APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 18 NOVEMBER 2019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00415
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER D J MATTHEWS - CHAIRMAN MS H REDMOND - BOARD MEMBER MR J LAMB - BOARD MEMBER
HEARD	**:**	BY SUBMISSIONS
DELIVERED	**:**	MONDAY, 20 JULY 2020
FILE NO.	**:**	PSAB 4 OF 2020
BETWEEN	**:**	TREVOR WALLEY Appellant AND DEPARTMENT OF BIODIVERSITY, CONSERVATION AND ATTRACTIONS Respondent

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CatchWords	**:**	Industrial Law (WA) - Appeal against employer's decision to terminate appellant's employment - Appeal filed outside of time limit - Principles applied - Extension of time to institute proceedings granted
Legislation	**:**	
Result	**:**	Extension of time granted
Representation:		
Appellant	**:**	In person
Respondent	**:**	Mr J Carroll (of counsel)

Case(s) referred to in reasons:

Nicholas v. Department of Education and Training (2009) 89 WAIG 817

Reasons for Decision

1 This is the would-be appellant's application to extend time for the filing of his Notice of Appeal.

2 The power of the Public Service Appeal Board to extend time exists for the sole purpose of enabling the Public Service Appeal Board to do justice between the parties. It is incumbent upon the would-be appellant to demonstrate that if the Public Service Appeal Board were to take the, prima facie, uncontroversial approach of applying the clear rules relating to the time within which an appeal must be initiated, this would work a real injustice against him.

3 In *Nicholas v. Department of Education and Training* (2009) 89 WAIG 817 a Public Service Appeal Board, in a decision which is now considered to be the leading one on the matter, set out the four main considerations which illuminate the decision maker's path in deciding where justice lies on an application such as this. They are the length of the delay, the reason for the delay, the strength of the appeal grounds and the prejudice to the potential respondent to the appeal if an extension of time were granted. Regard for those factors cannot replace the overarching duty to consider whether the rules work an injustice upon a would-be appellant, but it is hard to go wrong, at least in terms of approach, if parties address these issues and the Public Service Appeal Board considers them.

4 The would-be appellant was dismissed on 6 January 2020. He filed a Notice of Appeal against the decision on 26 March 2020, that is two months after the deadline for the regular filing of an appeal.

5 The would-be appellant says that he was unwell and points to medical certificates of Dr Bradley Price dated 16 December 2019 and 16 January 2020 which, together, certify him as having no capacity for work from 16 December 2019 to 16 April 2020.

6 The medical certificates were given in the context of a workers' compensation claim and state the would-be appellant is suffering from a post-traumatic stress disorder related to an incident on 18 October 2000.

7 As at 16 January 2020 it must be accepted, without more, that the would-be appellant had been suffering from a post-traumatic stress disorder and had been unable to work as a result since 16 December 2019. It must be accepted, given there is no competing evidence and nothing about the certificate which calls its contents into question, that the would-be appellant was, on that date, suffering from a post-traumatic stress disorder. It must also be accepted, without more, that the opinion of Dr Price was that the would-be appellant would not be capable of working before 16 April 2020.

8 The second certificate says nothing about the would-be appellant's ability to complete and file a Notice of Appeal against a decision to dismiss him from his employment. We are, however, prepared to accept that suffering from a post-traumatic stress disorder would affect the taking of such a step and would be a good reason for not completing and filing a Notice of Appeal.

9 The alternative is that we find that the opinion of Dr Price was that the would-be appellant was, and would be, unable to work but could complete and file a Notice of Appeal. We do not see how we could fairly make such a finding. The far more reasonable conclusion is that a medical condition which led to an inability to do something with which the would-be appellant was familiar with and experienced in, his work, would also render the appellant unable to do something with which he was less familiar and had no experience in relation to, that being the completion and filing of a Notice of Appeal.

10 We consider the would-be appellant has established that there is a reason for the delay and that the reason is a good one.

