



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Toni Perret

v

Ayers Real Estate
(U2020/6336)

DEPUTY PRESIDENT MANSINI

MELBOURNE, 5 JUNE 2020

Unfair dismissal application filed out of time –circumstances exceptional - extension of the time for filing allowed.

[1] This decision concerns an application by Ms Toni Perret (Applicant) for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009* (Cth) (Act).

[2] The Applicant’s employment as Commercial Property Manager with Ayers Real Estate (Respondent) was made redundant with effect from 1 April 2020. The unfair dismissal application was lodged on 7 May 2020.

[3] Section 394(2) of the Act states that an application for an unfair dismissal remedy must be made ‘within 21 days after the dismissal took effect’, or within such further period as the Commission allows pursuant to s 394(3). The period of 21 days ended at midnight on 22 April 2020. The application was therefore filed 15 days outside the 21 day period. The Applicant asks the Commission to grant a further period for the application to be made under s 394(3). The Respondent opposes this request.

[4] The Act allows the Commission to extend the period within which an unfair dismissal application must be made only if it is satisfied that there are ‘exceptional circumstances’. 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.¹ 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.²

[5] The requirement that there be exceptional circumstances before time can be extended under s 394(3) contrasts with the broad discretion conferred on the Commission under s 185(3) to extend the 14 day period within which an enterprise agreement must be lodged, which is exercisable simply if in all the circumstances the Commission considers that it is ‘fair’ to do so.

¹ *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [13].

² *Ibid.*

[6] Section 394(3) requires that, in considering whether to grant an extension of time, the Commission must take into account the following:

- (a) the reason for the delay;
- (b) whether the person first became aware of the dismissal after it had taken effect;
- (c) any action taken by the person to dispute the dismissal;
- (d) prejudice to the employer (including prejudice caused by the delay);
- (e) the merits of the application; and
- (f) fairness as between the person and other persons in a similar position.

[7] The requirement that these matters be taken into account means that each matter must be considered and given appropriate weight in assessing whether there are exceptional circumstances. I now consider these matters in the context of this application.

Reason for the delay

[8] The Act does not specify what reason for delay might tell in favour of granting an extension however decisions of the Commission have referred to an acceptable or reasonable explanation. The absence of any explanation for any part of the delay will usually weigh against an applicant in the assessment of whether there are exceptional circumstances, and a credible explanation for the entirety of the delay will usually weigh in the applicant's favour, however all of the circumstances must be considered.³

[9] The Applicant said that within one week of her dismissal she had considered making an unfair dismissal claim but did not do so as she had no reason to suspect that the redundancy may not be a genuine redundancy. On 5 May 2020, the Applicant found a private advertisement online (at seek.com.au) for a Commercial Property Manager with an anonymous employer for which she applied. Then, on 7 May 2020, the Applicant found an advertisement online (at indeed.com) for a Commercial Property Manager with the Respondent employer. That same day, the Applicant caused this application for unfair dismissal to be lodged.

[10] The Applicant's evidence was that, on 8 May 2020, she received a text message from a Mr Leo Rizzo of the Respondent requesting the Applicant to contact him about the "PM Position". Later on 8 May and again on 10 May 2020, Mr Rizzo sent text messages requesting the Applicant to call him. On 10 May 2020, the two spoke by telephone and Mr Rizzo informed the Applicant that the Commercial Property Manager position had changed in that the salary would be different and the role would now be managing 210 to 240 properties. The Applicant requested that Mr Rizzo send her a "proposal" of the position including properties to manage, salary and other information, which he never did.

[11] The Respondent chose not to file any materials or evidence in response. However, in submissions at the hearing before the Commission, the Respondent's primary contention was

³ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFB 901 at [39].

that the fact of the Respondent having advertised the position does not amount to exceptional circumstances for the purposes of s 394(3). It argued that an extension of the time for filing should not be allowed simply because the Applicant's case got stronger after the expiry of the time for filing.

[12] It is clear on the Applicant's evidence that she became aware that her dismissal may have been unfair on 7 May 2020, a short time after being told that her role was redundant. She then acted immediately and without delay to file this application.

