TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s29 application for hearing of an industrial dispute

Mr H
(T13827 of 2011)

and

Minister administering the State Service Act 2000 / Department of Education

DEPUTY PRESIDENT TIM ABEY HOBART, 9 November 2011

Industrial dispute - a dispute in relation to termination of employment – extension of time – exceptional circumstances – application for an extension of time granted

REASONS FOR DECISION

[1] On 7 September 2011, Mr H, applied to the President, pursuant to s.29(1A) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (MASSA)/Department of Education(DOE).

[2] A hearing was conducted in Hobart on 2 November 2011.

[3] At the hearing Mr D Kerr SC was granted leave to appear for Mr H. Mr T Kleyn appeared for MASSA and DOE.

Overview

[4] The basis of this application is that Mr H asserts that his decision to accept an "early retirement incentive package" was "not freely made" and amounted to a constructive dismissal.

[5] The relevant timing of events is as follows:

[6] On 18 February 2011 Mr H consulted his GP and was given a medical certificate to cover an absence from work for a period of three weeks. On or about the same day Mr H contacted Mr Cleaver from the DOE, expressing an interest in an early retirement incentive package. By email dated 1 March 2011 Mr Cleaver advised that this had been approved. Mr H's employment formally ended on 7 March 2011.

[7] On 7 September 2011 Mr H lodged a s29(1A)(a) application concerning a dispute in relation to termination of employment.

[8] Section 29(1B) requires such applications to be lodged within 21 days after the date of termination, "or if the Commission considers there to be exceptional circumstances, such further period as the Commissioner considers appropriate."

[9] The application is some 23 weeks out of time. Accordingly Mr H seeks an extension pursuant to s29(1B).

[10] On the day of hearing, (2 November 2011), I issued a decision on transcript granting the extension, indicating that written reasons would follow.

The Evidence

[11] Mr H tendered a statutory declaration dated 27 October 2011. (Note: During the hearing I omitted to identify the statutory declaration, which I now do. Exhibit A1). Mr Kleyn declined to cross-examine Mr H. Accordingly I accept the statutory declaration as uncontested evidence. Attached to the statutory declaration are two medical certificates stating that Mr H was unfit for work during the period 18 March 2011 to 18 September 2011.

[12] Mr Kleyn tendered a chain of emails between the Department and Mr H during the period between 1 and 10 March 20111. The content of this correspondence related to the early retirement incentive package and attendant matters pertaining to the finalisation of the employment contract.

[13] The evidence of Mr H can be summarised as follows:

[14] Mr H was in a state of stress when he accepted the redundancy on 18 February 2011.

[15] On 1 March Mr H's daughter died in tragic circumstances. His daughter had a long history of mental illness and was legally blind. Mr H was her primary carer. Mr H said:

> "I was plunged into profound grief. My capacity to deal with even ordinary day-to day affairs was lost. It is only in the last two months that I have been able to address matters beyond my immediate self-care."

[16] Mr H was referred to a professional grief counsellor. His statutory declaration went on to say:

> *"While I still suffer grief I have now recovered my capacity to resume professional and other responsibilities.*
>
> I was in no condition to make the application now before the Industrial *Relations Commission until well beyond the time prescribed (21 days after the date of my constructive dismissal) pursuant to section 29(1B) of the Act.*
>
> *In or around early June I began to make inquiries as to my entitlement to seek a review of my dismissal. I was still only partially recovered.*
>
> *I first approached the Fair Work Ombudsman on 02 June with respect to these matters but was advised my issues could only be dealt with under state jurisdiction.*
>
> *On or around 31 July I wrote a letter to the Tasmanian Industrial Commission advising that I was seeking to apply out of time, giving reasons of extenuating circumstances. (I inadvertently mis-dated this letter by leaving on the date that I wrote to the Fair Work Ombudsman).*

[1] Exhibit R1

I regret I cannot recall the circumstances of my sending or delivering that letter but I recall sending it as intended it to commence these proceedings.

At a time I cannot now identify I visited the offices of the Commission and was advised to make a formal application on the appropriate forms and a formal application was filed with the Commission on 21 September 2011(sic).

I put forward this history to explain the extraordinary circumstances, which led me to make this application out of time."

[17] During the hearing Mr H explained that he may have been confused as to the letter he states was written on or around 31 July 2011. He said that it may have been a telephone call to the Commission, rather than a letter.

