QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Dickson v Mornington Shire Council* [2020] QIRC 106
PARTIES:	**Dickson, Bradley James** (Applicant) **v** **Mornington Shire Council** (Respondent)
CASE NO:	GP/2020/5
PROCEEDING:	General Protections – application for extension of time
DELIVERED ON:	22 July 2020
HEARING DATES:	On the papers
MEMBER:	Industrial Commissioner Dwyer
HEARD AT:	Brisbane
ORDER:	**1. The application for extension of time is refused;** **2. Matter number GP/2020/5 is dismissed.**
CATCHWORDS:	INDUSTRIAL RELATIONS ACT 2016 – GENERAL PROTECTIONS APPLICATION RELATING TO DISMISSAL – Late filing – Eight days out of time - Application for extension of time – Reason for delay – Medical Conditions – Representative error – Merits
LEGISLATION:	*Fair Work Act 2009* (Cth), s 366, s 394 *Industrial Relations Act 2016* (Qld), s 285, s 297, s 306, s 310
CASES:	*Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500; 220 IR 445; [2012] HCA 32 *Doorley v State of Queensland (Department of Premier and Cabinet)* [2019] QIRC 089 *Kornicki v Telstra-Network Technology Group* (1997) 140 IR 1 *Kyvelos v Champion Socks Pty Ltd,* Print T2421 AIRC FB 10 November 2000

Long v Keolis Downer [2018] FWCFB 4109

Nulty v Blue Star Group Pty Ltd [2011] FWAFB 975

Periklis Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters [2018] FWCFB 901

Robinson v Interstate Transport Pty Ltd [2011] FWAFB 2728

Rose v BMD Constructions Pty Ltd [2011] FWA 673

Reasons for Decision

The Application

[1] On 6 January 2020 Mr Bradley Dickson was advised at a meeting with his employer that his employment with the Mornington Shire Council ('the respondent') was to be terminated, effective 12 January 2020 ('the termination date').

[2] On 11 February 2020 Mr Dickson filed an application with the Commission alleging contraventions of s 285 and s 297 of the *Industrial Relations Act 2016* ('the IR Act') ('the adverse action complaint). Mr Dickson filed an affidavit supporting his application on 11 February 2020.

[3] The time limit prescribed by s 310 of the IR Act for filing such an application is 21 days after the date the dismissal took effect. It is not disputed that Mr Dickson's application was filed eight days outside the prescribed time limit.

[4] On 5 March 2020 Mr Dickson filed an application in existing proceedings and a further supporting affidavit seeking an extension to the time limit for filing.

[5] The Chief Executive Officer of the respondent, Mr Frank Mills, filed an affidavit on 19 March 2020.

[6] The parties agreed to have the application dealt with on the papers and filed written submissions on various dates between 7 and 16 April 2020. In addition to these submissions, I have had regard to the aforementioned affidavits filed by Mr Dickson[1] and Mr Mills[2] in my deliberations.

[1] Filed on 11 February and 5 March 2020.
[2] Filed on 19 March 2020.

[7] The question for determination is whether Mr Dickson ought to have the benefit of the discretion contained at s 310(2) of the IR Act to allow an extension of time.

Legislation

[8] Section 310 of the IR Act:

> **310 Time for application**
>
> (1) An application relating to dismissal must be made within –
>
> (a) 21 days after the dismissal took effect; or
> (b) if the commission allows a further period under subsection (2) – the further period.
>
> (2) The commission may allow a further period if the commission is satisfied 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 similar position.

(Underlining and emphasis added)

[9] Consideration of s 310 by the Commission has been, to date, limited to a single decision[3].

[10] The provisions of s 366 and s 394(3) of the *Fair Work Act 2009* (Cth) ('the FW Act') are materially the same as s 310:

> **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.
>
> **394 Application for unfair dismissal remedy**
>
> …
>
> (2) The application must be made:

[3] See *Doorley v State of Queensland (Department of Premier and Cabinet)* [2019] QIRC 089.

