DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Alice Olga Papp
v
DS Opco Pty Ltd (trading as Harris Scarfe) (formerly PSEA Dept. Stores Pty Ltd)
(U2020/6677)

DEPUTY PRESIDENT SAUNDERS NEWCASTLE, 10 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 Alice Papp (Applicant) for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act* 2009 (Act).

[2] The Applicant's employment with DS Opco Pty Limited (Respondent) was terminated with effect on 31 March 2020. The unfair dismissal application was lodged on 14 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 21 April 2020. The application was therefore filed 23 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,

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

[2] Ibid

which is exercisable simply if in all the circumstances the Commission considers that it is 'fair' to do so.

[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 the Application.

Reason for the delay

[8] The delay required to be considered in s 394(3)(a) is the period after the prescribed 21 day period for lodging an application. It does not include the period from the date the dismissal took effect to the end of the 21 day period.[3] However, the circumstances from the time of the dismissal must be considered when assessing whether there is an acceptable reason for the delay, or any part of the delay, beyond the 21 day period.[4]

[9] 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.[5]

[10] The Applicant contends that the delay in filing her unfair dismissal application was due to representative error on the part of her union, the Shop, Distributive and Allied Employees' Association (SDA).

[11] A number of decisions of the Commission and its predecessor have considered the principles which apply to cases concerning representative error in the context of an

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[3] *Long v Keolis Downer* [2018] FWCFB 4109 at [40]

[4] *Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank* [2015] FWCFB 287 at [12]; *Ozsoy v Monstamac Industries Pty Ltd* [2014] FWCFB 2149 at [31]; *Diotti v Lenswood Cold Stores Co-op Society t/a Lenswood Organic* [2016] FWCFB 349 at [29]-[31]

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

application for an extension of time.[6] In *Clark v Ringwood Private Hospital*,[7] a Full Bench decided that the following general propositions should be taken into account in determining whether or not representative error constitutes an acceptable explanation for delay:

- 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.

- 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.

- 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.

- 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.

[12] It is not necessary for an applicant to demonstrate that they were "blameless" for the delay in filing an unfair dismissal application beyond establishing the fact that they gave appropriate instructions to a legal practitioner or union in a timely fashion.[8] However, as the Full Bench explained in *Long v Keolis Downer,*[9] "an applicant cannot simply instruct his solicitor then sit on his hands for an extended period while the prescribed time for filing the application passes by".

[13] The relevant sequence of events leading up to and following the Applicant's dismissal was as follows. On 30 March 2020, the Applicant was at home on her rostered day off. She received a telephone call from Mr Ben Morrow, Regional Manager for Harris Scarfe, and Ms Annette Overton, Store Manager of the Harris Scarfe Ulverstone store where the Applicant worked. Mr Morrow told the Applicant that the company had decided to make her redundant as of Tuesday, 31 March 2020. This was the first time that the Applicant was told that her position was redundant. No prior consultation had taken place with the Applicant.

[14] The Applicant is, and was at all relevant times, a member of the SDA. After speaking with Mr Morrow on 30 March 2020, the Applicant immediately called her SDA representative, Mr Andrew Coyle. The Applicant told Mr Coyle that she wanted the SDA to

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[6] See, for example, *C. Davidson*, Print Q0784, 12 May 1998, (Ross VP, Watson SDP, Eames C); *Robinson v Interstate Transport Pty Ltd* [2011] FWAFB 2728; *Qantas Ground Services Pty Ltd v Rogers* [2019] FWCFB 2759; *Melios v Qantas Airways Ltd* [2019] FWC 5029; *Burgess v General and Window Cleaning Pty Ltd* [2011] FWA 2802; *Long v Keolis Downer* [2018] FWCFB 4109

[7] (1997) 74 IR 413 at 418-9

[8] *Qantas Ground Services Pty Ltd v Rogers* [2019] FWCFB 2759 at [17]; *Long v Keolis Downer* [2018] FWCFB 4109

[9] [2018] FWCFB 4109 at [60]

get her job back. The Applicant also told Mr Coyle to do everything he needed to do to get the decision to terminate her employment on the grounds of redundancy reversed and if they could not get the decision changed then to bring an unfair dismissal application on her behalf.

