided the reasons for his dismissal were a manifestation of his disability or not.

[41] For these reasons, we consider that the Commissioner failed to take into account Mr Kurtev's reason for the delay and so failed to take into account a mandatory consideration in determining that there were exceptional circumstances for the purposes of s 366(2). The consequence is that the decision of the Commissioner must be quashed and the question of whether a further period should be allowed for Mr Kurtev to file his application must be reconsidered by the Full Bench.

Redetermination

[42] The Full Bench is satisfied that there are exceptional circumstances for the purposes of s 366(2) of the Act and, the discretion having been enlivened, that we should grant a further period for Mr Kurtev to make his application to 24 July 2024. In forming that view, we have taken into account each of the matters set out in s 366(2)(a) to (e).

[43] In relation to s 366(2)(a), we consider the reason for the delay to be primarily that Mr Kurtev believed that he needed to know whether he was suffering from a recognised medical condition and the nature of that condition before he could consider or make a claim that he was dismissed because of the symptoms or manifestations of a physical or mental disability for the purposes of s 351(1) of the Act. We consider that this reason provides an acceptable explanation for the delay in filing the application given that Mr Kurtev did not receive a formal diagnosis that he was suffering from Parkinson's disease until 17 July 2024.

[44] The circumstances facing Mr Kurtev had two critical components. First, Mr Kurtev was, during the 21-day period following his dismissal, receiving medical treatment in relation to a recent and sudden deterioration in his health and, at that very time, awaiting a diagnosis of the cause his condition. Second, he believed that the reasons given for his dismissal corresponded to the symptoms of a medical condition, but he could not know whether that was the case, or if he had a viable claim to that effect, until he had received a diagnosis in relation to the nature of his medical condition. That did not occur until after the expiry of the time limit imposed by s 366(1)(a). That combination of events is, in our opinion, undoubtedly out of the ordinary course, unusual, special and uncommon and favours a conclusion that there are exceptional circumstances for the purposes of s 366(2)(a).

[45] To the extent there was a further delay after Mr Kurtev's diagnosis on 17 July 2024 until the filing of the application on 24 July 2024, we do not consider that undermines the explanation for the delay provided by Mr Kurtev. Mr Kurtev said that, even after he commenced receiving treatment, the symptoms associated with Parkinson's disease meant it took him more time to prepare the application than would otherwise have been the case. In any event, we do not believe the period between 17 July and 24 July 2024 represents an unreasonable period for an individual to take to prepare the application to the Commission. Mr Kurtev acted promptly after receiving his diagnosis to prepare and file his application.

[46] In relation to s 366(2)(b), although Mr Kurtev disputed the steps taken as part of the preceding disciplinary process, he accepted that he did not take any steps to dispute the dismissal after it had occurred before the filing of his application. That consideration might ordinarily weigh against a finding that there were exceptional circumstances. In this matter, we consider that it is at most neutral. In circumstances in which Mr Kurtev believed he needed to await a diagnosis of his medical condition in order to consider whether he had a claim relating to his dismissal, it is unsurprising that he did not dispute the dismissal at an earlier point.

[47] In relation to s 366(2)(c), KCB did not suggest that any prejudice had been caused to it by reason of the delay in the filing of the application or for any other reason. The absence of any prejudice does not itself give rise to exceptional circumstances but represents a consideration we have taken into account as part of the overall assessment.

[48] In relation to s 366(2)(d), consideration of the merits of the substantive application in the context of an extension of time application does not require a detailed analysis of the substantive merits. The Commission will not ordinarily, at this stage, be in a position to make findings of fact on contested issues. Nonetheless, the Commission must consider the merits of the application as part of the overall assessment of whether there are exceptional circumstances. For the consideration in s 366(2)(a) to weigh in favour of such a finding, it will generally need to be shown that there is some merit in the substantive application.²⁹ The weight to be given to this consideration is dependent on the extent to which there is merit in the substantive application.

[49] Mr Kurtev's application is long and convoluted. Although he alleges contraventions of Part 3-1 on grounds his dismissal occurred because of the exercise of workplace rights, age and physical or mental disability, the same text appears under each heading. The core complaint is that he was dismissed for reasons that reflect the symptoms of Parkinson's disease. An allegation that a person has been dismissed because of the features of a disability might, if made out by evidence, give rise to a contravention of s 351(1).³⁰ Such a claim potentially raises complex issues of both fact and law, including as to whether a distinction can be drawn between a disability and its manifestations and may require consideration of the nature of Parkinson's disease as a condition, the features or symptoms of Parkinson's disease as well as the mental processes of the decision-maker within KCB.³¹ On the information available, Mr Kurtev's claim has some possible merit, but is also likely to encounter substantial hurdles. In the circumstances, we believe Mr Kurtev's claim has some merit so as to weigh in favour of a finding of exceptional circumstances, but only marginally so.

[50] In relation to s 366(2)(e), there is no material before the Full Bench in relation to the fairness as between Mr Kurtev and other persons in a like position. As we have said, on the

information available to us, the circumstances facing Mr Kurtev are highly unusual and perhaps unique. The consideration of fairness as between Mr Kurtev and other persons does not weigh one way or the other in the assessment of whether there are exceptional circumstances.

[51] Having weighed each of the considerations set out in s 366(2), we are satisfied there are exceptional circumstances in this matter and that it is appropriate to exercise our discretion to allow a further period for Mr Kurtev to make his application. The most significant feature of the circumstances is that Mr Kurtev could not have been expected to formulate the claim that he was dismissed as a result of the symptoms of Parkinson's disease until he had received a medical diagnosis which did not occur until after the expiry of the time limit imposed by s 366(1)(a). That consideration, considered in light of the other relevant matters, demonstrates that the circumstances were out of the ordinary.

