TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s.29 application for hearing of industrial dispute

David Wanless
(T13497 of 2009)

and

The Wilderness Society Inc.

COMMISSIONER T J ABEY HOBART, 11 November 2009

Industrial dispute - termination of employment - extension of time - exceptional circumstances - jurisdiction - representative error - extension granted

REASONS FOR PRELIMINARY DECISION

[1] On 19 August 2009, David Wanless (the applicant) applied to the President, pursuant to Section 29(1A) of the *Industrial Relations Act 1984,* for a hearing before a Commissioner in respect of an industrial dispute with The Wilderness Society Inc. arising out of the termination of his employment.

[2] The matter was listed for a hearing (conciliation conference) on 2 September 2009. Appearances: Mr D Wanless, the applicant; Mr M Swanton, of the Australian Municipal, Administrative, Clerical and Services Union; Mr J Zeeman, solicitor, with Mr A Hacker, for The Wilderness Society Inc. The matter was further listed for 5 November 2009 to deal with the preliminary issue. The only change to the appearances was that Mr G Blanksby, instead of Mr A Hacker, appeared with Mr J Zeeman.

[3] This is an application for extension of time pursuant to s.29(1B) of the Act. Section 29(1B) reads:

> *'29. Hearings for settling disputes*
>
> *...*
>
> *(1B) An application for a hearing before a Commissioner in respect of an industrial dispute relating to termination of employment or severance pay relating to redundancy is to be made within 21 days after the date of termination or, if the Commissioner considers there to be exceptional circumstances, such further period as the Commissioner considers appropriate.'*

[4] The applicant's contract of employment was terminated on 21 July 2009. The application pursuant to s.29(1A) alleging unfair termination of employment was lodged with the Commission on 19 August 2009. Hence the application was eight days out of time.

[5] During the hearing sworn evidence was taken from the following witnesses:

- *David Wanless,* the applicant.

- *Michael Swanton,* Organiser, Australian Services Union.
- *Paul Edwards,* Consultant, engaged by the respondent.

Sequence of Events

[6] Mr Wanless commenced employment in January 1992. At the time of termination he was employed as Database Development Team Manager.

[7] On 21 July 2009 Mr Wanless was advised in writing that, as a consequence of what was described as *"… your conduct as the Database Development Manager in relation to the illegal and unauthorised access to internal systems by a Database Development Officer",* his services were terminated with effect from 20 July 2009. The same letter noted that *"TWS has been further advised by your union representative that your election is to pursue this matter in the Industrial Relations Commission".*

[8] An application for *Unfair Dismissal Remedy* was lodged with Fair Work Australia (FWA) on 31 July 2009. This was inside the 14-day time frame allowed under the *Fair Work Act.* This application was listed for a conciliation conference (per telephone) for 17 August 2009.

[9] On 13 August 2009 the respondent (through Mr Edwards) contacted Mr Swanton advising that the Wilderness Society would not object to any *"out of time issue"* if Mr Wanless agreed to re-lodge the application with the Tasmanian Industrial Commission (TIC), thus avoiding the need for the conciliation conference. Mr Swanton declined this offer. On the same day the respondent lodged relevant documentation with FWA asserting that the Wilderness Society was not a *national system employer* in that it was not a constitutional corporation.

[10] Mr Wanless said he became aware of this development on 14 August 2009.

[11] The conciliation conference proceeded on 17 August 2009. The only tangible outcome from this conference appears to be that the application was listed for a jurisdictional hearing in FWA for 27 August 2009.

[12] Following the conference Mr Wanless decided to seek his own independent legal advice. An appointment with his legal adviser took place on 19 August 2009. On the same day Mr Wanless sought and was given an undertaking from the respondent to the effect that it would not argue that it was a constitutional corporation should the application be lodged with the TIC. On receipt of this undertaking Mr Wanless immediately withdrew the FWA application and lodged a s29 application with the TIC.

