DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mr Robert Hay

v

Renesola Australia Pty Ltd
(U2016/7890)

COMMISSIONER HUNT BRISBANE, 7 SEPTEMBER 2016

Application for relief from unfair dismissal – extension of time – applicant sought advice on making application – applicant misconceived the last date for filing application – applicant waiting for final pay – no exceptional circumstances – application dismissed.

[1] On 23 June 2016, Mr Robert Hay filed an application pursuant to s.394 of the *Fair Work Act 2009* (the Act) claiming he was unfairly dismissed by Renesola Australia Pty Ltd (Renesola Australia).

[2] Renesola Australia objected to the Fair Work Commission (the Commission) exercising its jurisdiction to deal with the application because it was lodged more than 21 days after the dismissal took effect.

[3] The matter was initially allocated to Drake SDP and her Honour wrote to Mr Hay requesting he provide an explanation for the delay in lodging his application. Mr Hay and Renesola Australia provided written material to the Commission.

[4] The jurisdictional objection was then allocated to me for hearing and determination.

Relevant Statutory Provisions

[5] Section 394 states:

> "**394 Application for unfair dismissal remedy**
>
> (1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.
>
> (2) The application must be made:
>
> (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."

[6] The meaning of "exceptional circumstances" was considered in *Nulty v Blue Star Group Pty Ltd*[1] where the Full Bench said:

'[10] It is convenient to deal first with the meaning of the expression "exceptional circumstances" in s.366(2). In *Cheval Properties Pty Ltd v Smithers* a Full Bench of FWA considered the meaning of the expression "exceptional circumstances" in s.394(3) and held:

"[5] The word "exceptional" is relevantly defined in The Macquarie Dictionary as "forming an exception or unusual instance; unusual; extraordinary." We can apprehend no reason for giving the word a meaning other than its ordinary meaning for the purposes of s.394(3) of the FW Act."

[11] Given that s.366(2) is in relevantly identical terms to s.394(3), this statement of principle is equally applicable to s.366(2).

[12] The ordinary meaning of the expression "exceptional circumstances" was considered by Rares J in *Ho v Professional Services Review Committee No 295* a case involving in s.106KA of the *Health Insurance Act 1973 (Cth)*. His Honour observed:

"23. I am of opinion that the expression 'exceptional circumstances' requires consideration of all the circumstances. In *Griffiths v The Queen* (1989) 167 CLR 372 at 379 Brennan and Dawson JJ considered a statutory provision which entitled either a parole board or a court to specify a shorter non-parole period than that required under another section only if it determined that the circumstances justified that course. They said of the appellant's circumstances:

'Although no one of these factors was exceptional, in combination they may reasonably be regarded as amounting to exceptional circumstances.'

24. Brennan and Dawson JJ held that the failure in that case to evaluate the relevant circumstances in combination was a failure to consider matters which were relevant to the exercise of the discretion under the section (167 CLR at 379). Deane J, (with whom Gaudron and McHugh JJ expressed their concurrence on this point, albeit that they were dissenting) explained that the power under consideration allowed departure from the norm only in the exceptional or special case where the circumstances justified it (167 CLR at 383, 397).

25. And, in *Baker v The Queen* (2004) 223 CLR 513 at 573 [173] Callinan J referred with approval to what Lord Bingham of Cornhill CJ had said in *R v Kelly (Edward)* [2000] QB 198 at 208, namely:

> 'We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.'

26. Exceptional circumstances within the meaning of s 106KA(2) 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. Thus, the sun and moon appear in the sky everyday and there is nothing exceptional about seeing them both simultaneously during day time. But an eclipse, whether lunar or solar, is exceptional, even though it can be predicted, because it is outside the usual course of events.

27. 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' in s 106KA(2) 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. And, the section is directed to the circumstances of the actual practitioner, not a hypothetical being, when he or she initiates or renders the services."

[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.' [Endnotes not reproduced]

[7] For exceptional circumstances to arise as contemplated by s.394 of the Act, it is not necessary that the applicant for that extension of time be overtaken by a catastrophic event. Reasons for delay in the category of extreme events are not necessary to meet the test. All of the factors outlined in s.394(3) of the Act must be considered and weighed when deciding whether or not exceptional circumstances, circumstances sufficient to support an exception, exist.