Disposition of the appeal

[52] For the reasons outlined above, the Full Bench makes the following orders:

- (a) Permission to appeal is granted;
- (b) The appeal is upheld;
- (c) The decision of Commissioner Johns in Matter No. C2024/5145 handed down on 26 August 2024 and related order made on 26 August 2024 are quashed;
- (d) A further period is allowed for Mr Kurtev to make an application under s 365 of the *Fair Work Act 2009* (Cth) to 24 July 2024; and
- (e) The application made by Mr Kurtev under section 365 is remitted to Commissioner Johns to deal with in accordance with s 368 of the *Fair Work Act 2009* (Cth).



VICE PRESIDENT

Appearances:

Mr K Kurtev, appearing for himself as the Appellant
Ms T Telfer for the Respondents

Hearing details:

12 November 2024
Sydney
Hearing by Microsoft Teams.

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¹ *Kurtev v KCB Australia Pty Ltd; Ms Toni Telfer* [2024] FWC 2374.

² [2024] FWC 2374 at [4] (PN142-PN150).

³ [2024] FWC 2374 at [4] (PN151).

⁴ [2024] FWC 2374 at [4] (PN152).

⁵ [2024] FWC 2374 at [4] (PN153-PN155).

⁶ [2024] FWC 2374 at [4] (PN156).

⁷ [2024] FWC 2374 at [4] (PN160).

⁸ *Fair Work Act 2009* (Cth), s 342(1) (Item 1(a)).

⁹ *Fair Work Act 2009* (Cth), s 369(1).

¹⁰ *Fair Work Act 2009* (Cth), s 370.

¹¹ *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 at [24], [55] and [59] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 274 CLR 450 at [42] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

¹² *Lombardo v Commonwealth* [2014] FWCFB 2288 at [21]; *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd (t/as Richmond Oysters)* [2018] FWCFB 901; (2018) 273 IR 156 at [14].

¹³ *Maan v Minister for Immigration and Citizenship* [2009] FCAFC 150; (2009) 179 FCR 581 at [51] (Dowsett, Greenwood and Collier JJ).

¹⁴ *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [26]-[27] (Rares J); *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290 at [66] (Campbell JA).

¹⁵ See, for example, *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975; (2011) 203 IR 1 at [13]; *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd (t/as Richmond Oysters)* [2018] FWCFB 901; (2018) 273 IR 156 at [14]-[17].

¹⁶ *R v Buckland* [2000] 1 WLR 1262 at 1268; *Yacoub v Pilkington (Aust) Ltd* [2007] NSWCA 290 at [66] (Campbell JA).

¹⁷ Cf. *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Australian Postal Corporation* [2007] AIRC 848; (2007) 167 IR 4 at [11].

¹⁸ *Edwards v Giudice* (1999) 94 FCR 561 at [5] (Moore J); *National Retail Association v Fair Work Commission* [2014] FCAFC 118; (2014) 225 FCR 154 at [56] (Collier, Bromberg and Katzmann JJ); *Re 4 yearly review of modern awards* [2019] FWCFB 6067 at [13].

¹⁹ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd (t/as Richmond Oysters)* [2018] FWCFB 901; (2018) 273 IR 156 at [19].

²⁰ *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153 at 187-188 (Hill J); *Application by Construction, Forestry and Maritime Employees Union – The Maritime Union of Australia Division for an entry permit for Shane Reside* [2024] FWC 3409 at [7].

²¹ *Shaw v Australia and New Zealand Banking Group Ltd (t/as ANZ Bank)* [2015] FWCFB 287; (2015) 246 IR 362 at [12]; *Long v Keolis Downer (t/as Yarra Trains)* [2018] FWCFB 4109; (2018) 279 IR 361 at [40]; *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd (t/as Richmond Oysters)* [2018] FWCFB 901; (2018) 273 IR 156 at [22].

²² *Shaw v Australia and New Zealand Banking Group Ltd (t/as ANZ Bank)* [2015] FWCFB 287; (2015) 246 IR 362 at [12];

²³ *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [17] (Gleeson CJ, Gaudron and Hayne JJ).

²⁴ *GlaxoSmithKline Australia Pty Ltd v Makin*. [2010] FWAFB 5343; (2010) 197 IR 266 at [26]; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089; (2010) 202 IR 388 at [26], (affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78).

²⁵ *GlaxoSmithKline Australia Pty Ltd v Makin*. [2010] FWAFB 5343; (2010) 197 IR 266 at [24]-[27].

²⁶ [2024] FWC 2375 at [4] (PN143-PN145).

²⁷ [2024] FWC 2375 at [4] (PN148-PN150).

²⁸ [2024] FWC 2375 at [4] (PN143).

²⁹ *Long v Keolis Downer (t/as Yarra Trains)* [\[2018\] FWCFB 4109](#); (2018) 279 IR 361 at [71]; *Therexa Pty Ltd v Yammouni* [\[2019\] FWCFB 2085](#) at [47].

³⁰ *Shizas v Commissioner of Police* [2017] FCA 61; (2017) 268 IR 71 at [121] (Katzmann J).

³¹ See, for example, *RailPro Services Pty Ltd v Flavel* [2015] FCA 504; (2015) 242 FCR 424 at [123]-[124] (Perry J); *Shizas v Commissioner of Police* [2017] FCA 61; (2017) 268 IR 71 at [112]-[122] (Katzmann J); *Western Union Business Solutions (Australia) Pty Ltd v Robinson* [2019] FCAFC 181; (2019) 272 FCR 547 at [80] (Kerr J) and [136]-[138] (O'Callaghan and Thawley JJ).