DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Simon Rogers
v
Qantas Ground Services Pty Ltd T/A QGS
(U2018/10673)

COMMISSIONER SIMPSON BRISBANE, 21 FEBRUARY 2019

Application for an unfair dismissal remedy – applicant lodged 52 days out of time – Representative error - Exceptional circumstances – Extension of time granted

[1] This matter concerned an application made in accordance with section 394 of the *Fair Work Act 2009* (the Act) by Mr Simon Rogers who alleges his employment with Qantas Ground Services Pty Ltd (Qantas) was terminated unfairly.

[2] Mr Rogers stated in his application that he commenced employment with Qantas on 25 July 2016 and was dismissed on 3 August 2018. The 21st day after his dismissal was 24 August 2018. Mr Rogers' unfair dismissal application was lodged on 15 October 2018, and was therefore made 52 days outside the period prescribed by the Act. The application cannot proceed unless an extension of time is granted by the Fair Work Commission (the Commission).

[3] The Act provides that a person who has been dismissed and applies to the Commission for it to deal with an unfair dismissal application pursuant to s.394 of the Act, must make the application within 21 days after the dismissal took effect. However, the Commission may allow a further period for the application to be made if the delay in lodgement was due to exceptional circumstances.

[4] Section 394 of the Act provides:

> **"Section 394 Application for unfair dismissal 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."

Background

[5] On 15 October 2018 the Commission received a "Form F2 – Unfair Dismissal Application" from Mr Rogers. Part 1.4 of the Application contains a question, "*Are you making this application within 21 calendar days of your dismissal taking effect?"* Mr Rogers' response indicated that when advised of his dismissal on 3 August 2018 by Qantas, he was advised he could appeal the decision in accordance with the *Qantas Group Standards of Conduct Policy* and the grounds of appeal must be sent within 7 days of the dismissal. He said he submitted the appeal on 9 August 2018, and a response was not received until 27 August 2018 and his solicitor who was familiar with the whole circumstances of the issue was on leave, and upon his return "we immediately proceed to assemble this appeal as expeditiously as was possible".

[6] In its Form F3 response Qantas referred to the Full Bench decision in *Qantas Airways Limited v Mr Jarrod McRae*[1] and correctly submitted that the decision is authority for the proposition that an internal appeal process does not extend the 21 day time limit for filing an unfair dismissal application.

[7] The matter was listed for directions on 13 December 2018. Mr Rogers was represented by Mr Greg Casey a law clerk engaged by Paul Pattison Solicitor and Qantas was represented by Mr Mark Stokes, Industrial Relations Manager. Directions were issued for the filing of material by the parties. Following non-compliance by Mr Casey, the directions were amended. Ultimately two witness statements were filed for Mr Rogers, one from himself and one from his solicitor Mr Paul Pattison. Qantas filed a written submission. A written submission was filed on behalf of Mr Rogers the day before a hearing which was conducted on 14 February 2019. Qantas did not require either of the witnesses for cross examination and both statements were admitted into evidence. Both parties made brief oral submissions at the hearing.

Section 394(3)(a) – reason for the delay

[8] In his statement at paragraph 3 Mr Rogers said the following:

"When I received the Notice of Termination if my employment from the Respondent on 3 August 2018 I decided at the recommendation of my father, to engage the

services of Paul Pattison Solicitor in Kallangur to pursue whatever rights I might have to challenge that termination of my employment."

[9] At paragraph 6 and 7 Mr Rogers said as follows:

"6. The decision by Qantas to terminate my employment effective immediately was made on 3rd August 2018 – a Friday – and contact was made with Mr Pattison's office on that day and I secured the first available appointment with him on the following Monday 6th August 2018.

7. Mr Pattison was departing for biennial leave on the 20th August 2018 but it was expected by then that the submission of my internal appeal to Qantas could have been prepared, submitted and reacted to so that if it was necessary any subsequent appeal to the Fair Work Commission could be prepared and submitted without (sic) the 21 day period."