11 The potential respondent says that medical issues are not a good reason for the delay. The potential respondent appeals to our logic. The potential respondent points to some things the would-be appellant did during the period of time covered by the medical certificates. The potential respondent says that because the would-be appellant was capable of doing those things, we cannot possibly accept that he was medically incapable of completing and lodging a Notice of Appeal.

12 The potential respondent points to the would-be appellant giving instructions to a union, some communications he had, and apparently had, with Parliamentarians and, remarkably, to the Notice of Appeal.

13 The potential respondent says the would-be appellant has offered no explanation as to how he had the capacity to do these things but did not have capacity to file a Notice of Appeal within 21 days of the date of dismissal and that, as a matter of logic, we ought deduce that if the would be-appellant could do these things then he could have equally completed and filed a Notice of Appeal.

14 We reject the argument for a number of reasons.

15 The invocation of the filing of the Notice of Appeal takes us nowhere given that there is no evidence the would-be appellant was incapable of completing and filing a Notice of Appeal as a result of a post-traumatic stress disorder for the entire period up until 16 April 2020, and that doing this on 26 March 2020 puts to the lie the assertion that illness explains his delay in taking this step.

16 Dr Price thought the would-be appellant would be unable to work until 16 April 2020 and opined as much on 16 January 2020. However, this does not mean as a matter of fact, or as a matter of logic, that the would-be appellant was suffering from a post-traumatic stress disorder and unable to complete and file a Notice of Appeal on 26 March 2020, a date that was about three weeks before the outer limit of Dr Price's opinion.

17 The would-be appellant could have relied upon the medical certificate to excuse him from working, and filing a Notice of Appeal, until 16 April 2020. This does not mean that filing a Notice of Appeal before this date is fatal to his explanation that illness is the reason for his delay. The would-be appellant may have recovered sufficiently from the post-traumatic stress disorder by 26 March 2020 to take this step. As a matter of logic that conclusion is as open as that he was suffering a post-traumatic stress disorder on that date and so his filing of the Notice of Appeal puts to the lie that the post-traumatic stress disorder prevented him from taking this step earlier.

18 The potential respondent's argument must be that, for the sake of consistency and logic, the would-be appellant should have waited until 17 April 2020 to file the Notice of Appeal even if he felt better beforehand. We do not think this is a good argument.

19 The would-be appellant should have filed the Notice of Appeal as soon as he was able. We have no evidence before us that he did not do this. In fact, we have an opinion from a doctor that the would-be appellant would have no capacity to work until at least 16 April 2020. We have found this means he was predicted to have no capacity to complete and file a Notice of Appeal until that date. The filing of the Notice of Appeal before that date is a good thing all round, not something that can, as matter of logic, or should, as matter of fairness, be relied

upon against the would-be appellant. It is odd to suggest that the filing of a Notice of Appeal on a certain date proves that the would-be appellant could have filed the Notice of Appeal on an earlier date.

20 In relation to the other matters referred to in [12] above, the potential respondent's argument must be that either the would-be appellant was not really suffering from a post-traumatic stress disorder at the times he did these things, or that it did not prevent him from doing things that were, all in all, like filing a Notice of Appeal.

21 We do not think the potential respondent is saying the would-be appellant did not suffer from a post-traumatic stress disorder. If it is, there is no basis for the assertion.

22 If the potential respondent is saying that the would-be appellant did things that equate to, or are in the same ball park as, the completion and filing of a Notice of Appeal we must look at the evidence of what the would-be appellant did and turn our minds to whether these establish that the would-be appellant could have completed and filed a Notice of Appeal despite having a post-traumatic stress disorder.

23 In relation to the meeting with his union, we do not know what happened at the meeting and we are unable to decide whether the would-be appellant conducted himself in such a way that proves he was capable of doing things like completing and filing a Notice of Appeal despite suffering from a post-traumatic stress disorder.

