



DECISION

Fair Work Act 2009
s.365—General protections

Laura Tolson

v

Your Way Support Services Pty Ltd T/A Your Way Support Services
(C2021/193)

COMMISSIONER YILMAZ

MELBOURNE, 15 APRIL 2021

Application to deal with contraventions involving dismissal - application made outside the prescribed 21 days – whether there are exceptional circumstances - extension of time denied.

[1] Your Way Support Services (YWSS) is a disability support services provider and employed the Applicant, Ms Tolson, as a member concierge commencing employment on 5 October 2020 and she was dismissed during the period of probation on 16 December 2020.

[2] I scheduled the extension of time hearing for 3 March 2021. At the hearing, Ms Tolson was represented by Mr Corey Dyer of Patcor HR & Business Solutions.

[3] YWSS was represented by Paul Goddard of Employsure Law.

[4] Both parties relied on s.596(2) (a), (b) and (c) of the Act, that the Applicant and Respondent had no specialist skills or experience before the Commission and because of the complexity of the jurisdictional matter, that representation would enable the matter to be dealt with more efficiently by narrowing the issues in contest and to enable the more efficient use of the Commission's time. Neither party objected to the other from being represented and in the interests of fairness relied on s.596(2)(c). I granted leave for both parties to be legally represented to ensure fairness between the parties and to enable the matter to be dealt with more efficiently.

[5] Section 366(1) of the FW Act requires that an application under s.365 be made within 21 days after the dismissal took effect, or in such further time as the Commission may allow.

Applicant's submissions

[6] Ms Tolson submits that she was unfairly dismissed therefore she is seeking that her general protections' application be granted an extension of time, because the delay was due to her representative's error.¹ It is submitted by Ms Tolson that her representative may have lost track of time as he was on holiday.²

¹ Applicant's outline of argument at [5] and form F8 at Q1.4.

² Applicant's outline of argument at [13].

[7] Ms Tolson confirms that her employment was terminated immediately on 16 December 2020, and with the 21-day time limit her application should have been lodged on or earlier than 6 January 2021.³

[8] Ms Tolson is seeking compensation for alleged non-payment of a public holiday, 10-minute rest breaks and 26 weeks compensation for unfair dismissal on the basis that her termination was due to her taking a day of paid leave which prevented her from performing her tasks on her day of absence.

[9] Ms Tolson submits that YWSS took adverse action against her in contravention of:

- S.340 - Protection of Workplace Rights (her right to take paid leave); and
- S.352 – temporary absence – illness or injury (a day of absence to care for her dog).

Respondent's submissions

[10] YWSS submits that Ms Tolson failed to establish any contravention of the general protections provisions and further that they object to an extension of time. YWSS submit that Ms Tolson was dismissed for misconduct and not because she took a period of authorised leave as alleged by her. YWSS submit the reasons given for the delay by Ms Tolson do not constitute exceptional circumstances and further there is nothing out of the ordinary course, unusual, special or uncommon and there is nothing to suggest the high hurdle has been met for an extension of time. YWSS refer to the authority of *Nulty v Blue Star Group Pty Ltd*⁴ and *Miller v DPV Health Ltd (Hume)*⁵ in support of their position.

Consideration

[11] It is not contentious that the employment of Ms Tolson was terminated on 16 December 2020. The application was filed in the Commission on 13 January 2021 at 8.37am. This means the application is 7 days late.

[12] General protections applications involving dismissal must be made within 21 days of termination.

[13] However, s.366(2) permits the Commission to consider an extension to the period for filing an application if there are exceptional circumstances, taking into account the following considerations:

- (a) The reason for the delay; and
- (b) Steps taken to dispute the termination; and
- (c) Prejudice to the employer; and
- (d) Merits of the application; and
- (e) Fairness between the person and other persons in a like position

³ Applicant's outline of argument at [8].

⁴ (2011) 203 IR 1 [13].

⁵ [2019] FWCFB 6890 at [17].

[14] The meaning of ‘exceptional circumstances’ was considered in *Nulty v Blue Star Group Pty Ltd* (Nulty)⁶ where it was held that:

“To be exceptional, circumstances must be out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare. Circumstances will not be exceptional if they are regularly, or routinely, or normally encountered. Exceptional circumstances can 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 are seen as exceptional. It is not correct to construe “exceptional circumstances” as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural “circumstances” as if it were only a regular occurrence, even though it can be a on off situation. The ordinary and natural meaning of “exceptional circumstances” includes a combination of factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon.”⁷

[15] I now turn to the Applicant’s arguments for an extension of time in relation to each of the considerations of s.366(2).

The reason for the delay

[16] The general protections involving dismissal application was lodged with the Commission on 13 January 2021, 7 days late.

[17] Ms Tolson submits the reasons for the delay of her application was due to representative error. Ms Tolson’s representative confirmed that she contacted her representative on 29 December 2020 and then again on 4 January 2021 to seek advice.