The Authorities

[18] The approach of the Commission to extension of time applications is found in *Izard v R G Simons as Trustee for R G Simons Family Trust*[2] After reviewing the leading authorities the Commission concluded that the relevant matters for consideration are:

- *The length of the delay.*
- *The explanation for the delay.*
- *The prejudice to the applicant if the extension of time is not granted.*
- *The prejudice to the respondent if the extension of time is granted.*
- *Action taken by the applicant to contest the termination, other than applying under the Act.*
- *Any relevant conduct of the respondent.*
- *The nature and circumstances of any representative error.*
- *The applicant's prospect of success at the substantive hearing."*

[19] Further, the Commission found that these considerations are underpinned by the following principles:

- *Prima facie the time limits should be complied with. There is public interest in the prompt institution and prosecution of litigation before the Commission.*
- *Ignorance of the law is no excuse.*
- *The onus rests on the applicant to demonstrate sufficient reason to justify an extension.*
- *Each case must be considered on its own facts and circumstance.*
- *The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.*

[2] T11310 of 2004 Abey C 18 May 2004

- *The discretion to allow out of time applications is directed towards ensuring that justice is afforded to both parties.*

- *Considerations of fairness as between the applicant and other persons in a like position are relevant to the exercise of discretion."*

[20] The enactment of the *Fair Work Act 2009 (Commonwealth)* introduced the concept of "*exceptional circumstances''* for similar extension of time applications. Whilst the scheme of the Commonwealth statute is not identical to the Tasmanian Act, there are sufficient parallels for FWA decisions to at least provide some guidance as to how this question should be approached.

[21] Mr Kleyn referred to a number of FWA decisions.

[22] In *Nulty v Blue Star Print Group Australia Pty Ltd*[3] the applicant relied on a combination of circumstances including the hospitalisation of her father, a failure of technology, postal errors, miscommunication and stress and anxiety associated with her father's condition.

[23] Cambridge C observed:

> *"The serious illness of a close relative would often provide a basis to establish exceptional circumstances. In instances where a (potential) applicant may have been understandably preoccupied with concern and attention for a close relative who was suffering serious illness, there would usually be an understandable acceptance that matters such as the lodgement of a general protections claim might be of second or third order priority. Consequently in this instance I would be prepared to accept that a valid reason for the delay in the lodgement was established in respect to that period connected with the applicant's travel to Queensland to provide support for her sick father.*
>
> *However, two countervailing aspects relating to the applicant's sick father need to be considered. Firstly, the period associated with the applicant's travel to Queensland in respect of her father's sickness only accounts for at most, a 20 day period during the overall 99 day period between dismissal and the lodgement of the application in this matter. Secondly, during the period that can be directly connected to the applicant's concern for her father the applicant was able to successfully launch a variety of other claims and applications with various agencies."*

[24] The Commissioner concluded:

> *"The reasons offered for the delay were not satisfactorily supported by the evidence. Although I would be prepared to accept that the serious illness of a close relative can provide justifiable basis for an extension of time, in this case it has become clear that factors other than the illness of the applicant's father represented the true reason for the delay in the lodgement of the claim."*

[25] The application for an extension was dismissed.

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[3] [2010] FWA 6989 Cambridge C 9/9 2010

[26] In *Ebbott v FSMA*[4] the applicant provided three reasons for the delay in lodging his application:-distress from having been bullied at work and then dismissed and without a job; his girlfriend's high risk pregnancy and the need to care for her, and the death of his 100 year old grandmother with whom he was very close.

[27] Cribb C declined the application for an extension concluding that the applicant had not provided an acceptable explanation for the delay and that the personal circumstances of the applicant did not prevent the lodgment of an application within time.

[28] In *Smithers v Cheval Properties Pty Ltd*[5] McKenna C initially granted an extension of time observing:

> *"On a consideration of the matrix of circumstances in this case in the context of the provisions of s.394(3) of the Act, I am satisfied, on balance, that exceptional circumstances exist in relation to this application having regard, in particular, to the physical dislocation and exigencies associated with the applicant's carer's responsibilities concerning the admission of her 91 year old mother to Young District Hospital and the filing initially of an application concerning unfair dismissal in the wrong jurisdiction. On the evidence adduced at this stage of the proceedings, I also consider the applicant has an arguable case concerning the substantive application."*

[29] This decision, however, was overturned on appeal.[6] The Full bench concluded that "*Mrs Smithers' reasons for her delay in making her unfair dismissal remedy application cannot be regarded as unusual or extraordinary in circumstances where she advanced no credible reason for her failure to make her unfair dismissal remedy application to FWA between 8 and 21 January 2010.*

[30] It is clear from the above authorities that each case must turn on their own facts and, in particular, the combination of circumstances applicable. Possibly the only common thread in these decisions is that caring responsibilities for a seriously ill family member may, but not automatically, constitute a valid reason for an extension of time.

[31] I conclude that the circumstances of Mr H's application are very different from the above and hence should be distinguished.

[32] In relation to the notion of *exceptional circumstances,* the Full Bench in *Cheval Properties* appeal said:[7]

> *"The word "exceptional" is relevantly defined in The Macquarie Dictionary as "forming an exception or unusual instance; unusual; extraordinary." We can apprehend no reason for giving the word a meaning other than its ordinary meaning for the purposes of s394(3) of the FW Act."*

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[4] [2010] FWA 2177 Cribb C 17/3/2010
[5] [2010] FWA 3701 McKenna C 14/5/2010
[6] [2010]FWAFB 7251 Acton SDP, Cartwright SDP, Thatcher C. 17/9/2010
[7] Cheval Properties Pty ltd v Smithers [2010] FWAFB 7251 17/9/2010

[33] In *Johnson v Joy Manufacturing Co. Ltd*[8] Lawler VP adopted, with approval, the analysis of Whelan C in *Parker v Department of Human Services*[9]:

