



DECISION

Fair Work Act 2009

s.394—Unfair dismissal

Amanda Jane Burns

v

AUB Group Limited
(U2019/11581)

COMMISSIONER JOHNS

SYDNEY, 30 JANUARY 2020

Application for relief from unfair dismissal - whether to extend time for lodging the application.

Introduction

[1] At least since (somewhere around) 500 to 600 BC there has been an instruction to “Honour your ... mother”.¹ On 21 September 2019 the applicant, Amanda Burns, flew to the United Kingdom and, soon after her arrival, learned that her mother was dying. From then until the untimely death² of her mother from metastatic adenocarcinoma³ on 30 November 2019 the Applicant fulfilled that age-old instruction.

[2] Three days before flying to the UK (i.e. on 18 September 2019) the Applicant’s employment with AUB Group Services Pty Ltd (**Respondent**) (a related body corporate of AUB Group Limited) was terminated.

[3] The *Fair Work Act 2009* (Cth) (**FW Act**) provides that an applicant for an unfair dismissal remedy made pursuant to s.394 of the FW Act must lodge an application within 21 days after the dismissal took effect.⁴ However, the Fair Work Commission (**Commission**) may allow a further period for lodgement in exceptional circumstances.⁵

[4] This decision is about whether the Commission should allow the Applicant a further period for lodgement of her application for an unfair dismissal remedy. The relevant circumstances are as follows:

- a) the employment was terminated on 18 September 2019;
- b) an incomplete F2 application was lodged at 7.57 am on 10 October 2019,

¹ Exodus 20:12.

² The Applicant’s mother died 18 days before, what would have been, her 67th birthday.

³ A type of cancer that forms in mucus-secreting gland cells.

⁴ Section 394(2)(a) FW Act. Note that the 21 days for lodgment does not include the date that the dismissal took effect by reason of the operation of the *Acts Interpretation Act 1901* (Cth) s.36(1) (item 6—where a period of time ‘is expressed to begin after a specified day’ the period ‘does not include that day’).

⁵ Section 394(3) FW Act.

- c) a validly completed F2 application was lodged at 6.48 am on 16 October 2019,
- d) the valid application was therefore filed:
 - A. 28 days after the employment was terminated; and
 - B. 7 days after the 21-day time limit provided for in the FW Act.

[5] For the reasons set out below I have decided to grant the Applicant an extension of time.

The jurisdictional objection

[6] On 18 November 2019 the Respondent indicated its objection to the Commission exercising its jurisdiction to deal with the Application because it was lodged later than the 21 days after the dismissal took effect.

[7] On 19 November 2019 the Commission, constituted by Vice President Catanzariti, wrote to the Applicant inviting her to explain whether there were exceptional circumstances in her matter.

[8] On 25 November 2019 the Applicant replied. She wrote,

“Firstly, I was unaware dismissal was going to happen so close to my arranged travel date. This meant that I could not respond or have time to process what had happened until at least 48 hours after this took place.

Once arriving in the UK had the devastating news that my mum was seriously ill and was up and down to the hospital for two weeks.

I did however, finally get my application filled out an email to the Fair Work Commission dead on the 21 days after my dismissal took place (09/10/19). I had problems with the size of the file which included my application with relevant supporting documents, so resend one included my application and the other additional supporting documents only.

Setting my documents in this way single gone through no problem. However, there was only when I received an email from ... The Fair Work Commission of the 14/10/2019 that’s explained that the additional work documents were received but there was no application attached.

I have attached a relevant email conversations and email delivery reports for your records to show that I did everything I could possibly do to get this application filed within the 21 day timeframe.

Under normal circumstances I would have looked into filing this earlier, but these were unexpected and exceptional circumstances as I was caring for my two-year-old son and struggling with the fact that my mum was diagnosed with terminal cancer.”

[9] Later that day the matter was allocated to me and I programmed it for hearing on 11 December 2019. However, because the Applicant was involved in making arrangements for

her mother's funeral,⁶ it became necessary to adjourn the matter for hearing on 24 January 2020. Because of the late request for an adjournment, the matter briefly commenced on 11 December 2019.

[10] At the commencement of the hearing on 11 December 2019 I gave the Respondent permission to be represented. I was satisfied that, the jurisdiction objection, invested the matter with complexity and that I would be assisted in the efficient conduct of the matter if I allowed the Respondent to be represented. I did so pursuant to s.596 of the FW Act and the authority in *Warrell v FWC* [2013] FCA 291.

Legislative scheme

[11] Relevant to the Commission considering whether an extension of time to lodge the application should be granted is s.394(3) of the FW Act:

- (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.

