



DECISION

Fair Work Act 2009
s 394—Unfair dismissal

Nathan Thomas

v

Highway NN Pty Ltd
(U2020/2698)

DEPUTY PRESIDENT SAMS

SYDNEY, 10 AUGUST 2020

Application for an unfair dismissal remedy – repeated failure of applicant to attend Commission conferences – application to have application dismissed pursuant to 399A(1) – insufficient evidence to establish applicant’s claim of signal outages at the time of the conferences – caution to be exercised when dismissing applications at an early stage – Commission satisfied, albeit on a fine balance, that the applicant’s conduct was not unreasonable – s 399A application dismissed – application programmed for further directions.

[1] On 6 March 2020, Mr Nathan Thomas (the ‘applicant’) filed an unfair dismissal application, pursuant to s 394 of the *Fair Work Act 2009* (the ‘Act’) as a consequence of his alleged dismissal by Highway NN Pty Ltd (the ‘respondent’) on 14 February 2020. The parties dispute the nature of the alleged termination of the applicant’s employment; namely, the respondent claims that not only was the applicant not dismissed, but that the unfair dismissal application was filed out of time, pursuant to s 394(2). However, for the purposes of this decision, this is not a relevant consideration. As to a remedy, the applicant sought reinstatement and compensation.

[2] In accordance with my usual practice, I issued directions and listed the matter for a pre-directions conference and a subsequent hearing. Due to a listing clash, the initial conference had to be rescheduled to 29 May 2020. During the teleconference on 29 May 2020, the applicant was unable to be contacted. Mr Trevor Dance, the contact person for the respondent, contacted my Chambers shortly thereafter asking whether the matter would be proceeding. I therefore had cause for my Associate to send Mr Dance the following email:

‘Dear Mr Dance,

I have tried to contact the [applicant] on five occasions and left a voice message, but have been unable to reach him. Mr Thomas, if you are reading this email, please urgently call me on the below number in my email signature. Otherwise, this morning’s listing may be cancelled if you do not contact Chambers immediately.

Regards,

Daniel McNamara
Associate to the Hon. Deputy President P Sams AM

[3] As the teleconference obviously could not proceed, I had cause for my Associate to send the following email to the applicant on 29 May 2020:

‘Dear Mr Thomas,

I refer to the above matter, and refer to your non-attendance at today’s teleconference listed at 10:00am (see the attached notice of listing), despite Chambers attempting to contact you on multiple occasions on both the new number you provided to the Commission, and your old number. The Commission had set this matter down during a spike in Commission matters being lodged, and costs by the Commission were wasted due to your non-attendance.

His Honour requires an explanation by way of evidence as to your non-attendance by close of business Monday 1 June 2020. If you do not provide an explanation in writing, the matter may be closed for a failure of want of prosecution. Please be advised that as a result of Chambers being unable to reach you by phone, all correspondence with Chambers in this matter by both parties must now be in writing.

You are reminded that your submissions are due to be filed by 4pm 25 June 2020 (see the attached directions).

Parties are reminded that all correspondence with Chambers must copy in the other side.

Regards,

Daniel McNamara
Associate to the Hon. Deputy President P Sams AM’

[4] On 1 June 2020, the applicant sent the following email to my Chambers:

‘Apologies for missing appointment as I when I got to change the date for some reason I have a over look change the time took an hour off work at 2 pm am as I do have trouble reading sometimes I did not want to was anybody’s time It’s not right I don’t have any Proof Just my word’.

My Associate then responded as follows:

‘Dear Mr Thomas,

The Deputy President has considered your email below. Given that the matter was originally listed for 2pm last Wednesday, His Honour understands there may have been some confusion with the amended listing. As a result, His Honour will accept your reason for non-attendance and will relist the matter at 10am this Friday 5 June 2020 for teleconference. His Honour notes that the amended directions issued to parties remain in place (i.e. the respondent to file its submissions on 11 June) per the attached email. Please note that failure to attend this conference may result in your application being dismissed pursuant to s 587 of the *Fair Work Act 2009*. Therefore, if either party is unable to attend at this time, please advise Chambers at your nearest convenience. Parties will receive notice of listing to this effect shortly. Parties are reminded that all future correspondence with Chambers must be via email.