[15] In the period between 30 March 2020 and the filing of her unfair dismissal application on 14 May 2020, the Applicant spoke to Mr Coyle three or four times in the first 10 days and then about every three weeks to find out what was happening. Mr Coyle told the Applicant that they were going for unfair dismissal on her behalf. At no time during that period did anyone from the SDA tell the Applicant that the SDA had made a decision, or was considering making a decision, to delay the filing of the Applicant's unfair dismissal application until after the sale of Harris Scarfe's business had completed, even though that would result in the application being filed outside the 21 day time limit. The Applicant was not even aware of the existence of the 21 day time limit.

[16] On 31 March 2020, the Applicant engaged in email communications with the Respondent seeking information in relation to the reason for the redundancy of her position. She was not satisfied with the reply she received.[10]

[17] At some time after her unfair dismissal application was filed on 14 May 2020, Mr Coyle informed the Applicant that an application had been filed on her behalf, but it was not until the Applicant's discussion with Mr Paul Griffin, Branch Secretary of the Tasmanian Branch of the SDA, on 28 May 2020 that the Applicant was told that her application had been filed out of time. During that conversation, Mr Griffin told the Applicant that the anticipated sale of Harris Scarfe's business was due to occur on the last day of the 21 day period but the sale was delayed.

[18] Following the termination of the Applicant's employment, Mr Griffin spoke to the General Manager of Harris Scarfe to raise his concerns about the redundancy of the Applicant. Mr Griffin says his concerns were dismissed by the General Manager.

[19] In late March and early April 2020, representatives of the SDA, including Mr Griffin, had discussions with Mr Vaughan Strawbridge, a partner of Deloitte Financial Advisory Pty Ltd, who was one of the receivers and managers (Receivers) appointed to the Respondent on 11 December 2019. Mr Strawbridge's appointment as a Receiver followed the appointment of voluntary administrators on the same day. In their discussions with Mr Strawbridge, the SDA asked questions and raised concerns about the redundancy of the Applicant and about 43 other employees of the Respondent. Mr Gerard Dwyer, National Secretary of the SDA, participated in such discussions on 3 and 8 April 2020. Mr Strawbridge explained to the SDA, among other things, that in order to secure the sale of the Respondent as a going concern, and to preserve the employment of the majority of the Respondent's about 1,200 employees, the Receivers needed to finalise a sale on terms acceptable to the buyer urgently, and ask creditors to approve a deed of company arrangement. Completing redundancies before the second creditors' meeting was essential to securing the buyer's agreement about the sale. Mr Strawbridge also answered the questions asked of him by Mr Griffin and other SDA representatives during these discussions. At no time did Mr Griffin or anyone else from the SDA inform Mr Strawbridge that the SDA was going to file an unfair dismissal claim on behalf of the Applicant, or any other person, against the Respondent. I accept Mr Strawbridge's evidence that he understood, based on his discussions with the SDA on 8 April

[10] Ex A3 at [12] and Attachment 1

2020, that the SDA did not intend to press any claims on behalf of those members who had been made redundant; the Receivers were not on notice that the redundancies would subsequently be the subject of unfair dismissal or any other applications before the Fair Work Commission.

[20] Following the second meeting of creditors of the Respondent held on 9 April 2020, at which the terms of the deed of company arrangement relating to the Respondent and other entities were approved by creditors, the shares in the Respondent were acquired by a subsidiary of Spotlight Group Holdings Pty Ltd pursuant to a share sale agreement. As a result, ownership of the Respondent transferred to the Spotlight group of companies and the Receivers retired on 29 April 2020.