24 In relation to the email dated 9 January 2020, it is the last email of an exchange about the would-be appellant seeking a meeting with the potential respondent's human resources branch about his work situation.

It says:

> "Good morning
>
> As advised I made to meet with employee relations
>
> And the response below
>
> Thank you"

25 We do not understand how the potential respondent says this is anything like completing a Notice of Appeal. In the email the would-be appellant informed the Minister for Environment that, as the Minister suggested he do in his letter dated 3 January 2020, he had tried to arrange a meeting with the human resources branch of the potential respondent and had received the response he forwarded.

26 The potential respondent seeks to characterise this in written submissions as a 'step'. We are not sure how simply informing the Minister that you have failed in your attempt to have a meeting with your ex-employer, while asking nothing at all of the Minister, is a 'step'. It is a very brief update or report back, not a 'step'.

27 In any event, it is nothing like the completion of a Notice of Appeal. If the would-be appellant had filed a Notice of Appeal that was as vague and brief as the email to the Minister, the potential respondent would have been entitled to complain about it being deficient.

28 In relation to the letter to the Minister for Environment dated 9 March 2020, we have not seen it.

29 The would-be appellant provided evidence upon which we may comfortably rely that he was suffering from a post-traumatic stress disorder and unable to work until 16 April 2020.

30 We are prepared to accept that suffering a post-traumatic stress disorder excuses one from turning their mind to the completion and filing of a Notice of Appeal. That the would-be appellant found it within himself to complete and file the Notice of Appeal on 26 March 2020, that is a date within his doctor's opinion as to his unfitness for work, does not establish that the would-be appellant had capacity to file the document prior to 26 March 2020 and inappropriately sat on his hands.

31 Looking at the other relevant factors, the period of delay is not so short as to be of no concern. As the potential respondent says, the rules are there for a reason and, prima facie, should be obeyed. There will be occasions where the length of delay is so great that other factors become almost irrelevant. This is not such a case. A delay of two months goes into the mix but is not, on its own, a determinative factor.

32 The potential respondent does not point to any particular prejudice. We note on this aspect that the potential respondent, on the materials we have before us, knew that the would-be appellant was unhappy about what was happening to him and exploring, in an admittedly ineffectual way, what he could do about it from December 2019.

33 In relation to the merits of the appeal we have, after considering them in a rough and ready way, come to the conclusion that it cannot be said that the grounds are so inarguable as to have this factor loom large in our considerations.

34 In our view, in this case, we have a long, but not excessively long, period of delay adequately explained, a potential respondent who has suffered no particular prejudice and appeal grounds that are worth hearing.

35 We are of the view that we would not be doing justice as between the parties if we effectively concluded this appeal against the would-be appellant at this time. We are satisfied strict compliance with the rules would work an injustice upon him.

36 We will grant an extension of time and treat the documents filed as being regular.

37 A further issue needs to be dealt with.

38 Our reasons for decision were delivered to the parties in the above terms before any orders in this matter were perfected.

39 Counsel for the potential respondent subsequently pointed out that we had in fact had the opportunity to look at the communication which at [28] above we said we had not seen.

40 [18(c)] of the written submissions filed by the potential respondent says:

> "18. Even taking those [medical] certificates at their highest, they do not provide evidence to support an assertion that the appellant was unable to commence an appeal within 21 days in circumstances where:
>
> …
>
> (c) it appears that the appellant wrote to Hon Stephen Dawson MLC in relation to his dismissal,[9]"

41 Footnote 9 says:

> "See the attachment to the notice of appeal, which appears to be an email from the appellant to Minister Dawson, and appears to be dated 9 March 2020."

42 We interpreted the reference to "appears" in [18(c)] above to mean that the potential respondent's knowledge had been gathered from a secondary source. It is apparent from footnote 9, to which we did not have sufficient regard, that this incorrect.

43 It is necessary for us to review what we have written above, taking into account the communication, a letter in email form from the would-be appellant to the Hon Stephen Dawson MLC, and the reliance the potential respondent placed upon it in its submissions.