Regards,

Daniel McNamara
Associate to the Hon. Deputy President P Sams AM’

Due to the respondent’s unavailability at the time specified, the teleconference was relisted to 9am Thursday 4 June 2020.

[5] Prior to the commencement of the teleconference on 4 June 2020, my Associate tried to contact the applicant on a number of occasions, but he was again unable to be reached. Annexed to this decision at ‘Annexure A’ is a screenshot of the phone log of my Associate in his attempts to call the applicant, with the redacted phone numbers of the applicant. On 5 June 2020, as a result of the applicant’s repeated non-attendance, the respondent sent my Chambers an email requesting that the matter be dismissed pursuant to s 399A(1)(a) of the Act. I subsequently issued further directions for parties to make submissions as to whether the application should be dismissed as a result of the applicant’s non-attendance at Commission proceedings and relisted the matter on 15 July 2020. On this occasion, the applicant was able to be reached and participated in the conference together with Mr Dance of the respondent. The matter was unable to be resolved at the conference.

SUBMISSIONS

[6] I note at this juncture that both parties in this matter have remained self-represented throughout the proceedings. Understandably, the submissions of the parties were brief, and do not address the specific requirements for the Commission must take into account when considering whether to dismiss an application pursuant to s 399A of the Act.

For the respondent

[7] In its submissions, the respondent referred to the lengthy email correspondence between parties and Chambers as to the time and location of listings. It noted that the business had expended costs for attending and preparing for the conference, and that, after failing to attend on 29 May 2020, the applicant did not make contact with the Commission until 1 June 2020. Despite the applicant advising of his intention to attend at the rescheduled teleconference relisted for 4 June 2020, he was unable to be reached. The respondent submitted that the applicant had ‘abused the system as to ensure he has cost the business and [Commission] both in time and resources’.

The applicant’s submissions

[8] The applicant filed short written submissions which I set out in full below:

‘1. On the first occasion on the 29th of the 5th 2020 I missed that appointment because when I was at work I checked my email and I seen that date had been changed. But for some reason I did not look at the time I just assumed the time was the same there for I was at work And had organised to have lunch before 2 then realised the mistake I made.

2. Then I was granted to reschedule on the fourth of the six 2020 at 9 am I was waiting for that phone call my phone didn’t ring I don’t know why it’s the right number. All I can say is I not trying to waste taxpayers money definitely not the fair work mission As Without The Fair Work Commission I wouldn't have a chance to prove how wrong respondent is Declaims (*sic*) I'm trying to waste taxpayers money I have no intention of doing that.

3. All I say is if you do decide to re-schedule I could ring you When appointments is on. I also don't know what the respondent claims that I said to think that I resigned. I'm sorry if this isn't light out how supposed to be its best I can do I'm doing this by myself.’

[9] Notwithstanding the repeated failures by the applicant to attend Commission conferences, or at least advise my Chambers of anything which may have caused his non-attendance, the relisting of the conference on 15 July 2020 was a final attempt to resolve the matter, and to discuss the path forward regarding the s 399A application. As the reasons provided by the applicant as to his non-attendance largely revolved around alleged network outages, I directed the applicant to provide evidence of the outages by 17 July 2020. No response was received. However, on 21 July 2020, the applicant advised my Chambers as follows:

‘I’m sorry I did ring Telstra they said no outages on that day my area must be a problem with my device I have no Evidence sorry’.

CONSIDERATION

[10] Section 399A of the Act provides as follows:

399A Dismissing applications

(1) The FWC may, subject to subsection (2), dismiss an application for an order under Division 4 if the FWC is satisfied that the applicant has unreasonably:

- (a) failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or
- (b) failed to comply with a direction or order of the FWC relating to the application; or
- (c) failed to discontinue the application after a settlement agreement has been concluded.

Note 1: For another power of the FWC to dismiss applications for orders under Division 4, see section 587.

Note 2: The FWC may make an order for costs if the applicant’s failure causes the other party to the matter to incur costs (see section 400A).

(2) The FWC may exercise its power under subsection (1) on application by the employer.

(3) This section does not limit when the FWC may dismiss an application.”