[13] I accept the Applicant's explanation for the period 23 April to 7 May 2020 and consider this to be an acceptable or reasonable explanation. In the circumstances, the Applicant took the Respondent's reason for her dismissal at face value and had no reason to doubt the genuineness of the reason for her dismissal until learning of the Respondent's advertisement on 7 May 2020.⁴

[14] The finding of an acceptable explanation weighs in favour of a conclusion that there are exceptional circumstances.

Whether the person first became aware of the dismissal after it had taken effect

[15] The Applicant was notified of the dismissal on the same day that it took effect and therefore had the full period of 21 days to lodge the unfair dismissal application. This might otherwise weigh against the Applicant because she had the benefit of the whole 21 day period to lodge an application. However, given that the Applicant did not have any reason to suspect the genuineness of the reason for her dismissal or its unfairness until 7 May 2020, I consider this factor to be neutral.

Action taken to dispute the dismissal

[16] There is no evidence before the Commission that the Applicant took any action to dispute the dismissal prior to filing this application on 7 May 2020. However, that is understandable given that the Applicant did not have any reason to suspect the genuineness of the reason for her dismissal or its unfairness until 7 May 2020. I consider this factor to be neutral.

Prejudice to the employer

[17] The Respondent submitted it would be unfair to allow an extension of the time for filing. I cannot identify any particular prejudice that would accrue to the company if an extension of time were to be granted. The mere absence of prejudice is not in my view a factor that would point in favour of the grant of extension of time.

Merits of the application

[18] The Act requires me to take into account the merits of the application in considering whether to extend time. The Respondent declined to file materials and made only brief submissions at the hearing of the jurisdictional point. Accordingly, the competing contentions of the parties in relation to the merits of the application are at this preliminary stage unknown

⁴ See *Coates v Johansson Solicitors Pty Ltd* [2020] FWC 2755 at [15], per Deputy President Gostencnik.

and untested. The merits of the application would need to be tested if an extension of time were granted and the matter were to proceed. It is not possible to make any firm or detailed assessment of the merits. The Applicant has a prima facie case, to which the Respondent has foreshadowed an apparent defence. I do not consider the merits of the present case to tell for or against an extension of time. I consider the merits to be a neutral consideration.

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

[19] This consideration may relate to matters currently before the Commission or to matters previously decided by the Commission. It may also relate to the position of various employees of an employer responding to an unfair dismissal application. However, cases of this kind will generally turn on their own facts. Neither party brought to my attention any relevant matter concerning this consideration and I am unaware of any relevant matter. I therefore consider this to be a neutral consideration.

Conclusion

[20] The statutory time limitation applicable to the exercise of a person's right to make an unfair dismissal remedy application is an expression of the Parliament's intention that rights must be exercised promptly so as to bring about certainty. Time limitations seek to balance a right to bring an action, against the desirability for prompt action and certainty. This is so that proceedings involving questions about actions that have been taken will be agitated within a particular period, otherwise that right of action is lost.

[21] A person seeking relief from unfair dismissal must make an application within 21 days after the dismissal takes effect. Only in exceptional circumstances will the Commission consider allowing a further period. Weighing all of the matters set out in s 394(3), this is a case in which I am satisfied that the Applicant has established that there are exceptional circumstances warranting consideration of the exercise of my discretion to allow a further period within which the Applicant may lodge an unfair dismissal remedy application. The Applicant has established by evidence a substantial reason, which I am satisfied is an acceptable and credible reason for the delay. The merits are as yet untested and weigh neutrally. All other factors are neutral. There is no other matter which would suggest that I should not exercise my discretion in favour of the Applicant.

[22] Accordingly, I will allow a further period within which this application may be made. That further period is extended to 7 May 2020. An order will issue separate to this decision.



DEPUTY PRESIDENT

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Appearances:

C. Schumacher of Boylan Lawyers for the Applicant.

S. Farrell of SJF Work Advice Pty Ltd for the Respondent.

Hearing details:

2020

Melbourne (by telephone)

June 3.