The Jurisdictional Hearing

[8] The matter was listed for jurisdictional hearing on 26 August 2016. At the hearing Mr Hay represented himself. Renesola Australia was granted leave pursuant to s.596 of the Act to be represented by Mr Andrew Denton of counsel.

[9] Mr Hay gave evidence on his own behalf. Renesola Australia did not call any witnesses for the purpose of the jurisdictional hearing.

Agreed Facts

[10] The following facts were agreed and not contested:

(a) Mr Hay commenced employment with Renesola Australia on 1 September 2015;

(b) Mr Hay was issued with a termination letter on 1 June 2016 due to alleged unsatisfactory performance. The termination letter states Mr Hay *'will be terminated'*, that '*HQ would like to terminate your employment with immediate effect'* and that '*this notice takes effect immediately'*;

(c) On 17 June 2016, Renesola Australia's HR Manager notified Mr Hay that his final pay had been processed and would be cleared in his bank by 21 June 2016. Mr Hay responded to this email on 18 June 2016 with the words *'thank you'* and raised issues of access to the payroll system. Further communications were exchanged on 20 June 2016; and

(d) Mr Hay filed his application for unfair dismissal on 23 June 2016.

[11] It is not disputed, and I accept that Mr Hay's dismissal took effect on 1 June 2016.

[12] It is also not disputed that Mr Hay filed his application on 23 June 2016. The application needed to have been filed by 22 June 2016. I find that Mr Hay filed his application 1 day outside of the statutory timeframe provided in s.394(2) of the Act.

[13] As I have determined that the application was filed out of time, it is necessary for me to determine if there are exceptional circumstances that would warrant allowing a further period for filing the application, pursuant to the criteria set out in s.394(3) of the Act.

s.394(3)(a) - The reason for the delay

[14] The reason given by Mr Hay for the delay in filing his application is twofold. In correspondence sent by Mr Hay on 4 August 2016 to Drake SDP, Mr Hay stated:

> 'To: The Hon. Lea Drake
>
> I received advice from the Fair work solicitor that the 21 days to lodge an application starts from when you have finish work for the company. I was paid up to the 1st June 2016, therefore I was not working for Renesola on the 2nd June 2016. So the 2nd June + 21 equalled 23rd June 2016, which was the dated I had applied on.

> As I was taking this action and not to jeopardise may[sic] final payment from the company which they originally had advised that I had to wait for the pay cycle in July 2016, 5 weeks after leaving the company. I received this money actually on the 21st June 2016 and then proceeded to lodge the application.
>
> If I have not complied with the 21 days, I apologise as I was working on the advice of a Government appointed Fair work solicitor and hope you can consider my application.'

First reason for the delay

[15] Mr Hay's first contention appears to be that he relies on the fact that he misconceived the date his dismissal took effect due to representative error. Mr Hay stated that he received advice from a 'Fair work solicitor' who purportedly gave advice to him that led him to believe that his last day for filing the application within time was 23 June 2016.

[16] In cross-examination, Mr Hay explained that he contacted a service by telephone and was provided with a referral to another service located in Woodridge. Mr Hay was not able to identify whether the number he had called was that of the Fair Work Commission, the Fair Work Ombudsman, or another service. Mr Hay stated that he visited the service in Woodridge for advice, but was unable to provide particulars on the service he had visited, other than he spoke with a woman named Helen.

[17] It is asserted by Mr Hay that Helen from the Woodridge service provided him with advice that *'the 21 days to lodge an application starts from when you have finish[ed] work for the company'*. It is not clear whether Mr Hay received advice from the Woodridge service that his application should be filed by 23 June 2016, or whether he had misconstrued the advice he had received regarding the 21 day time limit, and determined (incorrectly) that he had until 23 June 2016 to file his application.

[18] Renesola Australia submitted that Mr Hay was clearly informed that his dismissal took effect on 1 June 2016 by way of the termination letter provided to him on that date. The Respondent further submitted that it is disingenuous to assert that Mr Hay's dismissal did not take effect until 2 June 2016. It was submitted that it is an established principle that ignorance of the legislation is not considered an exceptional circumstance. [2]

[19] Renesola Australia submitted that Mr Hay's claim of representative error should not be accepted by the Commission because Mr Hay did not engage a representative. It was further submitted that Mr Hay failed to provide critical information on the issues of:

(a) Who this solicitor is;
(b) When contact was made with this solicitor;
(c) What questions were asked; and
(d) What instructions were provided.