> (a) within 21 days after the dismissal took effect; or
> (b) within such further period as the FWC allows under subsection (3).
>
> (3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:
>
> (a) the reason for the delay; and
> (b) whether the person first became aware of the dismissal after it had taken effect; and
> (c) any action taken by the person to dispute the dismissal; and
> (d) prejudice to the employer (including prejudice caused by the delay); and
> (e) the merits of the application; and
> (f) fairness as between the person and other persons in a similar position.

[11] It follows that judicial consideration of these provisions of the FW Act will be of assistance in considerations required by s 310 of the IR Act.

[12] Section 310(2) of the IR Act contains a number of key considerations for the exercise of the exercise of my discretion. Primarily, the discretion is only enlivened if I am satisfied that there are exceptional circumstances.

Exceptional Circumstances

[13] The meaning of the term 'exceptional circumstances' was considered by a Full Bench of the Fair Work Commission in *Nulty v Blue Star Group Pty Ltd:*[4]

> [13] In summary, the expression "exceptional circumstances" has its ordinary meaning and requires consideration of all the circumstances. **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 singular occurrence, even though it can be a one 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**.

(Emphasis added)

[14] The term 'exceptional circumstances' was introduced with the FW Act in 2009. It is generally recognised that it imposes a more restrictive approach to the exercise of the discretion and limits the circumstances in which an extension may be granted.

[15] Even where exceptional circumstances are found to exist, the discretion to refuse an extension remains[5].

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[4] [2011] FWAFB 975.
[5] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [15].

[16] Section 310(2) provides that consideration of 'exceptional circumstances' requires the Commission to take into account a number of prescribed factors, namely:

> (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 similar position.

Consideration of s 310(2) Factors

(a) Reason for delay

[17] Mr Dickson filed two affidavits (on 11 February and 5 March 2020) that set out his evidence dealing with *inter alia* the reasons for his delay in filing his application.

[18] The reasons for delay offered by Mr Dickson are:

- Mr Dickson's medical conditions;
- Representative error.

Medical conditions

[19] Mr Dickson states that he experienced 'stress and anxiety' from approximately 18 December 2019[6]. Mr Dickson attended for medical treatment on 7 January 2020 i.e. the day after he was advised his employment was terminated though it is apparent that he formulated a plan to seek medical attention from about 4 January 2020[7] .

[20] Mr Dickson's affidavit filed 11 February 2020 attaches two medical certificates certifying (cumulatively) that Mr Dickson is 'unfit for work' due to a 'medical condition' between 6 January to 3 May 2020.

[21] Neither Mr Dickson, nor any medical expert provide any evidence in these proceedings as to the precise nature of Mr Dickson's medical condition or any expert opinion on what (if any) impact such condition had on e.g. his cognitive capacity.

[22] Significantly, apart from a broad assertion, Mr Dickson in his affidavits provides no insight into how his asserted 'stress and anxiety' impeded his capacity to file proceedings within the prescribed time limit.

[23] In his affidavit evidence he makes the following statements:

- The delay in bringing this application is a result of his current health situation which caused an inability to obtain legal advice[8];

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[6] Affidavit of Bradley Dickson filed 11 February 2020, paragraph 34 and 43.
[7] Affidavit of Bradley Dickson filed 11 February 2020, paragraph 44.
[8] Affidavit of Bradley Dickson filed 11 February 2020, paragraph 64.

- His condition has worsened since his employment was terminated on 6 January 2020[9];

- On or about 9 January 2020[10], he had an appointment to meet David Lang ('Mr Lang') at Fuss Law to obtain legal advice. The appointment did not proceed as Mr Lang was unavailable on the day[11];

- The appointment was rescheduled and, on or about 14 January 2020, he attended the offices of Fuss Law for a meeting with Mr Lang[12];

- On 16 January and during the later part of January 2020, he was in contact with Mr Lang in relation to his employment matters…[13]

- On 14 January 2020, he attended the office of Fuss Law and met with Mr Lang to discuss his sudden termination and the accusations made against him...[14]

- On 1 February 2020, he contacted Fuss Law regarding other claims that may be available to him…[15]

[24] Notwithstanding his assertion in his affidavit filed on 11 February 2020 that his 'current health situation caused an inability to obtain legal advice' Mr Dickson then immediately goes on, in glaring contradiction, to attest to no fewer than two or three separate instances of contact with his (then) lawyer Mr Lang. I note that all of these contacts were within the prescribed time limit.