Authorities

[13] The principles adopted by this Commission in relation to extension of time applications are found in *Izard v Simons Family Trust*[1]. In that matter the Commission examined a range of authorities and concluded:

> *"The common threads in these authorities point to the following as being relevant matters for consideration:*

[1] T11310 of 2004 Abey C. 18 May 2004

- *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.*

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.*
- *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."*

[14] In the context of s29(1B) the Commission went on to observe that:

> *"For an application to be successful there would need to be an additional element or elements consistent with the ordinary and natural meaning of the word "exceptional"."*

[15] Like the Tasmanian Act, the FW Act also applies the test of *"exceptional circumstances".* In *Shields v Warringarri Aboriginal Corporation,* Kaufman SDP observed:[2]

> *"The requirement that there be exceptional circumstances was not found in the Workplace Relations Act 1996 (the WR Act), the Act that preceded and was repealed by this Act. Time for making an application under the Act is also shorter than it was under the WR Act: 21 days under the WR Act and 14 days*

[2] [2009] FWA 860

> *under the Act. It seems to me that the alterations between the two Acts evince an intention by the parliament that applications for relief should be confined to 14 days, except in rare cases; cases where there are exceptional circumstances. The use of the word "exceptional" also, in my view, evinces an intention that the hurdle for extensions of time is higher under the Act than it was under the WR Act."*

The Evidence

[16] Much of the evidence went to the extent of Mr Wanless' knowledge and understanding of the jurisdictional issue.

[17] Mr Wanless said that prior to his termination he had a background awareness of the existence of Commonwealth and State tribunals dealing with industrial disputes. This knowledge did not extend to a detailed knowledge of the functions of the tribunals and certainly not to jurisdictional issues.

[18] Mr Wanless said he accepted the advice of Mr Swanton that FWA was the appropriate forum. Together with Mr Swanton, he did meet briefly with legal counsel shortly after his termination. This meeting dealt largely with the merits of his case, and whilst FWA may have been mentioned, no jurisdictional issue was raised.

[19] Mr Wanless was adamant that he first became aware of the jurisdictional issue on 14 August 2009 when the developments on the previous day were brought to his attention by Mr Swanton. He said that at that point he and Mr Swanton began investigating the jurisdictional issue. Mr Wanless said he contacted FWA who advised that the conciliation conference was likely to proceed notwithstanding the jurisdictional doubts.

[20] Immediately following the conciliation conference Mr Wanless sought independent legal advice. He said the first available appointment was on 19 August 2009. On the same day Mr Wanless withdrew the FWA application and lodged a s29 application with the TIC. Mr Wanless said:[3]

> *"When I became aware of my employer's assertion that this was the wrong forum I acted promptly and reasonably to respond. I accepted their position on the matter. I didn't challenge their assertion and continue running the case in FWA, expending more of everyone's time and money. I moved forums because my intent was not about legal argument, it was about achieving my reinstatement with the minimum of effort, delay and cost for all concerned."*

[21] Mr Edwards gave evidence relating to conversations he had with Mr Swanton in the days immediately preceding and following the termination of Mr Wanless. He said:[4]

> *"Prior to that discussion I had told Michael that if David was going to pursue an unfair dismissal case that Fair Work Australia may not be the correct jurisdiction based on advice that the organisation had received that it was not in the federal system.*
>
> *Michael didn't request any information from me to confirm whether this was the case. David also did not request any information from me in respect to*

[3] Exhibit A1
[4] Exhibit R2

this point, nor am I aware of either Michael or David requesting information from any employee of The Wilderness Society Inc. in respect to this issue.

…

On or around 24 July in a meeting between the Wilderness society and the ASU I again raised the issue of jurisdiction with Michael Swanton and Sean Kelly State Secretary of the ASU. In this meeting I was highlighting the difference between Tasmanian and Victorian employees with reference to rights of entry and again suggested that the Wanless matter was a State issue."

[22] In relation to events on 13 August, Mr Edwards said:[5]

"To avoid the need for the conciliation conference, on 13 August 2009 I telephoned Michael Swanton and told him that I believed that David should be in the Tasmanian jurisdiction due to the Wilderness Society Inc. not being a national employer, given it was a not for profit organisation, and was not trading. I also said to Michael that The Wilderness society Inc. would not object to any "out of time issue" should he agree to re-lodge in the Tasmanian jurisdiction, thereby avoiding the necessity of the conciliation conference in Fair Work Australia. Michael declined this offer and said that the matter will end up in the Federal Magistrates Court."

[23] Mr Swanton said that based on his understanding that the Wilderness Society was incorporated and engaged in trading activities through the *Wilderness Society Shops,* he formed the view that the respondent was a constitutional corporation and hence FWA was the appropriate forum.

[24] Mr Swanton acknowledged that Mr Edwards did raise the jurisdictional issue with him in the days immediately following 20 July, but said that Mr Edwards did not provide the source of this advice.

[25] Mr Swanton acknowledged that he rejected the offer relating to jurisdiction made on 13 August but denied using the term *Federal Magistrates Court.*

[26] Mr Swanton said that he did not inform Mr Wanless of the jurisdictional issue until 14 August 2009. He indicated that he did not wish to burden Mr Wanless with additional concerns at a time when he was aware Mr Wanless was under considerable stress.