[18] Ms Tolson’s representative submits that they were on leave at both times they spoke to the applicant:

10. “.....however in light of the necessity to have the application processed within the 21-day requirement of the Fair Work Commission, during the course of both conversations that we had with the Applicant, an agreement was made between ourselves as the Representative, and the Applicant, that despite our office being closed, we would make the resources available within our organisation to prepare the Applicant’s application and lodge it with the Commission on her behalf and we gave the Applicant a firm undertaking in both of our phone conversations that we would lodge the Applicant’s submission to the Commission on her behalf by the deadline.

11. Our email records also show that the client emailed us at 1:23PM on 29 December 2020, 9:46AM on 4 January 2021, and 9:51AM on 4 January 2021 providing us with information pertaining to her termination and further instructions.”⁸

⁶ [2011] FWAFB 975.

⁷ Ibid at [13].

⁸ Applicant’s outline of argument at [10] – [11].

[19] Ms Tolson’s representative submits they incorrectly noted the due date and they state:

“14.we submit that we were unaware of our inadvertent error until we attempted to lodge the application on the Applicant’s behalf and realised that the application date was more than 21 days after the termination date, and we duly notified the Applicant of our error immediately and apologised for the oversight, once it was noted.

15. As the Representative of the Applicant, we take full responsibility for the lateness of the Applicant’s submission and apologise to the Applicant, the Respondent and the Commission for the delay in the Applicant’s application being lodged to the Commission.”⁹

[20] Ms Tolson submits that as she placed the responsibility to file her application on time on her representative, and that she was given an assurance that it would be, therefore the matter was outside of her control and the lateness occurred without her knowledge until she was advised on 13 January 2021.

[21] Ms Tolson relies on *Robinson v Interstate Transport Pty Ltd*¹⁰ in support of an extension of time, as the applicant is blameless, and to not allow an extension to the time for filing the application would be unjust.

[22] YWSS submit that Ms Tolson knew her representative was on leave when they spoke on both 29 December 2020 and 4 January 2021, and despite this she relied on them. They state that Ms Tolson’s submission, that she did not know when her representatives would return from leave was “dubious”, and she did not follow-up with her representative after 4 January 2021.¹¹ Failure to act from 4 January 2021, YWSS submit that Ms Tolson contributed to the delay.

[23] Ms Tolson was aware that there was a 21-day time limit for the application, her date of termination was clear to her and despite her representative being on leave, she did not act on her application but rather waited on her representative. Her representative advised her the application was made late after they returned from leave and filed. It was incumbent on Ms Tolson to press her application and to ensure it was filed by the required timeframe; she was aware of the timeframe and she was well aware her representative was on leave but did not inform herself of their return from leave date. Ms Tolson relied on her representative’s undertaking that they would lodge on time and indirectly relied on their miscalculated deadline.

[24] Ms Tolson’s agent submitted there were emails between them and their client, but did not wish to submit any of the email correspondence so as not to prejudice their client. The emails coincided with the period that Ms Tolson sought representation for a general protections application after she realised an unfair dismissal had no prospect of success. One may assume that the emails contain instructions, an agreement to act or confirmation of instructions. As to whether those emails would be relevant to the consideration of delay in support of an extension of time is not known, as I have not had the benefit of assessing their

⁹ Applicant’s outline of argument at [14] – [15].

¹⁰ [2011] FWA FB 2728.

¹¹ Respondent’s form F8A Q2.2 7(c) and (d).

relevance to this matter. Based on the absence of evidence and essentially Ms Tolson's reliance on submissions in support of this consideration, I cannot be satisfied that she is blameless. Evidence of instructions or authority to act would relevantly address the matter of Ms Tolson's actions and the level of responsibility that lay on her representative. Ms Tolson relied on submissions and provided no evidence that she had no control over the filing of the application on time. Further, I note her decision to withhold email communication that may have been relevant to the question of her contribution to the delay or otherwise. Ms Tolson and her representative chose not to tender any emails or any other evidence in support of the argument that the delay was caused by representative error and that Ms Tolson was blameless.

[25] The explanation by Ms Tolson's representative for the delay was poor, there was no effort made to ensure the application was filed on time. Ms Tolson's representative relies on the submission that they miscalculated the timeframe, and that submission should suffice as representative error. However, the conduct of the applicant is central to the consideration whether the representative error is an acceptable explanation for the delay.¹² Had Ms Tolson taken steps to ensure that her application was filed on time, then she would have been blameless. However, Ms Tolson knew of the 21-day timeframe, she knew her agent was on leave, by her own admission she placed all responsibility on her agent despite not inquiring of the date of return from leave and she chose not to tender any evidence that she was blameless and the error rested with her representative.

[26] Therefore, I cannot find this consideration to weigh in Ms Tolson's favour.

Steps taken to dispute the termination

[27] Ms Tolson provides no submissions addressing this consideration other than contacting her legal representative.

[28] YWSS state that Ms Tolson did not dispute her dismissal.

[29] As Ms Tolson did not challenge her dismissal with YWSS, I cannot find this consideration to weigh in her favour.