[25] Further, in his affidavit filed on 5 March 2020, Mr Dickson recites, with some particularity, his understanding (as at 16 January 2020) of the advice he says he had from Mr Lang[16].

[26] I accept Mr Dickson's assertions that he felt anxious and stressed from approximately 18 December 2019 and beyond. I further accept that he was unfit for work as stated in the medical certificates. But these findings do not assist Mr Dickson in establishing that he lacked sufficient capacity to commence proceedings within the stipulated time frame.

[27] It is trite to note that both the lead up to and the aftermath of a dismissal will likely cause an employee in Mr Dickson's situation to feel distressed and anxious[17]. But Mr Dickson's assertion go much further. He asserts that he was so affected by his medical condition that he was robbed of the capacity to obtain legal advice[18].

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[9] Affidavit of Bradley Dickson filed 11 February 2020, paragraph 67.
[10] Note – this is three days after Mr Dickson was informed of his termination and three days before his termination took effect.
[11] Affidavit of Bradley Dickson filed 11 February 2020, paragraph 69.
[12] Affidavit of Bradley Dickson filed 11 February 2020, paragraph 70.
[13] Affidavit of Bradley Dickson filed 11 February 2020, paragraph 71.
[14] Affidavit of Bradley Dickson filed 5 March 2020, paragraph 51.
[15] Affidavit of Bradley Dickson filed 5 March 2020, paragraph 54.
[16] Affidavit of Bradley Dickson filed 5 March 2020, paragraph 52.
[17] See for example *Rose v BMD Constructions Pty Ltd* [2011] FWA 673 at [9] – [10].
[18] Affidavit of Bradley Dickson filed 11 February 2020, paragraph 64.

[28] There are two problems with his submission. Firstly, there is no medical or other *independent* evidence before me to provide any insight into:

- The precise nature of the medical condition affecting Mr Dickson at the relevant time; or
- What capacity (if any) to manage his affairs he was demonstrating to others e.g. a spouse during the relevant period; or, more importantly
- How his medical condition (whatever it might be) impeded Mr Dickson from taking appropriate steps to action his dismissal within the requisite time frame.

[29] The second (and much larger) problem with the submission is that it is directly contradicted by Mr Dickson's own evidence. He attests to *multiple* attendances upon a solicitor *within* the prescribed limitation period and particularises the advice he says he received.

[30] On his own account, Mr Dickson had the wherewithal to:

- Arrange an appointment with a solicitor;
- Attend that appointment;
- Give instructions;
- Follow up on the attendance; and
- Recall the advice he says he was given to the extent of being able to reproduce a precis of it in his affidavit.

These are *not* the actions of a person impaired by mental health issues.

[31] In the circumstances, I reject entirely the submission that the medical condition affecting Mr Dickson during the relevant period was:

- An impediment to him seeking advice or commencing proceedings within the statutory time limit; or
- An exceptional circumstance, by comparison to the usual stress attending the loss of employment.

Representative error

[32] The second explanation offered by Mr Dickson is that of representative error. Claims of representative error are relatively commonplace in applications for extension of time.

[33] Representative error was considered by a Fair Work Commission Full Bench in *Robinson v Interstate Transport Pty Ltd*[19]:

> [24] The approach to representative error as an acceptable explanation for late lodgement has been considered by Full Benches of Fair Work Australia and its predecessors in the context of various Acts. The approach followed was first set out by a Full Bench in *Clark's Case* in the context of the exercise of a discretion to extend time under s.170CE(8) of the *Workplace Relations Act 1996* (the WR Act). It was followed by a Full Bench in *Davidson's Case* in relation to s.170CFA(8) of the WR Act. More recently, a majority of the Full Bench in *McConnell's Case* found that the approach remained apposite to the exercise of the discretion in s.366(2) of the Act. We too think that the approach in *Clark's Case* provides appropriate guidance for consideration of representative error in the context of the exercise of the discretion within s.366(2) of the Act. We think that representative error, in circumstances **where the applicant was blameless**, **would constitute exceptional circumstances under s.366(2),** subject to consideration of the statutory considerations in ss.366(2)(b) to (e) of the Act.
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> [25] The approach in *Clark's Case* was summarised in *Davidson's Case* as follows:
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> 'In *Clark* the Commission decided that the following general propositions should be taken into account in determining whether or not representative error constitutes an acceptable explanation for delay:
>
> (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.**
> (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 carry out 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.'

[34] I agree with the comments of the Full Bench in *Robinson* that representative error, where a litigant is blameless, would likely constitute an exceptional circumstance. The pivotal consideration in *those* circumstances will be the actions or inactions (as the case may be) of the litigant.

[35] However, before considering Mr Dickson's actions, I must be satisfied that there actually was representative error.

[36] The submission by Mr Dickson on this reason for delay is that he attended upon a solicitor (Mr Lang) with Fuss Law for the first time on 14 January 2020. Mr Dickson says that he was provided with certain advices by Mr Lang by 16 January 2020 but was not advised about the operation of any time limits[20].

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[19] *Robinson v Interstate Transport Pty Ltd* [2011] FWAFB 2728.
[20] Affidavit of Bradley Dickson filed 5 March 2020, paragraphs 51-52.

[37] Further, while not expressly stated in his evidence, the implication in his affidavit is that Mr Dickson was not provided with or does not recall any advice about his rights to bring a General Protections matter.

[38] By 4 February 2020, according to Mr Dickson, Mr Lang referred him to his current solicitors. In his affidavit filed on 5 March 2020, Mr Dickson exhibits a copy of the email[21] (dated 4 February 2020) from Mr Lang referring him to other solicitors.

[39] It is useful to extract the relevant portions of the email here:

> Good morning Brad (**second addressee name redacted**) …
>
> I have spoken to Adam Brown at Axia Law **regarding Brad's dispute with Council**. He does work on similar disputes/court actions regarding employment, workplace bullying and Council.
>
> **I confirm my advice that I cannot assist on your particular matter**.
>
> I have given Adam your name and have advised him you will call. There may be time limits which require you to take action with Council. I suggest you contact Adam as soon as possible…

(Emphasis added)

[40] Consistent with the referral advice in the email, Mr Dickson says that he contacted his current solicitors on the same day he received the email from Mr Lang and, shortly thereafter, commenced these proceedings.

[41] The difficulty for Mr Dickson is that the exhibited email from Mr Lang raises more questions than it answers. The only advice to Mr Dickson that Mr Lang appears to confirm is to the effect that he cannot assist him. It is impossible for me to reach a conclusion about error by Mr Lang having regard *only* to the exhibited email.

[42] Further, portions of the exhibited email are redacted. The redactions include the name and email address of another recipient of the email. It is not clear why this has been done. What is clear is that Mr Lang communicates with Mr Dickson *through* the anonymous third party e.g. see the first line of the email says '*…regarding Brad's dispute…*'.

[43] There is no evidence provided to explain why the email is written to this third party, or what role (if any) that person had in obtaining or receiving advice from Mr Lang about or for Mr Dickson.

[44] From the wording of the email, it would seem that the unidentified third party was at least privy to discussions between Mr Dickson and Mr Lang. It would seem likely that the unidentified person was privy to the advice from Mr Lang in the circumstances.

[45] While I cannot reach any conclusion as to what the unidentified person may or may not have known about the advice from Mr Lang, the decision to de-identify that person raises questions that ought to have an answer i.e. was that person in attendance with Mr Dickson upon Mr Lang previously? Was that person able to corroborate Mr Dickson's

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[21] Affidavit of Bradley Dickson filed 5 March 2020, Exhibit 'BJD 8'.

precis of the advice from Mr Lang? If yes, why is no evidence provided by them to corroborate Mr Dickson's account of events?