Findings

[27] On the evidence I have no hesitation in concluding that the first occasion on which Mr Wanless became aware of the jurisdictional question was 14 August 2009. This was one business day before the conciliation conference scheduled for 17 August. At this point any application to the TIC would have already been out of time, as it would have been on 13 August when the respondent formally raised the jurisdictional issue. It must, however, be acknowledged that the respondent offered to waive the out of time issue if the scheduled conciliation conference could be avoided.

[28] I now apply the circumstances of this case against the criteria and principles established in *Izard.*

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[5] Exhibit R2, PN 13

The length of the delay.

[29] The application is eight days out of time. Whilst this is significant, it is a relatively short time period in the scheme of applications for an extension of time.

The explanation for the delay.
The nature and circumstances of any representative error.

[30] Mr Swanton's rationale for initially forming the view that the respondent is a constitutional corporation was not unreasonable based on the information he had. In good faith he advised Mr Wanless to lodge the application with FWA, which occurred within the 14-day time frame.

[31] It would seem that the respondent raised the jurisdictional issue as early as 21 July and again a few days later. To the extent that Mr Swanton failed to investigate this issue further and consult with Mr Wanless, he fell into representative error. In fairness to Mr Swanton, the initial question does not appear to have been raised with absolute conviction:

> *"FWA may not be the correct jurisdiction based on advice that the organisation had received …"*[6]

[32] Nonetheless, having been raised it should have been investigated and Mr Wanless informed. The apparent rejection of the offer made on 13 August without reference to Mr Wanless similarly falls into the category of representative error.

[33] Whilst Mr Swanton clearly fell into representative error, I am quite satisfied that he was motivated by a strong conviction that his original conclusion as to jurisdiction was correct. It would be quite wrong to conclude that Mr Swanton knowingly took any action which might have been to the prejudice of Mr Wanless. To the contrary, I am quite satisfied that Mr Swanton at all times felt that he was acting in the best interests of Mr Wanless, even though, with the benefit of hindsight, he should have acted differently.

[34] The question of representative error was considered in *Carlito Cruz v Australian Post Corporation*[7] in which a Full Bench of the AIRC summarised the position as follows:

> *"[35] For the sake of completeness, the giving of wrong advice by a union is a species of representative error. Representative error as an acceptable explanation for delay in filing an application for relief against termination of employment was considered at length by the Full Bench in Clark v Ringwood Private Hospital 15 (Clark). A Full Bench in Davidson v Aboriginal & Islander Child Care Agency16 (Davidson) usefully summarised the propositions emerging from Clark as follows:*
>
> > *"(i) Depending on the particular circumstances, representative error may be a sufficient reason to extend the time within which an application for relief is to be lodged.*
> >
> > *(ii) A distinction should be drawn between delay properly apportioned to an applicant's representative where the applicant is blameless and delay occasioned by the conduct of the applicant.*

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[6] Exhibit R2, PN 8
[7] PR981818

> *(iii) The conduct of the applicant is a central consideration in deciding whether representative error provides an acceptable explanation for the delay in filing the application. For example it would generally not be unfair to refuse to accept an application which is some months out of time in circumstances where the applicant left the matter in the hands of their representative and took no steps to inquire as to the status of their claim. A different situation exists where an applicant gives clear instructions to their representative to lodge an application and the representative fails to carryout those instructions, through no fault of the applicant and despite the applicant's efforts to ensure that the claim is lodged.*
>
> *(iv) Error by an applicant's representatives is only one of a number of factors to be considered in deciding whether or not an out of time application should be accepted."*
>
> *[36] Notwithstanding that Davidson was decided before Brodie-Hanns, it is not inconsistent with Brodie-Hanns and these propositions may be seen as giving content to the observation of the Full Bench in Smart that a failure by a union to give correct advice "would not normally weigh against the employee". Obviously, Brodie-Hanns should be seen as identifying the "other factors" referred to in proposition (iv)."*

[35] The conduct of Mr Wanless is dealt with later in this decision.

[36] The facts of this case have a marked similarity with facts in *Rudman v Workpower Inc.*[8] Both cases involve a challenge to jurisdiction and a finding of representative error. The main points of difference are that in *Rudman,* the application was nearly three months out of time and the delay between the formal jurisdictional challenge and the lodgement of the application was nearly seven weeks. It is noteworthy that in *Rudman,* Williams C found that there was an acceptable explanation for the delay and granted the extension. Whilst persuasive, it must be noted that *Rudman* was decided under the *Workplace Relations Act,* not the FW Act.