44 The significance of the communication from the potential respondent's point of view is said to be that it proves that the would-be appellant had the capacity to draft and file a Notice of Appeal earlier than 26 March 2020.

45 One argument is that it is a matter of logical deduction that if the would-be appellant could draft such a communication on 9 March 2020, despite having a post-traumatic stress disorder, then he equally could have drafted and filed a Notice of Appeal.

46 Alternatively, the would-be appellant clearly had capacity to take that step on 9 March 2020 and sat on his hands from 9 March 2020 until 26 March 2020.

47 The communication is certainly more detailed in terms of history and complaint than other documents referred to. It contains references to the kind of things one would expect to see in a Notice of Appeal.

48 However, the question is whether it undoes the would-be appellant's contention that he had a good reason for delay in not filing the Notice of Appeal until 26 March 2020, being that he was suffering from a post-traumatic stress disorder.

49 We are of the view that, as a matter of logic, evidence or fairness, it cannot work this result.

50 The drafting of a letter to the Hon Stephen Dawson MLC is just not the same thing as commencing a legal action. The former can be viewed as an informal approach rather than the formal approach represented by the latter.

51 It is plain from the terms of the letter that the would-be appellant knew about the possibility of commencing legal action and wanted it to happen but wanted others to take the step on his behalf. Wanting someone to represent you in legal proceedings is normal and readily understandable.

52 An inability to take a step in which you must represent yourself may be something that a person suffering from a post-traumatic stress disorder finds a step too far. It is, after all, a big step, and perhaps it is one that is, from a medical point of view, reasonably understood as being too big for someone suffering from a post-traumatic stress disorder.

53 We just do not know. At the end of the day, in terms of medical evidence, what we have before us is the opinion of a doctor that the would-be appellant would be suffering from a post-traumatic stress disorder that would prevent him from working until 16 April 2020. We simply do not see how, unassisted by any other medical evidence, we could say 'Yes, but the communication on 9 March 2020 proves that the would-be appellant had capacity to commence legal action on a date earlier than 26 March 2020'.

54 The syllogism would have to be:

(1) The commencement of legal action requires the same level of health and wellbeing as writing the letter dated 9 March 2020.

(2) The would-be appellant wrote the letter dated 9 March 2020.

(3) Therefore, the would-be appellant was well enough and healthy enough to commence legal action on or about 9 March 2020.

55 Looked at this way it is surely clear that the process of deductive reasoning breaks down at (1) in the previous paragraph. Where is the evidence in support of the premise? There is none. It may be completely wrong. The potential respondent's argument is a flawed syllogism.

56 In any event, the Notice of Appeal was filed 17 days after 9 March 2020. Let us accept, because the medical evidence says as much, that the would-be appellant had a post-traumatic stress disorder that prevented him working until at least 9 March 2020 (on the potential respondent's argument) and that, as the potential respondent says, on that date the communication proves he the capacity to do "work-like" things and that drafting and filing a Notice of Appeal is a "work-like" thing. All this would mean is that the clock would start to run, as a matter of fairness to the would-be appellant, on 9 March 2020. If so, why would he not have 21 days from that date to file his appeal?

57 Of course, we accept immediately that that approach is not fair to the potential respondent who is entitled to expect a would-be appellant to stick to the rules, but that is a separate matter. That sounds in the potential respondent's submissions on prejudice.

58 In terms of explaining a delay, the would-be appellant's delay until 9 March 2020 would be explained and from that point the would-be appellant took no longer than someone who had full capacity would take, that is, less than 21 days.

59 Finally, the would-be appellant tells the Hon Stephen Dawson MLC in the 9 March 2020 communication that he is unhappy about the termination of his employment and wants to take it further. I do not see how the potential respondent could be surprised in any way when this happened. They should have been expecting it.

60 We have reviewed the document that was overlooked earlier. We apologise for any inconvenience, but it makes no difference to the outcome of the application for an extension of time.