[20] Renesola Australia contended that in any event, the conduct of Mr Hay himself is at all times the central consideration in cases of alleged representative error[3] and in the present case, there has been no acceptable explanation as to Mr Hay's conduct that resulted in the late lodgement.

Second reason for the delay

[21] Mr Hay's second contention is that he was waiting for his final pay to be made to him before making his application. Mr Hay's evidence is that he did not want to jeopardise this payment by lodging the application.

[22] Mr Hay received his final pay on 21 June 2016. It was put to Mr Hay in cross-examination that, because he had received his final pay on 21 June 2016, this would not have prevented him from making his application within time. When questioned as to why he had not made his application on either 21 or 22 June 2016, Mr Hay stated that he had been unable to make the application as he was actively seeking employment.

s.394(3)(b) - Whether the person first became aware of the dismissal after it had taken effect

[23] It is not disputed that Mr Hay was issued with a letter of termination on 1 June 2016. The termination letter states that Mr Hay's employment was terminated with immediate effect.

[24] I am satisfied that Mr Hay first became aware of the dismissal on 1 June 2016, which is the time it took effect.

s.394(3)(c) - Any action taken by the person to dispute the dismissal

[25] Mr Hay submitted that he contacted an information service by telephone to receive advice about his dismissal. Mr Hay also submitted that he had been referred to a service in Woodridge and that he went to that service to receive advice.

[26] Renesola Australia submitted that Mr Hay had a clear opportunity and capacity to dispute his dismissal at any time prior to lodging the application and he did not.

s.394(3)(d) - Prejudice to the employer (including prejudice caused by the delay)

[27] Renesola Australia does not contend that there is prejudice to the employer.

s.394(3)(e) - The merits of the application

[28] Renesola Australia submitted that Mr Hay was dismissed for performance reasons.

[29] Renesola Australia submitted that Mr Hay had been issued with a formal warning and then a final warning with an extension to satisfactorily meet his targets.

[30] Mr Hay did not make extensive submissions on the merits of his application but I have taken into consideration the material contained in his application.

[31] In the matter of *Kornicki v Telstra-Network Technology Group*[4] the Commission considered the principles applicable to the extension of time discretion under subsection 170CE(8) of the *Workplace Relations Act 1996 (Cth)*. In that case the Full Bench said:

> 'If the application has no merit then it would not be unfair to refuse to extend the time period for lodgement. However we wish to emphasise that a consideration of the merits of the substantive application for relief in the context of an extension of time application does not require a detailed analysis of the substantive merits. It would be sufficient for the applicant to establish that the substantive application was not without merit.'

[32] To require an applicant to establish more than that the substantive application was not without merit would, as noted by the Full Bench in *Kyvelos v Champion Socks Pty Ltd*[5]:

> '… serve as an encouragement to other applicants for late acceptance pursuant to subsection 170CE(8) to put the whole of their evidentiary case and seek to cross examine the respondent's witnesses to reduce the possibility of an adverse finding on the merits. This would lead to unjustifiable delay and expense.'

[33] I have considered the material filed in relation to the merits of the application and I am of the view that Mr Hay's application is not completely without merit.

s.394(3)(f) - Fairness as between the person and other persons in a similar position

[34] Mr Hay did not make submissions on this criterion. There is no evidence before the Commission that there were other persons in a similar position to that of Mr Hay. This factor is a neutral consideration in this case.

Consideration

[35] The Full Bench decision in *M N Robinson v Interstate Transport Pty Ltd*[6] considered representative error in terms of an extension of time for an application filed pursuant to s.365 of the Act. While that decision relates to s.366 of the Act (that being a general protections claim) it is relevant to a consideration pursuant to s.394(3) of the Act.

[36] In that decision the Full Bench stated:

> "[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[7] 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 Davidsons's Case[8] in relation to s.170CFA(8) of the WR Act. More recently, a majority of the Full Bench in McConnell's Case[9] found that the approach remained apposite to the exercise of the discretion in s.366(2) of the Act.[10] 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 application 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.
>
> [25] The approach in Clark's Case was summarised in Davidson's Case as follows:
>
> "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.""