[10] Mr Rogers sets out in his statement that his appeal (to Qantas) was submitted by email and letter on 9th August 2018 inside the Qantas 7 day period for lodging an internal appeal. He goes on to include at paragraph 9 of his statement:

"9. ….It was important that a response could be received to the appeal:

(a)…….

(b) Otherwise as a means of securing the reaction of Qantas to grounds (3) and (4) to my appeal to which it would, I am informed by my solicitor and verily believe, become significant if any subsequent appeal to the Fair Work Commission was necessary as transpired in this case."

[11] Mr Rogers said in paragraph 10 that despite the tight time frame imposed by Qantas there was no acknowledgement by Qantas of responding to the appeal within a comparable period, and he instructed his solicitor to pursue an outcome. Mr Rogers provided the Commission a copy of an email dated 16 August 2018 from his solicitor Mr Pattison seeking a response from Qantas to the internal appeal lodged on 9 August 2018. Mr Rogers said that he was informed that a further telephone call was made by the office of Mr Pattison to Qantas on 23 August 2018 to seek some response to the appeal.

[12] Mr Rogers said that it was not until 27 August 2018, 21 days after the lodgement of his appeal and 4 days outside the time limit for lodgement of an application with the Commission that a response was received from Qantas rejecting his appeal. Mr Rogers said his solicitor departed on leave on 20 August 2018 and did not return until 4 September 2018. Mr Rogers said the following at paragraph 13.

"13. Upon his return I instructed him to proceed with pursuit of my application to Fair Work Commission."

[13] Mr Rogers went on to say at paragraph 16 as follows:

"Any delay appears to have stemmed from the action of the representatives of the parties involved and therefore beyond my control and is certainly not of my making as

I have I down (sic) all that I could do personally to diligently and most promptly pursue my claim."

[14] Finally at paragraph 18 Mr Rogers said as follows:

- I presented detailed responses to each letter from Qantas threatening my dismissal and
- attended and engaged in interviews with them to emphasize my opposition to that course of action
- immediately after receipt of advice of the dismissal arranged for my legal representative to pursue a challenge to my dismissal in exercise of the right provided by my employer for an internal appeal to it and
- urged my legal representative to enquire as to the progress of that internal appeal and
- telephoned my legal representative regularly as to the progress in the matter and
- thereafter presented the subject application to the Fair Work Commission.

[15] Mr Pattison said in his statement that he has been a solicitor of the Supreme Court of Queensland since 1980. He said the following at paragraph 2 of his statement:

"2. I received instruction from the abovenamed Simon Rogers at 4.30pm on Monday 6th August 2018 to explore and pursue for him whatever rights he may have had to rectify and or remedy his position as a consequence of the termination of his employment with the Respondent which occurred on the preceding third day of August 2018."

[16] Paragraph 4 and 5 of Mr Pattison's statement included the following:

"4…….I formed the view in my professional opinion that the termination effected by the Respondent could not be sustained on the bases advanced by the Respondent or indeed at all.

5. I therefore recommended to the Applicant that he take up the invitation presented by the Respondent to present to it an appeal on his behalf against its decision to terminate the employment of my client."

[17] Mr Pattison went on say that the appeal was lodged with Qantas. He then went on to state at paragraphs 7 to 10:

"7. I had at that time arranged a long biennial vacation with my wife to commence on 20th August 2018 and from which I was due to return on 3rd September 2018.

8. Even after such a short period away from my practice and immense number of issues can accumulate upon my return which by their nature require my personal attention and so it was when I came back to my practice on 4th September 2018 when I found myself confounded by a series of queries by my staff requiring my urgent attention.

9. My difficulties in that regard were compounded by the advent of the Queen's Birthday public holiday celebrated on 1st October in 2018 as any such public holiday necessarily creating a four day working week always exacerbates timing difficulties in a legal practice as with any business involving interaction with other practices as an integral part of operation of a practice.

> 10. The Applicant's interests were not overlooked and as soon as it was realistically possible attention was then given to the preparation and lodgement of the current application. The application did not introduce new or different features to his position beyond those already set forth in the previous internal appeal referred to in paragraph 6 of this affidavit."