[11] Despite the matter still being at a very preliminary stage, it has some history. The contextual background regarding this application can be summarised as follows. The

respondent submits that there have been numerous occasions in which the applicant was well aware of Commission conferences being conducted. On the first two occasions, he was not able to be reached. In any event, even if there were technical difficulties as he alleged, he made no attempt to contact my Chambers to inform the Commission that he was facing difficulties in connecting to the conference. On the other hand, the applicant asserts that he was ready and willing to participate in Commission conferences, and waited for calls from my Associate, which he alleges he never received.

[12] The respondent submits that the Commission should exercise its power under s 399A(1) of the Act to dismiss the applicant's unfair dismissal application on the grounds that he has failed to comply with a direction or order of the Commission, and has failed to provide adequate reasons as to his repeated non-attendance.

[13] The power under s 399A of the Act to dismiss an application is discretionary. The exercise of the power is predicated on the unreasonableness of the conduct of an applicant in relation to three specified circumstances: failing to attend a conference or hearing; failing to comply with a direction or order of the Commission; or in other circumstances (not material to this case), failing to discontinue an application after a settlement agreement has been concluded. The respondent's application under s 399A is based on subsection (1)(a) and in this regard it is asserted that the applicant unreasonably failed to attend two Commission conferences in relation to the application.

[14] Accordingly, s 399A of the Act requires a two-step process; firstly, a finding that one or more of the grounds set out are satisfied and secondly, if so, the consideration as to whether it is appropriate to exercise a discretion to grant the s 399A application and dismiss the unfair dismissal application. It is not in dispute that the applicant failed to attend Commission conferences on two occasions, knowing full well the ramifications of not doing so. Therefore, this decision rests primarily on my discretionary power as to whether I should dismiss this application as a result of the applicant's non-compliance.

[15] It has been long held by the Courts and this Commission that the power to dismiss a substantive application should only be exercised cautiously; see: *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125 at [8]. This is so because it results in the extinguishment of a party's application, which has been made in order

to seek some form of relief, from a beneficial statutory provision. In other words, the application is dismissed before an applicant has had his/her 'day in court'.

[16] In *Allen v Army and Air Force Canteen Service* [2013] FWC 9209, Senior Deputy President *Richards* considered the approach to applications made under section 399A of the Act and concluded:

[36] The discretion vested in the Commission by way of s.399A of the Act is fettered only in so far as it must be exercised on the basis of a judgement as to whether an Applicant had, in the circumstances before the Commission, "unreasonably [...] failed to comply with [a Commission] direction [...] relating to the application."

[37] Section 399A(1) of the Act focuses the Commission on the circumstances of the Applicant's conduct for the purposes of the exercise of discretion. The *Explanatory Memorandum* is consistent with the statutory focus in that it indicates that:

the amendment is intended to address the small proportion of applicants who may pursue claims in an improper or unreasonable manner.

[38] The *Explanatory Memorandum* further states that:

the power to dismiss an application is only intended to be available where there is an unreasonable act or omission by the applicant.

[39] The discretion is not one that should be read as being subject to the scope of considerations as might arise in *Brodie Hanns (Brodie-Hanns v MTV Publishing Ltd)* (1995) 67 IR see pages 299-300) or as are otherwise applicable by statutory direction under s.366 of the Act or s.394(3) of the Act.

[40] Further, it is not to be read into the jurisdiction, for example, that the Commission must establish that the Respondent has been exposed to a prejudice, or in some way disadvantaged or put to cost (though understandably such circumstances may well arise consequentially).

[41] Nor does the Respondent need to possess a defence against the claims as made in the originating application (as is said by the Full Bench in *Re: Sayers* to be required in relation to a dismissal of an application under s.587(1) of the Act, at the Commission's initiative).

[42] The discretion, therefore, to dismiss an application under s.399A(1) of the Act is exercised subject only to an objective evaluation of the Applicant's conduct, and more particularly, whether or not that conduct was unreasonable in the circumstances.'