[37] I accept that Mr Hay visited a service in Woodridge to obtain advice in relation to lodging an unfair dismissal application.

[38] I also accept Mr Hay's evidence that the service in Woodridge advised him that, *'the 21 days to lodge an application starts from when you have finish[ed] work for the company'.*

[39] Mr Hay did not contend that the service in Woodridge specifically told him that his last day to file his application was 23 June 2016. I find that on the balance on probabilities, Mr Hay was solely responsible for the error in his interpretation of the advice he received from the service in Woodridge and his error in calculating the final date for filing his application. The advice he received from the service appears to me to be factually correct.

[40] I find that the error made by Mr Hay, or ignorance of the proper application of the law, does not constitute an exceptional circumstance.

[41] Even if the advice Mr Hay had received was erroneous or misleading, this alone would not constitute an exceptional circumstance. Mr Hay did not engage or instruct the service in Woodridge to file an application on his behalf and it was incumbent on Mr Hay alone to ensure that his application was filed within the required time.

[42] Mr Hay's second contention is that he had not filed his application earlier because he did not want to jeopardise his final pay.

[43] In *Bendetto v Carbridge WA*[11], the Full Bench upheld a decision of Gooley DP in which the Deputy President considered whether awaiting final pay would contribute to exceptional circumstances as follows: [12]

> 'Mr Bendetto's claim for unfair dismissal was independent of any dispute over his LSL. In any event he was aware that he was not being paid his long service leave when he received his pay which was before the 11 November 2014. He still did not act promptly and waited anther nine days before lodging his claim. This is not a case where the strength of Mr Bendetto's claim outweighs the lack of reasonable explanation for the delay in lodging the application. I am therefore unable to find that there are exceptional circumstances which warrant the

> granting of an extension of time and therefore Mr Bendetto's application for unfair dismissal remedy is dismissed.'

[44] While I empathise with Mr Hay wanting to ensure he received payment in circumstances where he had been dismissed, I do not find this equates to reasonable explanation for the delay in lodging his application.

[45] There was no evidence before the Commission to suggest that Renesola Australia intended to or had threatened to withhold Mr Hay's final payment in the event he lodged an unfair dismissal claim.

[46] Even if Mr Hay's argument with regards to awaiting his final pay before filing the application was accepted (it is not), Mr Hay received his final payment on 21 June 2016. On his own evidence, the reason Mr Hay did not file the application on that date, or on 22 June 2016, within the time limit, was that he was searching for work.

[47] I find nothing exceptional about an employee who has been dismissed awaiting their final pay or searching for new employment.

[48] I find that the reasons for the delay provided by Mr Hay on their own, or taken together as a combined series of events do not constitute exceptional circumstances.

[49] Having considered all of the matters to which my attention is directed by the Act, I am not satisfied there are exceptional circumstances which would warrant granting an exception to the statutory time limit.

[50] In reaching my conclusion, I have taken into consideration the reasons and evidence provided by Mr Hay, the fact that the application was only made one day outside of the statutory timeframe and the criteria in s.394(3) of the Act.

[51] Mr Hay's circumstances are not out of the ordinary course, unusual, special or uncommon.

[52] As Mr Hay has not demonstrated that there are exceptional circumstances sufficient for me to exercise my discretion to extend time, I refuse the application for an extension of time. The application has been filed outside of the time required by s.394(2)(a) of the Act. The application must be dismissed.

[53] I order that the Application be dismissed.

COMMISSIONER

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<Price code C, PR584815>

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[1] [2011] FWAFB 975.

[2] Ibid at [14].

[3] Alan Chalmers v Deakin University [1998] FCA 1187 at [44].

[4] *Kornicki v Telstra Network Technology Group* [Print 3168, 22 July 1997] at page 8.

[5] *Kyvelos v Champion Socks Pty Ltd* [Print T2421, 10 November 2000] at [15].

[6] [2011] FWAFB 2728.

[7] (1997) 74 IR 413.

[8] Print Q0784.

[9] [2011] FWAFB 466.

[10] Ibid at [35].

[11] [2015] FWCFB 1263.

[12] [2015] FWC 198.