



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Aaron Gee

v

Grimmer Pty Ltd
(U2024/6876)

DEPUTY PRESIDENT DOBSON

BRISBANE, 24 JULY 2024

Unfair dismissal application filed out of time – circumstances not exceptional – application dismissed

[1] Mr Aaron Gee (**Applicant**) made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for an order granting a remedy, alleging that he had been unfairly dismissed from his employment with Grimmer Pty Ltd (**Respondent**).

[2] The information provided in the application and in the employer response form lodged by the Respondent indicates that the application may have been made out of time.

[3] Before considering the merits of the application, the Commission must be satisfied that the application was not made out of time.

When must an application for an order granting a remedy be made?

[4] Section 394(2) of the FW Act provides that such an application must be made:

- (a) within 21 days after the dismissal took effect; or
- (b) within such further period as the Commission allows.

The hearing

[5] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[6] After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing for the matter (s.399 of the FW Act).

Permission to Appear

[7] Section 596(1) of the FW Act provides that a party may be represented in a matter before the Commission by a lawyer or paid agent only with the permission of the Commission.

[8] The Respondent sought leave to be represented before the Commission by a lawyer and the Applicant objected on the basis that he felt it would be unfair. I shall not traverse the submissions made in any great detail, but I was satisfied that granting leave would enable the matter to be dealt with more efficiently taking into account the complexity of the matter, noting that the legal representative had a duty first to the tribunal (which included assisting the Applicant where appropriate to do so) and that the assistance of legal representation would assist the Commission to deal with the matter more efficiently.

[9] Accordingly, at the hearing on 24 July 2024, the Applicant was self-represented, and the Respondent was represented by Ms Madeleine Stone of Counsel, instructed by Ms Farah Motley of Prosper Law.

Witnesses

[10] The Applicant did not file a witness statement, however, gave evidence on his own behalf during the Hearing and the following witness also gave evidence on his behalf:

- Ms Alanna Horgan – Partner to the Applicant

[11] The Respondent did not file any witness statements.

Submissions

[12] The Applicant filed submissions in the Commission on 11 July 2024. The Respondent filed submissions in the Commission on 15 July 2024.

When did the dismissal take effect?

[13] It is not in dispute, and I so find, that the dismissal took effect on 14 May 2024.

When was the application made?

[14] It is not in dispute, and I so find, that the application was made on 14 June 2024.

Was the Application made within 21 days after the dismissal took effect?

[15] As the Full Bench has stated in relation to a general protections application but equally applicable here, “[t]he 21 day period prescribed... does not include the day on which the dismissal took effect.”¹

¹ *Singh v Trimatic Management Services Pty Ltd* [2020] FWCFB 553, [10]. See also *Acts Interpretation Act 1901* (Cth) s 36(1) as in force on 25 June 2009; *Fair Work Act 2009* (Cth) s 40A.

[16] As I found above, the dismissal took effect on 14 May 2024. The final day of the 21 day period was therefore 7 June 2024 and ended at midnight on that day. As I found above, the application was made on 14 June 2024. The application was made 7 days late.

[17] The application having not been made within 21 days of the date on which the dismissal took effect, I need to consider whether it was made within such further period as the Commission allows.

Was the application made within such further period as the Commission allows?

[18] Under section 394(3) of the FW Act, the Commission may allow a further period for an unfair dismissal application to be made if the Commission is satisfied that there are exceptional circumstances, taking into account:

- (a) the reason for the delay; and
- (b) whether the Applicant first became aware of the dismissal after it had taken effect; and
- (c) any action taken by the Applicant 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 Applicant and other persons in a similar position.

[19] Each of the above matters must be considered in assessing whether there are exceptional circumstances.²

[20] I set out my consideration of each matter below.

Reason for the delay

[21] For the application to have been made within 21 days after the dismissal took effect, it needed to have been made by midnight on 7 July 2024. The delay is the period commencing immediately after that time until 14 July 2024, although circumstances arising prior to that delay may be relevant to the reason for the delay.³

[22] The reason for the delay is not in itself required to be an exceptional circumstance. It is one of the factors that must be weighed in assessing whether, overall, there are exceptional circumstances.⁴

² *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFB 901, [39].

³ *Shaw v Australia and New Zealand Banking Group Ltd* [2015] FWCFB 287, [12] (Watson VP and Smith DP).

⁴ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFB 901, [39].

[23] An applicant does not need to provide a reason for the entire period of the delay. Depending on all the circumstances, an extension of time may be granted where the applicant has not provided any reason for any part of the delay.⁵

Submissions and evidence

[24] The Applicant submitted that the delay was for the following reasons:

- (a) The Applicant was not aware of the requirement to file within 21 days. He said that he became aware following a discussion between his partner Ms Horgan and a friend with whom she had a discussion that there was a time limit to the filing of such applications.
- (b) The Applicant also submitted that he had not taken any steps to pursue an application or to find out the requirements to do so, because he was crippled by the shock of his termination, which he submitted that he believed was unfair.
- (c) The Applicant saw his doctor on 23 May 2024 for a referral to obtain support pursuant to a mental health care plan. The doctor's referral notes that the Applicant complained of severe depression but does not make note of any restriction on the Applicant's capacity.
- (d) The Applicant raised a number of serious issues that occurred to his partner in February of this year (2024). There was no evidence before the Commission that this specifically contributed to the delay in filing the application. I also note that whilst this was a very serious and distressing issue for his partner and also in turn for the Applicant, they occurred some three months before the dismissal, and they were not accompanied by any supporting medical evidence demonstrating any impact on the Applicant's capacity to bring this application.