The prejudice to the applicant if the extension of time is not granted.

[37] If the extension is not granted, then that is the end of Mr Wanless' application.

The prejudice to the respondent if the extension of time is granted.

[38] There was no evidence or submission suggesting that the respondent would be prejudiced if the extension of time was granted.

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

[39] Mr Wanless, through his representative made it clear, even before he was formally terminated, that the decision would be contested. Between 21 July and 13 August, there was no reason why Mr Wanless should have explored the jurisdictional question. As soon as the jurisdictional challenge was brought to his attention (when he was already out of time) he took immediate and appropriate steps to remedy the position. He sought independent legal advice as a matter of urgency, and acted immediately following receipt

[8] [2009] AIRC 891

of that advice. It is difficult to imagine how Mr Wanless might have applied any greater expedition than he did.

Any relevant conduct of the respondent.

[40] The conduct of the respondent has at all times been co-operative and facilitative. This has a neutral impact on the application for an extension of time.

The applicant's prospect of success at the substantive hearing.

[41] The merits of the case are yet to be canvassed in any detail. On the papers there is the existence of an arguable case.

[42] Accepting the principle that *prima facie,* the time limits should be complied with, does the totality of the circumstances in this application amount to *exceptional circumstances* such as to warrant the granting of an extension of time.

[43] Looking at the evidence as a whole, the following picture emerges:

- The respondent was on notice from day one that the decision to terminate would be contested.
- Mr Wanless acted on the advice of an experienced Industrial Officer. He had no reason not to accept that advice.
- The initial application was lodged inside the FWA time limit.
- It transpired that Mr Swanton fell into representative error. No blame can reasonably attach to Mr Wanless for this error.
- As soon as the jurisdictional issue was brought to Mr Wanless' attention he acted with proper expedition to remedy the position.
- The respondent is not placed in a position of prejudice, should the extension be granted.

[44] Over and above these factors is the vexed legal issue of jurisdiction. An applicant not experienced in industrial matters could not be expected to have even the remotest understanding of the legal niceties going to the question of constitutional corporations, and what flows from that. Mr Swanton made an initial decision which was not unreasonably based. His failure to act when the jurisdiction was challenged has already been canvassed. However the reality is that even today, other than by the consent of the parties, the question has not been authoritatively determined in the case of the respondent.

[45] To his credit Mr Wanless has made it clear that he has no interest in a jurisdictional fight. He simply seeks the opportunity to have his case heard on its merits, whether that be in the State or Commonwealth tribunal.

[46] Certainly there is no barrier to lodging applications in both jurisdictions simultaneously. But should there be a requirement to do so? I think not. In my experience applicants are rarely interested in jurisdictional battles; they simply want the opportunity to be heard. Mr Wanless falls squarely into this category.

[47] I have no hesitation in concluding that Mr Wanless has satisfied the *exceptional circumstances* hurdle. In the circumstances it is unnecessary to address his evidence and submissions going to his personal circumstances immediately following the termination.

[48] The application for an extension of time is granted.

[49] Directions going to the future conduct of this case follow.

Tim Abey
COMMISSIONER

Appearances:
Mr D Wanless, the applicant
Mr M Swanton, of the Australian Municipal, Administrative, Clerical and Services Union.
Mr J Zeeman, solicitor, with Mr A Hacker (2/9/09) and Mr G Blanksby (5/11/09), for The Wilderness Society Inc.

Date and Place of Hearing:
2009
September 2
November 5
Hobart

TASMANIAN INDUSTRIAL COMMISSION

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COMMISSIONER T J ABEY HOBART, 11 November 2009

DIRECTIONS

[1] This matter is listed for substantive hearing on Tuesday 1 December at 9.30 am.

[2] Pursuant to s.21(2)(n) of the Act, I make the following directions:

1. The parties are to exchange the documentation listed below in accordance with the following schedule:

   - Names of witnesses to be called.

   - Outline of evidence to be given by each witness.

2. The applicant is to provide the above to the respondent not later than 1.00pm Friday 20 November 2009.

3. The respondent is to provide the above to the applicant not later than 1.00pm Thursday 26 November 2009.

4. Authorities upon which the parties intend to rely are to be exchanged not later than 1.00pm on Thursday 26 November 2009.

5. The Commission is to be provided with a copy of all documents exchanged.

[3] Either party may apply for an urgent directions conference per telephone should that be necessary.

Tim Abey
COMMISSIONER