[17] In *Viavattene v Health Care Australia* [2013] FWCFB 2532, a Full Bench of the Commission said at [39]:

[39] It is apparent from the decision subject to appeal that the Commissioner had regard to *Sayer v Melsteel*, and made her decision following an analysis of the respondent's uncontested evidence, noting that the respondent's sworn statements and submissions contained “*substantial arguments in response to the Applicant's contentions*”. There is no legislative or common law requirement pursuant to which the Commission must persevere with an application in circumstances where the applicant's conduct clearly demonstrates an unwillingness to participate in proceedings commenced at his or her initiative. It is important to bear in mind that there is respondent to the application for relief and the objects of Part 3-2 (Unfair Dismissal) provide that the unfair dismissal provisions of the FW Act are intended “to ensure that a ‘fair go all round’ is accorded to *both* the employer and employee concerned” (s.381).’ (*endnotes omitted*)

[18] While an ongoing pattern of non-attendance by an applicant in Commission proceedings would ordinarily result in a s 399A application being made out, the applicant has continued to advise my Chambers of his willingness to continue with his application. This was particularly demonstrated in the conference on 15 July 2020, despite the applicant not being able to provide any evidence as to network outages on the previous occasions in which this matter was listed. It is apparent he is not wilfully seeking to avoid prosecuting his case. In adopting a cautious approach to summarily dismissing his application, I am prepared to give the applicant the benefit of the doubt as to his network difficulties.

[19] As earlier observed, the evidence in this matter is very limited. The applicant claims that he cannot access records from his network provider as to the alleged outages at the time of the Commission conferences. Neither party has made submissions which would otherwise persuade me that the applicant was being ‘unreasonable’ in his initial failures to attend Commission proceedings. However, it must be stressed that the applicant had numerous opportunities throughout the course of the preliminary proceedings to engage more actively. He is warned that any further non-compliance with Commission directions might not be met with the same outcome as I have decided at this point.

[20] Having considered the views of both parties, I am satisfied that:

- The applicant’s explanations for his failure to attend Commission proceedings cannot be said to be unreasonable;
- While the respondent has claimed some prejudice, given its diligence in attending Conferences in the absence of the applicant, this does not outweigh the imperative of exercising caution in dismissing this matter; and

- The applicant has not deliberately set out to cause inconvenience, annoyance, or wasted costs of the respondent or the Commission.

[21] Accordingly, the respondent's section 399A(1) application is dismissed. I so order.

FURTHER DIRECTIONS

[22] In this matter, the respondent has raised two jurisdictional objections, namely:

- the respondent contends that the application was lodged 'out of time', meaning that the applicant's application cannot be determined by the Commission pursuant to s 394(2)(a) of the Act; and
- the applicant resigned from his employment, meaning that he has not been 'dismissed' for the purposes of s 386 of the Act.

[23] As the onus is on the applicant to establish 'exceptional circumstances' to file his application late pursuant to s 394, and to ensure the efficient conduct of the future proceedings in this matter, noting the significant delay which has already transpired, I issue the following directions to deal with the jurisdictional issues:

1. The respondent (Highway NN Pty Ltd) is directed to file with the Fair Work Commission, and serve on the Applicant, an outline of submissions, witness statements and other documentary material the respondent intends to rely on in support of their jurisdictional objection (regarding the alleged resignation of the applicant) in this matter by **no later than 4.00pm (AEST) on Monday, 24 August 2020.**
2. The applicant (Mr Nathan Thomas) is directed to file with the Fair Work Commission, and serve on the respondent, an outline of submissions, witness statements and other documentary material the applicant intends to rely on in opposition to the respondent's jurisdictional objection (regarding the alleged resignation of the applicant) AND the exceptional circumstances for the late lodgement of this application pursuant to s 394(3) in this matter **by no later than 4.00pm (AEST) on Monday, 7 September 2020.**

3. The respondent (Highway NN Pty Ltd) is directed to file with the Fair Work Commission, and serve on the applicant, an outline of submissions, witness statements and other documentary material the respondent intends to rely on in reply to the applicant's material **by no later than 4.00pm (AEST) on Monday, 14 September 2020.**
4. The matter will be programmed for a hearing which will occur shortly after the above directions have been complied with.



DEPUTY PRESIDENT

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ANNEXURE 'A'

	 SAMS, Deputy President Phone Call	4/06/2020
	 McNAMARA, Daniel Phone Call	4/06/2020
	 SAMS, Deputy President Phone Call	4/06/2020
	 [REDACTED] Phone Call	4/06/2020
	 [REDACTED] Phone Call	4/06/2020
	 [REDACTED] Phone Call	4/06/2020
	 [REDACTED] Phone Call	4/06/2020
	 SAMS, Deputy President Phone Call	4/06/2020
	 [REDACTED] Phone Call	4/06/2020
	 [REDACTED] Phone Call	4/06/2020
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