[25] Further, the Applicant gave evidence that as soon as he was aware of the requirement to file the application, he prepared it that evening and filed it the following day. This action was at odds with the Applicant's evidence at hearing that he was crippled or incapacitated from taking any action to file the present application.

[26] In relation to the reason for the delay, the Respondent submitted that there was no medical evidence to support the Applicant's inability or incapacity to lodge an application for unfair dismissal remedy.

Findings

[27] Having regard to the above, I find that the reasons for the delay were that the Applicant was unaware of the time frame in which he was required to file his application. Further he was very distressed by the dismissal and was not in a good state of mind to take any action. There is no medical evidence however to support the contention that the Applicant was unfit or had any reduced capacity to file an application in time and on the Applicant's own evidence, as

⁵ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFB 901, [40].

soon as he was aware of the timeframe, he had no difficulties filing the application within 24 hours of discovering this requirement.

What action was taken by the Applicant to dispute the dismissal?

[28] The Applicant stated that he didn't take any action to dispute the dismissal before he lodged the application with the Commission. He was of the view that his former employer, would not listen to anything he had to say anyway as was the Applicant's experience when he responded to the show cause action.

[29] In all the circumstances, I do not find that the Applicant took any action to dispute the dismissal. I consider this to be a neutral consideration.

What is the prejudice to the employer (including prejudice caused by the delay)?

[30] It is not in dispute, and I so find that, in the circumstances, there would be no prejudice to the Respondent if an extension of time were to be granted. I consider this to be a neutral consideration.

What are the merits of the application?

[31] The competing contentions of the parties in relation to the merits of the application are set out in the filed materials.

[32] Having examined these materials, it is evident to me that the merits of the application turn on contested points of fact. It is well established that "it will not be appropriate for the Tribunal to resolve contested issues of fact going to the ultimate merits for the purposes of taking account of the matter in s.366(2)(d)".⁶

[33] It is not possible to make any firm or detailed assessment of the merits. The Applicant has an apparent case, to which the Respondent has an apparent defence.

[34] In the circumstances, I find that it is not possible to make an assessment of the merits of the application. I consider this to be a neutral consideration.

Fairness as between the Applicant and other persons in a similar position

[35] Neither party brought to my attention any relevant matter concerning this consideration and I am unaware of any relevant matter. In relation to this factor, I therefore find that there is nothing for me to weigh in my assessment of whether there are exceptional circumstances and I therefore consider this to be a neutral consideration.

Is the Commission satisfied that there are exceptional circumstances, taking into account the matters above?

⁶ *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [36].

[36] I must now consider whether I am satisfied that there are exceptional circumstances, taking into account my findings regarding each of the matters referred to above.

[37] Briefly, exceptional circumstances are circumstances that are out of the ordinary course, unusual, special or uncommon but the circumstances themselves do not need to be unique nor unprecedented, nor even very rare.⁷ Exceptional circumstances may 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 can be considered exceptional.⁸

[38] Mere ignorance of the statutory time limit is not an exceptional circumstance.⁹

[39] The stress that accompanies a dismissal will not, without more, favour a finding of exceptional circumstances. Where there is medical evidence that stress or some other condition affected an applicant in such a way as to cause, contribute or explain the delay, such evidence may, depending on all the circumstances, weigh in favour of the Commission being satisfied that exceptional circumstances exist.¹⁰

[40] Each case turns on its own facts. There are no categories of illness or disability that will automatically result in the Commission being satisfied that exceptional circumstances exist.¹¹

[41] Evidence of hardship and misfortune will not, in and of itself, necessarily weigh in favour of a finding of exceptional circumstances. Of significance is evidence that establishes that, as a result of such hardship and misfortune, the Applicant was prevented from or seriously impeded in lodging their application.¹²

[42] I am not satisfied that the reasons for delay, weigh in favour of a finding of exceptional circumstances.

[43] I note that the remainder of the factors I must assess have all been determined as neutral considerations.

[44] Having regard to all of the matters listed at s.366(2) of the FW Act, I am not satisfied that there are exceptional circumstances.

Conclusion

⁷ *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [13].

⁸ *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [13].

⁹ *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [14]; *Miller v Allianz Insurance Australia Ltd* [2016] FWCFB 5472, [23].

¹⁰ *Becke v Edenvale Manor Aged Care* [2014] FWCFB 6809, [9].

¹¹ *Ellikuttige v Moonee Valley Racing Club Inc* [2018] FWCFB 4988, [31]; *Weir v Hydro-Chem Pty Ltd* [2017] FWCFB 758, [37].

¹² *Ellikuttige v Moonee Valley Racing Club Inc* [2018] FWCFB 4988, [31]; *Miller v Allianz Insurance Australia Ltd* [2016] FWCFB 5472, [22].

[45] Not being satisfied that there are exceptional circumstances, there is no basis to allow an of time. The Applicant's application for the Commission to deal with a claim for unfair dismissal is therefore dismissed.



DEPUTY PRESIDENT

Appearances:

Mr Gee appeared for himself.
Ms M Stone of Counsel appeared for the Respondent.

Hearing in Brisbane 24 July 2024

Printed by authority of the Commonwealth Government Printer

<PR777479>