[21] Although the completion of the sale did not take place until 29 April 2020, I accept Mr Griffin's evidence that he was optimistic the sale would be completed within the 21 day period (i.e. by 21 April 2020) and, had that been the case, then the SDA would have been able to lodge the Applicant's unfair dismissal application within the 21 day period. However, on 17 April 2020, Mr Strawbridge informed the SDA that "final agreement has been difficult to lock down. We are however, hopeful this will occur next week which we are pushing hard for …" Accordingly, the SDA was on notice by 17 April 2020 that it was unlikely to be able to execute its plan to file the Applicant's unfair dismissal application after completion of the sale but within the 21 day time period.

[22] Mr Griffin and the SDA had a clear conflict of interest. On the one hand they wanted, and were obliged (insofar as it concerned their members), to act in the best interests of the remaining 1,200 employees of the Respondent by doing all they could to assist, or not risk, the completion of the sale of the business and thereby secure the ongoing employment of those workers. As Mr Griffin explained in his statutory declaration:

> "In circumstances where it was being represented to the SDA that any challenge to the decisions made on the part of the Receiver to terminate particular individuals including Ms Papp might jeopardise a sale process that would ensure continuing employment for 1,200 retail workers, the decision was made by the SDA to defer further claim on behalf of those affected employees until the sale process was completed and the employment of those retail workers was secured. This was a decision made by the National Executive of the SDA; it was not a decision in relation to which Ms Papp was consulted or acceded to by Ms Papp."

[23] On the other hand Mr Griffin and the SDA had a duty to act in the best interests of the Applicant, including by lodging her unfair dismissal application within 21 days of her dismissal. The obvious conflict of interest could have been managed in a number of ways. For example, when it was becoming apparent towards the end of the 21 day period that completion of the sale would not, or was unlikely to, take place prior to the end of the 21 day time limit, the SDA could have arranged for the Applicant to be given independent advice and representation in relation to her unfair dismissal claim. No doubt any such independent advisor would have recommended that the Applicant lodge her claim within the 21 day period. Alternatively, at the very least, the SDA could have explained all the circumstances to the Applicant and allowed her to make an informed decision as to whether to lodge her application within the 21 day period. Rather than take any step to deal with the obvious conflict of interest, Mr Griffin did nothing, and worse still, did not inform the Applicant that

the SDA had made a deliberate decision, contrary to her interests, not to lodge the application within the 21 day period. This was a clear representative error.

[24] The sale completed on 29 April 2020, but it still took the SDA a further two weeks to lodge the application on 14 May 2020. Mr Griffin gave the following explanation for this delay in his statutory declaration:

> "There was additional delay in the SDA filing Ms Papp's application after the sale had been completed because of COVID19 isolation protocols affecting the staffing of the SDA Tasmanian Branch's office which impacted upon the capacity of the SDA office to prepare and finalise the relevant application for filing. The COVID19 isolation directives have impacted at both National Office (based in Victoria) and State Branch levels to cause delays in processing claims and applications which would not ordinarily have occurred."

[25] I do not accept this to be a reasonable excuse by the SDA for the further delay in filing the application after 29 April 2020. The SDA should have had the application ready to lodge in the Commission within the 21 day period following the dismissal on 31 March 2020. It is not a difficult or overly time consuming application to prepare. Lodging the application itself is as simple as sending an email or making a telephone call. The delay from 29 April 2020 until 14 May 2020 is a further representative error by the SDA.

[26] The Respondent contends that this is not a case of representative error. Instead, the Respondent submits that the SDA made a deliberate decision not to file the application within the 21 day time period. The Respondent also contends that there has been no acceptable explanation given for the further delay from 29 April 2020 until 14 May 2020.

[27] I do not accept either of these contentions made by the Respondent. I accept that the usual case of representative error arises where a lawyer or union forgets to file an application in time or makes a mistake in calculating the 21 day period. However, they are not the only circumstances in which a representative may make an error. As I have sought to explain above, a representative who fails to address a clear conflict of interest and thereby fails their duty to act in the best interests of their client or member acts in error. More importantly, however, the focus under s 394(3) is on the conduct of the Applicant. In the present case, the Applicant acted immediately on being informed of her redundancy. She spoke to Mr Coyle on 30 March 2020 and gave him clear instructions to do everything he needed to do to get the decision to terminate her employment on the grounds of redundancy reversed and if they could not get the decision changed then to bring an unfair dismissal application on her behalf. Further, this is not a case where the Applicant gave instructions to her representative to file a claim and then sat on her hands for an extended period while the prescribed time for filing the application passed by. The Applicant engaged in numerous discussions with Mr Coyle to find out what was happening with her case. At no time prior to 28 May 2020 was the Applicant told that the SDA had made, or was considering making, a decision to delay the filing of her application outside the 21 day time period.