[18] Qantas made a decision not to cross examine either of the two witnesses in Mr Rogers' case and therefore what is said in the statements is uncontested. However both statements lack precision in terms of the nature of advice given by Mr Pattison, and instructions given by Mr Rogers in relation to his dismissal.

[19] Qantas said in its submissions that Mr Rogers appears to attribute the reason for the delay in filing his unfair dismissal application to the time Qantas took to respond to his internal appeal, and to his solicitor being on leave. Qantas referred to the decision of Spencer C in *Tamu v Australia for UNHCR*[2] and a Fair Work Australia Full Bench decision in *Gao v Department of Human Services*[3] to submit that delay caused by waiting for the outcome of an internal appeal does not constitute a circumstance excusing delay.

[20] Qantas also submitted that Mr Rogers' solicitor being on leave was not an exceptional circumstance, as Mr Rogers knew Mr Pattison was going on leave and an unfair dismissal application could have been filed before Mr Pattison went on leave. Further it was said Mr Rogers could have sought assistance from a paralegal at the law firm.

[21] Qantas submitted that Mr Rogers' evidence does not overtly assert representative error, however it could be inferred from the evidence. It was submitted that the evidence does not identify representative error, and Mr Pattison followed instructions. The Respondent also stated that it was not until Mr Pattison returned from leave on 4 September that Mr Rogers instructed him to proceed with the application to the Fair Work Commission.

[22] Having considered the evidence in totality I disagree with the Qantas submission that this matter does not involve representative error. The uncontested evidence of both Mr Rogers and Mr Pattison appears to be that Mr Rogers' instructions to Mr Pattison were not confined, as put by Qantas, to the filing of the internal appeal. Instead the instructions appeared to have been to "….pursue whatever rights I might have to challenge that termination of my employment."[4]

[23] Mr Pattison put it this way in his evidence:

> "2. I received instruction from the abovenamed Simon Rogers at 4.30pm on Monday 6th August 2018 to explore and pursue for him whatever rights he may have had to rectify and or remedy his position as a consequence of the termination of his employment with the Respondent which occurred on the preceding third day of August 2018."

[24] On the evidence the instruction was far wider than as put by Qantas. It was Mr Pattison's evidence that he formed a view "in my professional opinion that the termination effected by the Respondent could not be sustained on the bases advanced by the Respondent or indeed at all." Having formed that view Mr Pattison went on to say that it was his recommendation to Mr Rogers that "he take up the invitation presented by the Respondent to

present to it an appeal on his behalf against its decision to terminate the employment of my client."

[25] It is clear that Mr Rogers sought legal advice at the first opportunity after his dismissal about how to contest the dismissal. The representative error in this case is the solicitor, on having been instructed to "pursue for him whatever rights he may have" recommending to Mr Rogers that he pursue the internal appeal without also advising, and taking steps to ensure that an unfair dismissal application be filed in the event of the result of the internal appeal being either unknown or unsuccessful before the expiry of the 21 day time limit to file an unfair dismissal application. Whilst the statement of Mr Pattison does not expressly address why he did not take both of these steps, as a solicitor he would have been aware, or should have been aware about the need to do so. The issue went to the heart of the instruction he was given, and the advice he should have provided to Mr Rogers.

[26] Qantas reads paragraph 7 of the statement of Mr Rogers as proof that Mr Rogers was aware of the 21 day time limit before Mr Pattison went on leave. Because of some ambiguity in the two unchallenged statements it is not entirely clear to me whether Mr Rogers was aware of the 21 day time limit before it expired, or not. Certainly on one view he could have been. If he was aware of it beforehand, perhaps he could have done more, however either way the primary fault for the delay in filing of the unfair dismissal application must sit with the solicitor and not Mr Rogers. Mr Rogers had acted as quickly as he could to seek legal advice to contest his dismissal, and by instructing his lawyer to "pursue whatever rights he may have." In the circumstances it was not unreasonable for Mr Rogers to expect that his solicitor Mr Pattison was taking the necessary steps to follow his instructions and to protect his interests.