[46] Further, the evidence that Mr Dickson gives about the advice he received from Mr Lang, appears to be a recitation from his memory[22]. In those circumstances it can only be a *precis* of Mr Lang's advice as understood and recounted by Mr Dickson.

[47] There is no attempt in any material filed in this application to provide direct evidence from Mr Lang, or to explain the absence of evidence from Mr Lang.

[48] I regard the absence of evidence from Mr Lang, or an explanation for that absence, as a critical evidentiary omission by Mr Dickson.

[49] Claims of representative error are a common occurrence in dismissals and general protections claims filed outside the prescribed time limit. However, such claims cannot (and should not) be used as simple 'throw away' lines in arguments for extension. Representative error must be proven by a litigant seeking to rely on it.

[50] It is not enough that the email from Mr Lang exhibited to Mr Dickson's affidavit would appear to demonstrate that Mr Lang has little experience or knowledge of employment law. It is not enough that the email mentions time limits without expressing any particular knowledge of what they might be. This tells me nothing about what discussions may have taken place from the point of Mr Dickson's first contact with Mr Lang on (or about) 14 January 2020 and on subsequent occasions up until 4 February 2020.

[51] In representative error matters it is often the case that a representative in question will be all too willing to 'fall on their sword' to assist a client or former client that they have failed. Alternatively, where e.g. the errant representative declines to cooperate, the litigant or their new representative will usually attest to their efforts to contact the former representative, and the lack of cooperation received.

[52] Neither Mr Dickson nor his current solicitors have placed any such evidence before me, and yet I am asked by Mr Dickson to conclude that Mr Lang gave certain erroneous (and possibly negligent) advices. I am entirely unprepared to reach such conclusions and impugn the professional reputation of Mr Lang based solely on the assertions of Mr Dickson alone.

[53] While I accept Mr Dickson's precis of the advice *he says* he received, that is not enough to support a conclusion of an error by Mr Lang.

[54] For completeness I should add that ignorance of time limits is not, of itself, an exceptional circumstance[23].

[55] In the circumstances I am not prepared to accept either of the explanations offered by Mr Dickson for the delay because there is no evidence that would allow me to reliably conclude that:

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[22] No emails, notes, or correspondence recording or setting out the alleged advice are in evidence.
[23] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [14].

- Mr Dickson was impaired by his medical condition to the point that he could not file an application;

- Mr Dickson was delayed by erroneous advice from Mr Lang.

(b) Action taken to dispute dismissal

[56] Mr Dickson has attested to the fact that he consulted with Mr Lang as early as 14 January 2020, or thereabouts[24]. He had an earlier appointment that was postponed. The respondents do not contest this timeline.

[57] Mr Dickson initiated his proceedings on 11 February 2020 i.e. within one month of the date he was informed that his employment was being terminated.

[58] Time limitation period aside, Mr Dickson has acted relatively quickly to take action to dispute his dismissal.

(c) Prejudice to the employer

[59] The respondent's submissions are silent as to the question of prejudice caused by the delay in filing. In the circumstances, as the delay is only 8 days, I cannot appreciate how they would be prejudiced by the granting of an extension.

[60] I can find no prejudice to the employer if the application were allowed to proceed.

(d) Merits

[61] In *Long v Keolis Downer*[25] a Full Bench of the Fair Work Commission, considering the materially similar provisions of s 394(3) of the FW Act, concluded that the appropriate standard for this consideration was that there must be some demonstrable merit:

> [71] The discretion to extend time in s.394(3) is not enlivened on the basis of a finding that it would be 'unfair not to do so'; rather the Commission must be satisfied that 'there are exceptional circumstances'. For the consideration in s.394(3)(e) to weigh in favour of such a finding it must be shown that there is ***some*** merit in the substantive application. The weight to be given to this consideration is dependent on the extent to which there is merit in the substantive application.

(Underlining and emphasis added)

[62] In *Kyvelos v Champion Socks Pty Ltd*,[26] the view was expressed that:

> It should be emphasised that in considering the merits the Commission is not in a position to make findings of fact on contested issues, unless evidence is called on those issues. Evidence is rarely called on the merits and there are sound reasons why the Commission should not embark on a detailed consideration of the substantive case in an application pursuant to s.170CE(8).

