

# ‘Exceptional circumstances’ – recent employment cases involving out-of-time applications

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### At a glance

- + Under the Fair Work Act, unfair dismissal and general protections applications must be made within 21 days of the dismissal, unless there are ‘exceptional circumstances’.
- + Two recent decisions by the Fair Work Commission provide useful examples of ‘exceptional circumstances’.
- + While these cases provide a timely reminder about the factors that can create ‘exceptional circumstances’, insurers should always consider whether an application is made in time before assessing the merits of the case.



### ‘Exceptional circumstances’ provisions

Under the *Fair Work Act 2009* (Cth) (**the FW Act**), an application for an unfair dismissal remedy or an application alleging a dismissal in contravention of Part 3-1 of the FW Act (the general protections provisions) must be made within 21 days of the dismissal taking effect, or within a period the Commission allows.

In considering whether to grant an extension of time, the Commission must be satisfied that there are ‘exceptional circumstances’ causing the delay. The Commission will consider factors including:

- when the applicant first became aware of the dismissal
- whether the applicant had taken an action to dispute the dismissal
- whether prejudice had been caused to the employer, including prejudice caused by the delay

- the merits of the application, and
- fairness between the applicant and other people in similar positions.

In *Nulty v Blue Star Group Pty Ltd*<sup>1</sup>, the Full Bench of the Commission (Vice President Lawler, Deputy President Sams and Commissioner Williams) stated:

*“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.”*

<sup>1</sup> *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975

## Recent cases before the Commission

Two recent cases show how the Commission will make orders granting an extension of time in out-of-time applications, where exceptional circumstances exist.

### ***Muhammad Ali Qureshi v Spotless Services Australia Limited [2023] FWC 1613***

In *Muhammad Ali Qureshi v Spotless Services Australia Limited*, the Commission granted a one-day extension of time to the applicant and accepted an out-of-time application.

In that case, Deputy President Anderson considered the ‘exceptional circumstances’ arose from the applicant’s time in remand. The applicant, who worked as a security officer at Royal Adelaide Hospital, was arrested at the end of a shift. Although the charges against the applicant were subsequently dropped, he was held in remand for 23 days. During that time, he did not have access to email or his mobile phone. While the applicant was in remand, his employer called him on his mobile

phone after he did not turn up for his rostered shifts. Without access to his phone, the applicant was unable to answer the calls or respond to the voice messages left by his employer.

In a letter dated 18 April 2023 and sent to the applicant by post and email, the employer asserted that the applicant had abandoned his employment, and ended his contract of employment.<sup>2</sup> The applicant was released from remand on the evening of 26 April 2023.

Deputy President Anderson found that the applicant’s dismissal took effect on 27 April 2023, which was the day after he was released from remand and had access to his email. Accordingly, the Commission found the application submitted on 19 May 2023 was one day late.

In considering the issue of granting an extension of time, Deputy President Anderson found that the delay was caused by the impact of the applicant’s time in remand for a prolonged period. The applicant was traumatised by the experience and had suffered anxiety and stress. During his time in remand, the applicant was seen by a mental health specialist.

On his release, and throughout the delay period, the applicant was unwell. He sought care from his general practitioner and took prescribed medication with sedative effects. These were important factors contributing to the Commission’s finding of ‘exceptional circumstances’.

### ***Todd Smith v Tricare Ltd [2023] FWC 1585***

In *Todd Smith v Tricare Ltd*, Commissioner Durham allowed an extension of time for an out-of-time unfair dismissal application. In that case, the Commission’s online lodgement system indicated the application was made 48 seconds after midnight on 13 May 2023.

Commissioner Durham stated: “I am satisfied that upon making the realisation that the deadline for his application was midnight that same day, Mr Smith then did everything in his power to lodge the application on time” and “in the particular circumstances of this case, I consider it is likely that [the Applicant] hit the ‘submit application’ button before midnight 12 May 2023. This consideration weighs in favour of an extension of time in this case”.

Commissioner Durham also made a finding that a 48-second extension of time would not prejudice the employer, which also weighed in favour of granting the extension of time.

## A timely reminder for insurers

These recent cases show the Commission will grant extensions of time where there are ‘exceptional circumstances’ in out-of-time applications.

However, it is important insurers and their insureds understand that the ‘exceptional circumstances’ bar is high, given it involves circumstances that are “out of the ordinary course, or unusual, or special or uncommon.”<sup>3</sup> For this reason, it is always worth considering whether an unfair dismissal or general protections application is out of time. If it is, an out-of-time jurisdictional objection can often mitigate exposures that may otherwise arise, depending on the facts of the case.

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<sup>2</sup> Ibid. at [41]

<sup>3</sup> *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 (16 February 2011) at [13]

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