[12] Section 394(3) of the FW Act states that the Commission may allow a further period to lodge an application provided there are "exceptional circumstances" taking into account the five nominated criteria. The principles are well established and set out in a decision of a Full Bench of Fair Work Australia (as the national tribunal was then called) in *Nulty v Blue Star Group*.⁷ In that matter the Full Bench held the following in relation to "exceptional circumstances":

- [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

⁶ The funeral occurred on 18 December 2019. <http://www.myfamilyannouncements.co.uk/national/view/4719376/pauline-jean-lawrence>.

⁷ [2011] 203 IR 1.

situation which is out of the ordinary course, unusual, special or uncommon.⁸

[13] More recently “exceptional circumstances” (in the context of a general protections claim) was addressed by a Full Bench in *Tamu v Australia for UNHCR*.⁹ The Full Bench held that:

[18] The test of “exceptional circumstances” establishes a “high hurdle” for an applicant for an extension.¹⁰ A decision whether to extend time under section 366(2) involves the exercise of a discretion.¹¹

[19] ...

[20] Generally speaking, the assessment of whether exceptional circumstances exist will require consideration of all relevant circumstances, because even though no one factor may be exceptional, in combination the circumstances may be such as reasonably to be regarded as exceptional.¹²

Chronology of relevant events

[14] The following matters were either agreed or not otherwise contested. Consequently, I make the following findings of fact:

- a) In July 2015 the Applicant commenced employment with the Respondent.
- b) The Respondent employs around 60 employees. It is not a small business.
- c) The Applicant was employed as an Accounts and Administration Assistant.
- d) The Applicant worked in that part of the Respondent’s business dealing with AIMS Austbrokers IBNA Member Services. The business employed 7 people.
- e) AIMS Austbrokers IBNA Member Services was a joint venture between the Respondent and the Insurance Brokers Network of Australia (**IBNA**).
- f) At some time prior to June 2019¹³ the Applicant advised the Respondent of a desire to take 4 months¹⁴ leave to return to the UK. The leave was agreed to and due to commence towards the end of September 2019. It was intended that the Applicant would return to work in Australia in January 2020.
- g) On 26 June 2019 the Respondent and IBNA announced the end of their joint venture.¹⁵
- h) IBNA was taken over by a third party, Steadfast.¹⁶
- i) The AUB Group Ltd (the parent company of the Respondent) became the sole

⁸ Ibid [13].

⁹ [2019] FWCFB 2384.

¹⁰ *Lombardo v Commonwealth of Australia as represented by the Department of Education, Employment and Workplace Relations* [2014] FWCFB 2288 at [21].

¹¹ *Halls v KR & MA McCordle and Ors* [2014] FCCA 316.

¹² *Misconi v Negri Contractors (Vic) Pty Ltd* [2019] FWCFB 654 at [13]; see also *Griffiths v The Queen* (1989) 167 CLR 372 at 379 (Brennan and Dawson JJ); *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [23]-[26] (Rares J); *Hasim v Attorney-General of the Commonwealth* [2013] FCA 1433, (2013) 218 FCR 25 at [65] (Greenwood J).

¹³ Transcript PN142-145.

¹⁴ Transcript PN149.

¹⁵ <https://www.aubgroup.com.au/site/blog/aub-group-and-ibna-part-ways-in-aims-joint-venture>.

¹⁶ <https://www.insurancenews.com.au/breaking-news/ibna-quits-aims-to-join-steadfast>;
<https://www.insurancenews.com.au/daily/all-on-board-steadfast-completes-ibna-takeover>.

owner of AIMS.¹⁷ The fact that the AIMS business remained with the Respondent is not consistent with the submissions made by its representative. The Applicant contended that the AIMS business remained with the Respondent.¹⁸ It seems more likely that the Applicant is correct.