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[24] Affidavit of Bradley Dickson filed 5 March 2020, paragraph 51.
[25] *Long v Keolis Downer* [2018] FWCFB 4109.
[26] *Kyvelos v Champion Socks Pty Ltd,* Print T2421 AIRCFB 10 November 2000 at [14].

[63] The inquiry into merit only need identify '*some*' merit. The inquiry does not need to be to the same standard as would apply at a final hearing of the matter. A party should not be required to potentially run the entirety of their evidentiary case twice[27].

[64] In general protections matters such as this, merits can be evaluated where an applicant can demonstrate the necessary elements of e.g. the exercise of a 'workplace right' and 'adverse action' within the meaning of the IR Act. If an applicant can demonstrate these elements, then a *prima facie* claim will be made out.

[65] On the evidence already available, it is clear that Mr Dickson can establish these elements of this claim i.e. that he exercised a workplace right within the meaning of s 284(1)(c)(ii) of the IR Act by sending the email on 5 January 2020, and further, that his employment was terminated[28].

[66] However, because there is a reverse onus, evaluation of the merits does not end with the applicant's case. The outstanding issue is whether the first two elements are causally connected. Section 306(2) of the IR Act presumes that they are. It is for the respondent to prove to the Commission that those elements are not causally connected i.e. there is a reverse onus. The reverse onus is invariably discharged through the evidence of *inter alia* the decision maker.

[67] At a final hearing, the mindset of the decision maker is the critical factor in the discharge of this onus[29]. The true merits of a claim will rarely be fully apparent until the decision maker has given their evidence, and often not until they have been cross examined. But in a preliminary jurisdictional hearing such as this, the extent to which a decision maker's evidence can be tested is limited.

[68] This is not a matter of the type discussed in *Kyvelos*[30] where there is no evidence on merit before me. The parties have supplied affidavits addressing substantive merits.

[69] In the absence of *viva voce* testimony and cross examination of the decision maker (Mr Frank Mills), it will be necessary to evaluate the relative plausibility of the explanation Mr Mills offers (and his denial of proscribed conduct) as against the assertions of Mr Dickson.

[70] In this matter the respondents rely on the affidavit of Mr Mills who is the CEO of the respondent Council[31]. In essence, it is the evidence of Mr Mills that:

- He was increasingly aware of difficult interactions between Mr Dickson, another staff member, and councillors, from late 2019[32];

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[27] Ibid.
[28] An action that meets the definition of adverse action contained at s 282(1)(a).
[29] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500;220 IR 445; [2012] HCA 32 at [44].
[30] Supra.
[31] Filed on 19 March 2020.
[32] Affidavit of Frank Mills filed 19 March 2020, paragraphs 4-9.

- He was informed about some of these matters by other councillors after the November and December council meetings[33];

- He instigated an investigation into Mr Dickson's conduct in mid-December 2019 following a formal complaint[34];

- He decided to terminate Mr Dickson's employment on 1 January 2020 after he received the preliminary investigation report largely substantiating the complaints [35];

- The *only* reason for his decision to terminate was that Mr Dickson was not working out and he wanted to act during Mr Dickson's probationary period[36].

[71] None of the evidence contained in Mr Mills' affidavit is out of the ordinary in terms of what might be anticipated in the circumstances of such a case. The evidence is concise and logical and, in plain terms offers a plausible explanation of how (and why) Mr Dickson's employment came to an end. If this evidence was undisturbed at a final hearing of this matter it would likely be sufficient for the respondent to discharge its onus.

[72] Importantly, Mr Mills explicitly nominates the date of his decision as 1 January 2020. Mr Mills nominates this date as it coincides with the date he received a preliminary report into the investigation of complaints about Mr Dickson[37].

[73] Mr Dickson on the other hand seeks to refute the evidence of Mr Mills with respect to the date upon which he formed his view to terminate Mr Dickson's employment, and in particular, asserts the decision was made *after* Mr Dickson raised concerns in an email of 5 January 2020[38].