[27] On viewing the material prepared by Mr Pattison for the purposes of the internal appeal, it is clear Mr Pattison had already familiarised himself with all of the information he would have required in order to file an unfair dismissal application at the same time or soon after lodging the internal appeal, or at the latest before he commenced his leave. Why he did not do so is not explained but given Mr Rogers' instructions to Mr Pattison, Mr Rogers should not be punished because Mr Pattison did not ensure that the step was taken either by himself or someone else in the firm before the 21 day time limit had expired.

[28] Mr Rogers gave evidence that upon Mr Pattison's return he instructed Mr Pattison to proceed with pursuit of his application to the Commission. Qantas relies on this evidence at paragraph 13 of Mr Rogers statement to submit that this was the first time Mr Pattison had received instructions to file such an application. For reasons already addressed above, I am not satisfied when viewed in totality Qantas's characterisation of what occurred is a fair representation of the evidence given the instructions Mr Rogers gave to Mr Pattison on 6 August. Even if it were to be the case that Mr Rogers did not give an explicit instruction to Mr Pattison to file an unfair dismissal application until 4 September 2018, that would it seem in all likelihood only be because Mr Pattison had failed to advise Mr Rogers of his ability to do so, and/or the need to have done so within 21 days of termination.

[29] The errors on the part of Mr Rogers' solicitor tend to support the case for granting an extension.

Section 394(3)(b) – whether the person first became aware of the dismissal after it had taken effect

[30] Mr Rogers accepted he was made aware of his dismissal on 3 August 2018. This does not tend to support the case for the granting of an extension.

Section 394(3)(c) – any action taken by the person to dispute the dismissal

[31] On the evidence already described above I am satisfied Mr Rogers took action to dispute his dismissal by seeking legal advice about how to dispute the dismissal at the earliest opportunity. This tends to support the case for the granting of an extension.

Section 394(3)(d) – prejudice to the employer

[32] Qantas did not submit that it has suffered any prejudice as a result of the delay. This is not a matter that would weigh against granting an extension.

Section 394(3)(e) – the merits of the application

[33] Qantas correctly submitted that the Commission should not embark on a detailed consideration of the substantive case and referred to the Full Bench decision in *Kyvelos v Champion Socks Pty Ltd*.[5]

[34] However Qantas asserted Mr Rogers made admissions not in dispute, and was focussed on matters that are peripheral, and a prima facie assessment points to the merits of the application not being strong. I have considered the respective material filed and I am satisfied the case will involve competing contentions that will give rise to factual disputes that I should not give detailed consideration to. I am satisfied that it is appropriate to regard the consideration under s394(3)(e) as a neutral matter.

Section 394(3)(f) – fairness as between the person and other persons in a similar position

[35] There is no suggestion that this consideration is relevant in this case and I will consider it a neutral matter.

Conclusion

[36] I have taken into account each of the elements of s.394(3) of the Act. This matter gives rise to exceptional circumstances that would warrant the granting an extension of time beyond the 21 day time limit. On that basis the application for an extension of time has been granted. The matter will be listed for further directions at 1:00pm Tuesday 26 February 2019.

COMMISSIONER

Appearances:

Mr G. Casey of Paul Pattison Solicitors for the Applicant.

Mr M. Stokes for the Respondent.

Hearing details:

2019,
Brisbane:
14 February

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[1] *Qantas Airways Limited v Mr Jarrod McRae* [2017] FWCFB 4033

[2] *Tamu v Australia for UNHCR* [2019] FWC 25

[3] *Gao v Department of Human Services* [2011] FWAFB 5605

[4] Statement of Mr Simon Rogers dated 30 January 2019 at paragraph 3

[5] *Kyvelos v Champion Socks Pty Ltd* (unreported, AIRCFB, Giudice J, Acton SDP, Gay C, 10 November 2000) Print T2421 [14].