[28] As to the delay in the period from completion of the sale on 29 April 2020 until the filing of the application on 14 May 2020, the SDA does not have an acceptable explanation for the delay. However, the Applicant does have an acceptable explanation for this delay, namely, the error on the part of the SDA in failing to lodge the application during this period.

[29] In all the circumstances, I am satisfied that the whole of the delay in filing the application (21 April to 14 May 2020) is to be attributed to the errors made by the Applicant's representative. No part of the delay was occasioned by the conduct of the Applicant; she is blameless for the delay.

[30] For the reasons stated I consider the Applicant's explanation for the delay in lodging her application to be an acceptable and reasonable explanation for the whole of the delay. This 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

[31] The Applicant was notified of the dismissal on the day before it took effect and therefore had the full period of 21 days to lodge the unfair dismissal application. This is a neutral consideration.

Action taken to dispute the dismissal

[32] The Applicant spoke to her union representative, Mr Andrew Coyle of the SDA, on 30 March 2020. In that discussion, the Applicant instructed Mr Coyle to do everything the SDA needed to do to get the decision to terminate the Applicant's employment on the ground of redundancy reversed and to bring an unfair dismissal application on her behalf if the SDA could not get the decision changed. The Applicant also engaged in email communication with the Respondent on 31 March 2020 in relation to the reasons for the redundancy of her position.[11] I am satisfied that this conduct by the Applicant was action taken by the Applicant to dispute her dismissal, even though the Receiver believed, reasonably in my view, on 8 April 2020 that it had answered the SDA's concerns and the SDA did not intend to press any claims on behalf of those members who had been made redundant.

[33] The action taken by the Applicant to dispute her dismissal weighs slightly in favour of a conclusion that there are exceptional circumstances.

Prejudice to the employer

[34] Mr Strawbridge says there will be prejudice to the Receiver and the creditors if an extension of time is granted and they need to deal with the application and potentially pay money to settle it or as compensation. Any such prejudice is irrelevant to the present application. The potential prejudice with which I am concerned is prejudice to the Respondent (s 394(3)(d) of the Act).

[35] I do not accept the Respondent's submission that the prejudice to it is obvious and significant. I accept the purchaser of the business (a subsidiary of the Spotlight group) wanted to purchase the Respondent in a state in which it could trade. The sale was touch and go. It was essential to the purchaser that a number of redundancies, including that of the Applicant, had to be effected in order for the sale to go ahead. I accept that the sale may have collapsed if the buyer was aware that there was to be a challenge to the termination of employment of the Applicant and others on the ground of redundancy. Part of the purpose in having time limits on litigation is so that businesses and individuals can make decisions with a fair degree of certainty. In this case, the deliberate strategy of the SDA to delay filing the application until

[11] Ex A3 at [12] and Attachment 1

after the completion of the sale meant that the purchaser, which now owns the shares in the Respondent, made the decision to purchase the shares on the basis of an understanding that the Applicant had been made redundant, paid her full entitlements, and was no longer an employee of the Respondent, and neither the purchaser of the shares in the Respondent nor the Respondent was aware that this position was disputed or that the Applicant intended to file a claim for unfair dismissal. The purchaser therefore made the decision to purchase the shares in the Respondent without information which they should have had, and which may have caused them to make a different decision. However, that is prejudice to the *purchaser* of the shares in the Respondent, not to the Respondent itself. That is also prejudice which is irrelevant to the present application (s 394(3)(d) of the Act).