[74] Mr Dickson has presented no evidence to support his assertion that the decision was not made until on or after 5 January 2020. The highest his submission rises is that no concerns about his conduct were raised with Mr Dickson prior to 1 January 2020[39]. I note that this submission ignores the fact that:

- Mr Dickson was aware of a complaint about his conduct from at least 6 December 2019[40]; and

- Mr Dickson was absent on leave from 27 December 2019 until 5 January 2020[41]; and

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[33] Affidavit of Frank Mills filed 19 March 2020, paragraph 7.
[34] Affidavit of Frank Mills filed 19 March 2020, paragraphs 4-5.
[35] Affidavit of Frank Mills filed 19 March 2020, paragraph 11.
[36] Affidavit of Frank Mills filed 19 March 2020, paragraph 19.
[37] A copy of the email from the investigator dated 1 January 2020 annexing the report is exhibit 'FM-1' to his affidavit.
[38] Applicant's reply submissions dated 16 April, paragraph 10.
[39] Applicant's reply submissions dated 16 April, paragraph 9.
[40] Affidavit of Bradley Dickson filed 11 February 2020, paragraphs 19-35.
[41] Affidavit of Bradley Dickson filed 5 March 2020, paragraph 22.

- Mr Dickson was informed on 4 January 2020 of the scheduling of the meeting at which his employment was terminated i.e. the day before his email of 5 January 2020[42].

[75] There are a number of key facts that do not appear from the submissions to be contested:

- Mr Dickson had difficult interactions with at least one other staff member;
- Mr Dickson was, at all material times, within his nominated probationary period;
- Mr Mills received an email on 1 January 2020 setting out preliminary investigation results;
- Mr Dickson was informed on 4 January 2020 of a meeting to take place with Mr Mills on 6 January 2020; and
- The timing of Mr Dickson's termination coincides with the expiration of his probationary period.

[76] While I am mindful that I do not have the benefit of the full body of evidence that could or might be produced at a final hearing of this matter, I am of the view that the facts presented and relied on by the respondent are plausible and consistent with an entirely legitimate explanation for the termination of Mr Dickson's employment.

[77] The undisputed facts are consistent with Mr Mills' explanation for the reasons for terminating Mr Dickson's employment. The independent documentary evidence[43] only strengthens the compelling account of Mr Mills.

[78] Putting the presumption of contravention at s 306 of the IR Act to one side, Mr Dickson would seem to assert that his email of 5 January 2020 was the substantive and operative reason for his employment being terminated[44]. This is so notwithstanding Mr Dickson's own evidence is that Mr Mills did not want to discuss the email when they met on 6 January 2020[45].

[79] In my view the more likely scenario is that, on 4 January 2020 when he received notification of the meeting, Mr Dickson anticipated his termination and 'went on the offensive' with his email on 5 January 2020. In my view, by the time Mr Dickson exercised his workplace rights, the decision to terminate Mr Dickson's employment was already made and was made for the reasons stated by Mr Mills.

[80] General protections complaints invariably rely on circumstantial evidence. While there is a presumption of contravention imposed by s 306 of the IR Act, I am satisfied on the evidence provided by both Mr Mills and Mr Dickson that the timing of the decision

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[42] Affidavit of Bradley Dickson filed 11 February 2020, paragraph 46.
[43] 'FM-1' to Mr Mills affidavit filed 19 March 2020.
[44] Applicant's reply submissions dated 16 April, paragraph 10, second sentence.
[45] Affidavit of Mr Dickson filed 11 February 2020, paragraph 51.

sworn to by Mr Mills and supported by the exhibited email is the more probable scenario.

[81] The submission of Mr Dickson is that his email of 5 January 2020 was the trigger for his termination[46]. Having concluded that the timing of the decision by Mr Mills was 1 January 2020, a finding of a nexus between Mr Dickson's termination and his exercise of workplace rights on 5 January 2020 is excluded.

[82] On the available evidence I conclude that Mr Dickson's claim is substantially lacking in merit.