> *"[30] Branson J, in a decision of the Full Court of the Federal Court (Hewlett Packard Australia Pty Ltd v GE Capital Finance Pty Ltd [2003] FCAFC 256) described exceptional circumstances as simply circumstances sufficient to render it just and equitable to grant relief.*
>
> *[31] Dealing with the expression 'exceptional circumstances' as used in regulations dealing with the cancellation of visas, the Full Court of the Federal Court, in a recent decision, also noted that the expression had been considered by the courts on numerous occasions:*
>
> > *Although the expression "exceptional circumstances" is not defined in the 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 Cornwell CJ in R v Kelly (Edward) [2000] 1 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."*

[34] Clearly the term *exceptional circumstances* is to be given its ordinary English meaning which in my view is clearly expressed by Lord Bingham of Cornwall CJ above.

[35] So far as they are relevant I now turn to the principles to be applied in applications for an extension of time.

Explanation for the delay

[36] On any reasonable objective test, the tragic circumstances confronting Mr H in March 2011 would justify an extension of time.

[37] Mr Kleyn submitted that the email chain in early March[10]is some indication, that notwithstanding the tragic circumstances, Mr H was capable of engaging with the Department as to the details of his cessation of work. However, an examination of this email chain reveals that Mr H was responding in polite but perfunctory terms to questions and requests put to him by the Agency. Indeed he said that he would be unable to personally attend to clearing his desk for a period of time. This is quite different to the initiation of a complex contest to an alleged constructive dismissal.

[38] In my view the question is not whether an extension is justified, but rather, for how long?

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[8] [2010] FWA 1394 Lawler VP 25/2/2010
[9] [2009] FWA 1638
[10] Exhibit R4

Prejudice to the employer if application granted

[39] Mr Kleyn submitted that in recent months the Department had processed 183 applications for early retirement of which 117 were teachers. He asserted that should the application be granted, it may create a precedent for others who may subsequently have second thoughts concerning the acceptance of an early retirement package.

[40] I am unable to accept Mr Kleyn's contention. Whilst any decision has the potential for precedent value to a greater or lesser extent, overwhelmingly, applications for extension of time turn on the facts of each case, a point readily acknowledged by Mr Kleyn.

[41] Further, any precedent value is not linked to the extension of time issue, and would apply equally if the application had been lodged in time.

[42] In my view the prejudice question relates to a possible disadvantage to the respondent should the matter be allowed to proceed. The unavailability of witnesses or significant operational difficulties are examples of the type of issue which might be raised under this heading.

[43] Nothing of this nature was put to the Commission and I conclude that there is no additional prejudice to the employer should the extension be granted.

Action taken by the applicant to contest the termination, other than applying under the Act

[44] Between termination of employment on 7 March and Mr H's approach to the Fair Work Ombudsman on 2 June, there is no evidence that Mr H took any action to contest the termination. Mr Kleyn contended that the nature of the chain of emails in early March[11]suggests that, to the contrary, Mr H actually accepted the termination. Whilst Mr H was not cross-examined in relation to these emails, I accept that there is some force in Mr Kleyn's submission. However given the juxtaposition of events in February/March 2011, it is not entirely surprising that any thought of contesting the termination would have been a low order priority at the time.

The applicant's prospect of success at the substantive hearing

[45] The authorities make it clear that it is not appropriate for a Tribunal to undertake a fact finding exercise in relation to the merits of a dismissal for the purpose of determining an extension of time application. (see *Ebbott)*. As a consequence I must rely on the papers.

[46] I am unable to conclude that Mr H's application is without merit although clearly, as the applicant, he bears a heavy onus to prove his case, particularly as this application raises the issue of constructive dismissal.

The length of the delay

[47] On any measure 23 weeks is a lengthy delay and an extension would only be allowed in the most compelling circumstances.

[11] Exhibit R4

[48] Mr H's uncontested evidence is that he first approached the Fair Work Ombudsman on 2 June 2011 at a time when he states that *"I was still only partially recovered."*

[49] I am troubled by the unexplained delay from 2 June until the time of lodgment on 7 September 2011. I do however accept that Mr H was still profoundly affected by grief and was in the care of his doctor and a grief counsellor.

[50] His evidence is that *"it is only in the last two months that I have been able to address matters beyond my immediate self-care."*

[51] This statutory declaration was made on 27 October 2011, and hence in this context, two months would approximate with the beginning of September. The application was received in the Commission on 7 September.

[52] I also note that medical certificates stating Mr H was unfit for work were tendered covering the period 18 March to 18 September 2011. Of course such a medical certificate does not necessarily mean that Mr H was unable to lodge the requisite application, but the certificates do tend to confirm Mr H's own evidence as to his capacity to function.

Conclusion

[53] On balance I am satisfied that Mr H has established the existence of exceptional circumstances justifying an extension of time. In accordance with s29(1B) an extension of time until 7 September 2011 is granted.

Tim Abey
Deputy President

Appearances
Mr D Kerr for the applicant
Mr T Kleyn for the respondent

Date and place of hearing:
November 2
2011
Hobart