[36] A long delay gives rise "to a general presumption of prejudice".[12] The delay here was 23 days. I am satisfied that there would be no greater prejudice to the Respondent caused by the Application being dealt with now than there would have been had it been made within the 21 day time period. Accordingly, prejudice to the Respondent is a neutral consideration.

[37] Even if I had found that the prejudice to which the Respondent points was prejudice to it and therefore weighed against the Applicant, the balance of relevant considerations would have led me to conclude as I have in paragraph [40] below on the questions of exceptional circumstances and discretion to extend time.

Merits of the application

[38] The Act requires me to take into account the merits of the application in considering whether to extend time. The competing contentions of the parties in relation to the merits of the Application are set out in the materials that have been filed and I do not repeat them here. Having examined these materials, it is apparent that the Respondent says it terminated the Applicant's employment on the grounds of redundancy. Given that 21 of the Respondent's stores were closed in early 2020, about 43 other employees were made redundant at the same time as the Applicant, and the evidence reveals that completing the redundancies was essential to securing the buyer's agreement to purchase the business, on a prima facie basis the Respondent has a strong case that it no longer required the Applicant's job to be performed by anyone because of changes in the operational requirements of the business. The Respondent adduced evidence that attempts were made to find redeployment opportunities, but none were available, which is not surprising given the state the business was in and the closure of 21 stores earlier in 2020. The only redeployment opportunities which Mr Strawbridge said were not pursued were with third parties in the retail sector. The obligation to arrange reasonable redeployment opportunities in s 389(2) does not extend to such third parties. Accordingly, the Respondent has a strong prima facie case that it was not reasonable in all the circumstances for the Applicant to be redeployed within the Respondent's enterprise or the enterprise of an associated entity. The Respondent accepts that it did not consult with the Applicant beyond the brief discussion with her on 30 March 2020. It follows that on a prima facie basis the Applicant has a strong case that the Respondent did not comply with relevant consultation obligations. If it is ultimately found that the redundancy was genuine other than the failure to consult, the remedy is likely to be a small amount of compensation to cover the period during which a proper consultation period should have taken place, but that depends on whether there was a realistic prospect of proper consultation resulting in a different outcome. Although that is possible, it seems unlikely given the state of the business

[12] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 556

and the insistence of the buyer on redundancies taking place prior to proceeding with the purchase of the business. In all the circumstances, while I would not assess the Applicant's substantive application as a strong case, it does, in my view, have sufficient merit to weigh slightly in favour of a finding of exceptional circumstances.

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

[39] 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.

[40] The Respondent contends that there is unfairness between the Applicant and the other 41 employees who were made redundant at the same time as her and who have not brought an unfair dismissal claim against the Respondent. I do not accept there is any such unfairness. Any of those 41 employees could have made an unfair dismissal claim against the Respondent. They elected not to do so. In all the circumstances, I consider this to be a neutral consideration.

Conclusion

[41] Having regard to the matters I am required to take into account under s 394(3), and all of the matters raised by the Applicant and Respondent, I am satisfied that there are exceptional circumstances. In making this evaluative assessment I have taken into account each of the factors in paragraphs 394(3)(a) to (f). The most persuasive factor in the circumstances of this case is the fact that the Applicant has provided an acceptable and reasonable explanation for the whole of the delay in lodging the application. In my view, it is unusual or uncommon for a member of a union to provide clear instructions to their union and then maintain regular communication with their union, but not be informed that the union had made a deliberate decision to act in a manner inconsistent with their best interests. I am also persuaded that it is appropriate in the circumstances of this case to exercise my discretion to extend the time for the Applicant's application to be lodged. In my view, it is in the interests of justice that the Applicant, whose conduct did not contribute to the delay in lodging her application, be permitted to pursue her unfair dismissal case. I will therefore extend the time for the Applicant to lodge her unfair dismissal application to 14 May 2020. An order will be issued to that effect [PR720068].

DEPUTY PRESIDENT

Appearances:

Mr Tierney, of counsel, with *Mr Macken*, solicitor, for the Applicant

Ms Mansfield, solicitor, with *Ms Sandy*, solicitor, for the Respondent

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