Fairness

[83] In *Doorley*[47] Commissioner Black observed:

> This consideration invites a comparison between the applicant and another employee in the position of the applicant. The purpose of this consideration is to ensure that the applicant does not obtain any forensic advantage from the delay in commencement of the proceedings. In *Ballarat Truck Centre v Kerr,* the Fair Work Commission Full Bench stated:
>
> > [26] It appears to be clear that s.366(2)(e) should be limited to a comparison of persons who have also had their employment terminated and are thus capable of lodging a s.365 application. A time limit for the lodgement of an application under Part 3-1 of the Act is only provided for with respect to s.365 applications. The Act imposes no time constraints on other applications available under Part 3-1. It follows that the consideration stipulated in s.366(2)(e) of the Act requires a comparison between people who are capable of bringing a s.365 application. Further, as Mr Follett submitted, if s.366(2)(e) allowed for a comparison to a person who had not been dismissed, then, as the Act imposes no time constraints on other applications under Part 3-1, that comparison would always produce comparative unfairness and it could hardly be seen to be indicative of whether there are exceptional circumstances for which a further period of time could be granted.

[84] In this case the proper comparison ought to be with Mr Dickson and another employee, dismissed from their employment at the conclusion of their probationary period, who has filed outside the statutory limit.

[85] Considered in isolation, in a matter like this the facts will always reveal unfairness where a person is denied an opportunity to pursue such an application. However, the considerations identified in s 310(2) require an holistic approach[48].

[86] In this matter, the absence of evidence to support the reasons for delay, and the lack of merit weighs heavily against Mr Dickson in my view. The question of fairness ought to be considered in that context.

[87] In all of the circumstances of this matter I am unable to identify any particular unfairness to Mr Dickson.

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[46] Applicant's reply submissions dated 16 April, paragraph 10, second sentence.
[47] Supra.
[48] *Periklis Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* [2018] FWCFB 901 at [39].

Conclusion

[88] In *Periklis Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* the Full Bench of the Fair Work Commission set out the approach to be adopted when considering s 366(2) of the FW Act:[49]

> [38] As we have mentioned, the assessment of whether exceptional circumstances exist requires a consideration of *all* the relevant circumstances. No *one* factor (such as the reason for the delay) need be found to be exceptional in order to enliven the discretion to extend time. This is so because even though no *one* factor may be exceptional, *in combination* with other factors the circumstances may be such as to be regarded as exceptional.
>
> [39] So much is clear from the structure of s.366(2), each of the matters needs to be taken into account in assessing whether there are exceptional circumstances. The individual matters might not, viewed in isolation, be particularly significant, so it is necessary to consider the matters collectively and to ask whether collectively the matters disclose exceptional circumstances. **The absence of any explanation for any part of the delay, will usually weigh against an applicant in such an assessment.** Similarly a credible explanation for the entirety of the delay, will usually weigh in the applicant's favour, though, as we mention later, it is a question of degree and insight. However the ultimate conclusion as to the existence of exceptional circumstances will turn on a consideration of all of the relevant matters and the assignment of appropriate weight to each.

(Underlining and emphasis added)

[89] I consider that this approach is equally apposite to s 310(2) of the IR Act.

[90] I am mindful that the delay in this matter is a relatively short period. I am also conscious that a refusal to grant the extension sought will extinguish Mr Dickson's opportunity to seek a remedy for his termination. If these were the only considerations, I might be inclined to a more favourable approach to his application.

[91] However, the absence of explanation for the delay and the obvious difficulties with merit are stark and compelling features of this matter that overwhelm the other factors when considered as a whole.

[92] Even when considering that the true failing with respect to the explanations for the delay could simply be a result of inadequate evidence put before me, I consider that the poor merits are, of themselves, a compelling reason to refuse the application.

[93] In all of these circumstances I refuse the application to extend the time for filing and dismiss matter GP/2020/5 in its entirety.

Orders

[94] I make the following Orders:

1. The application for extension of time is refused;

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[49] Ibid.

2. Matter number GP/2020/5 is dismissed.