Prejudice to the employer

[30] Ms Tolson does not address this consideration in her extension of time application.

[31] YWSS accepts that an extension would result in minimal if any prejudice. It submits that an absence of prejudice does not mean that an extension should be granted.

[32] I do accept that an extension will not result in prejudice to YWSS, however, the absence of prejudice does not weigh in Ms Tolson's favour, therefore this consideration is neutral.

Merits of the application

¹² *Clark v Ringwood Private Hospital* (1997) 74 IR 413, 418-420; cited in *Davidson v Aboriginal & Islander Child Care Agency* (1998) 105 IR 1; cited in *McConnell v A & PM Fornataro T/A Tony's Plumbing Service* (2011) 202 IR 59 [35].

[33] Ms Tolson makes reference to her dismissal being unfair both in her form F8 general protections application and her outline of argument. She submits that she was authorised to take leave, to which she was entitled, to take to care of her dog, and because she took the leave her employment was terminated. YWSS submit that Ms Tolson was not entitled to take paid carer's leave to care for her dog, yet this leave was granted. In addition, YWSS submit that Ms Tolson was not dismissed for taking a day of paid leave, instead she was dismissed for failing to perform her duties and further it was entitled to terminate her employment. It disputes that the termination of employment was a contravention of the general protections' provisions, as there were no general protections provisions that applied.

[34] Ms Tolson also refers to a workplace right, i.e., the taking of paid tea breaks, and she submits that she queried why she was not given paid tea breaks. YWSS contend that Ms Tolson did not raise this query with them and reject that she was denied paid tea breaks.¹³

[35] During the hearing Ms Tolson submitted that she contacted "Fair Work" and was advised that there was no scope for an unfair dismissal because she was terminated during a period of probation. She further states that it was only when she had made contact with her representative that she became aware that she was eligible to lodge a general protections application. Ms Tolson also states that she searched the Fair Work Commission website in regard to unfair dismissal applications and did not read the material on general protections.

[36] During an exchange in the hearing, it was confirmed by Ms Tolson's representative that they say the general protections' application arises because she was dismissed for failing to perform her tasks because she had taken a period of authorised leave.

[37] While merit is a consideration, contested evidence is not to be tested in an extension of time application, and where an application appears to be highly meritorious, it is relevant to the discretion of the decision maker.¹⁴ Based on the evidence and submissions, I have formed the preliminary view that this application is not strong on merit. YWSS submit that they provided to Ms Tolson a directive on 17 November 2020 to distribute Christmas cards and hams to 30 members by 18 December 2020. On 4 December 2020, YWSS submit that staff were reminded of the due date for the completion of the task. Ms Tolson took 14 and 16 December 2020 as leave to care for her dog. Early on 16 December 2020, YWSS submit they discovered that Ms Tolson made no delivery of hams and cards, while at the same time other concierge staff had delivered between 15-20 cards and hams. YWSS submit that Ms Tolson was dismissed for failing to perform this task and her reluctance to meet the Respondent's members that utilise the service.

[38] The merit turns on contested matters, even so, Ms Tolson has failed to substantiate that the application is not entirely without merit. Ms Tolson did not dispute that she did not complete the task, rather in her defence she asserted that she was dismissed before the due date for the completion of the task, this is relevant to an alleged causal relationship between the absence and the alleged contravention of the general protections' provisions. Despite the dismissal before the due date, it is evident that there was no capacity for Ms Tolson to physically deliver 30 hams and cards to the members within 2 days, a task that has been allocated for completion over some 5 weeks. While I am of the view based on the material

¹³ Respondent's outline of submissions at [39] and [41].

¹⁴ *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, 299-300 and *Haining v Deputy President Drake* (1998) 87 FCR 248, 250.

before me, that the application lacks merit, I am also mindful that an extension of time is not to test the merit, therefore I find at best, that this consideration is neutral.

Fairness between the person and other persons in a like position

[39] Ms Tolson does not address this consideration in her extension of time application.

[40] YWSS submit that there is no other employee in with similar circumstances. It also seeks to rely on the concept of a “nominal applicant” to suggest hypothetically had there been another employee, it would not be relying on representative error.¹⁵

[41] In my opinion, neither party addressed this consideration with any evidence of an employee in a like position, therefore I find this consideration neutral.

Conclusion

[42] In this instance, I need to be satisfied that there are exceptional circumstances warranting an extension of time. The bar is high for an extension of time and having considered each of the factors set out in s.366(2) on balance I do not find there to be exceptional circumstances warranting an extension of time. While I did not weigh representative error in Ms Tolson’s favour because there was no evidence that she was blameless, the other considerations, including merit were also taken into consideration and on balance overall, I do not consider to be exceptional circumstances to warrant an extension of time. Accordingly, the matter is dismissed.



COMMISSIONER

Appearances:

Mr C. Dyer *for the Applicant*

Mr P. Goddard *for the Respondent*

Hearing details:

2021

Melbourne (by telephone)

3 March

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¹⁵ Respondent’s outline of submissions at [50] – [56].