- j) The ending of the joint venture resulted in an internal restructure.
- k) Discussions ensued between the Applicant and the Respondent about her future role. There is a disagreement about whether an agreement was reached. The Applicant contends that there was an agreement about her working remotely from the UK. The Applicant attempted to have documented what she thought had been agreed with her managers on 8 August 2019. That did not occur.
- l) On 12 September 2019 the Applicant was awarded a pay rise (from \$43,546 pro rata per annum to \$44,852 pro rata per annum) and an incentive bonus (\$2,242.62).
- m) On 18 September 2019 the Respondent terminated the Applicant's employment by reason of redundancy. The termination of her employment was a surprise to the Applicant.
- n) The Applicant was paid an amount in lieu of notice¹⁹ and her entitlement to severance pay under the National Employment Standards.²⁰
- o) Of the 7 people employed in the joint venture business:
 - A. 3 moved to Steadfast,
 - B. 2 were redeployed within the Respondent, and
 - C. 2 (including the Applicant) were made redundant.²¹
- p) On 19 September 2019 the Applicant moved out of her apartment.²²
- q) On 20 September 2019 the Applicant flew to the UK.²³
- r) On 21 September 2019 the Applicant arrived in the UK.²⁴
- s) Soon after her arrival in the UK the Applicant learned her mother was dying of terminal cancer.
- t) At 4.45 am on 10 October 2019 (6.45 pm on 9 October 2019 in the UK) the Applicant sent an email (**First Email**) to the Commission attaching a Form F2 and relevant documents.
- u) In reply to the First Email the Applicant received the following message:

"The following message to sydney@fwc.gov.au was undeliverable.

The reason for the problem:

5.1.0 – Unknown address error 552-5.3.4 Message size exceeds fixed limit'

- v) At 7.57 am on Thursday, 10 October 2019 (9.57 pm 9 October 2019 in the UK) the Applicant sent an email (**Second Email**) attaching only the additional supporting documents. She did not resend the Form F2. For this reason, the 10 October 2019 email was treated by the Commission as an incomplete Form F2 application.
- w) The Applicant received a positive acknowledgement receipt in respect of the Second Email.

¹⁷ <https://www.aubgroup.com.au/site/blog/aub-group-to-redesign-and-expand-aims>.

¹⁸ Transcript PN239.

¹⁹ Transcript PN185.

²⁰ Transcript PN191.

²¹ Form F3, answer 3.2(4).

²² Transcript PN122.

²³ Transcript PN122.

²⁴ Transcript PN122.

- x) On Monday, 14 October 2019 the Commission wrote to the Applicant advising her that the documents filed by her on 10 October 2019 did not constitute a valid application. She was advised to lodge a valid application urgently and that applications must be lodged within specific timeframes. The Commission wrote “Applications lodged outside of these timeframes may be dismissed.”
- y) At 4.48 pm on 16 October 2019 (6.48 am on 16 October 2019 in the UK) the Applicant again emailed the Commission (**Third Email**) refiling the Form F2 Application she attempted to file with the First Email on 10 October 2019 (9 October 2019 UK time).
- z) By this time the Applicant’s application was 7 days out of time.
- aa) On 13 November 2019 the Applicant’s mother died. The Applicant was responsible for registering her mother’s death. She did so on 15 December 2019.

Submissions

[15] On 25 November 2019 I directed the parties to file submissions, witness statements and documents by 9 December 2019.

[16] On 9 December 2019 the Respondent submitted the following:

1. Section 394(2) of the Fair Work Act 2009 (Cth) (FW Act) provides that an Applicant for an unfair dismissal remedy made pursuant to s394 of the FW Act must lodge an application within 21 days after the dismissal took effect.
2. On 16 October 2019, being 28 days after her employment with the Respondent ended, Amanda Burns (Applicant) lodged an Unfair Dismissal Application (UD Application) with the Fair Work Commission (Commission).
3. The Respondent maintains a jurisdictional objection to the Applicant’s UD Application on the ground that the Applicant was out of time in making the UD Application for the purposes of section 394(2) of the FW Act, and that the Applicant’s dismissal was as a result of genuine redundancy.

Background

4. The Applicant commenced employment with the Respondent in or around July 2015 to work specifically in the Respondent’s AIMS Austbrokers IBNA Member Services business (AIMS business), which was a joint venture between the AUB Group Limited and the Insurance Brokers Network of Australia (joint venture).
5. On 26 June 2019 it was announced that the joint venture would end and the AIMS business was sold to a third party.
6. As a consequence of the joint venture coming to an end, the Applicant’s position was no longer required.
7. The Respondent commenced consultation with the Applicant on or around 16 August 2019 in relation to her employment being affected by the joint venture ending.
8. During this consultation period, the Respondent considered possible redeployment opportunities but did not have any suitable alternate positions for the Applicant to complete.
9. On 18 September 2019, the Applicant was notified that her employment was being terminated due to redundancy.
10. On 8 November 2019, the Respondent was notified that the Applicant had lodged the UD Application.

Legal Framework

11. The Commission may allow a further period for lodgement in exceptional

- circumstances.
12. Relevant to the Commission considering whether an extension of time to lodge the application should be granted, s 394(3) of the FW Act provides:
- “394 Application for unfair dismissal remedy
- ...
- (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.”
13. The term ‘exceptional circumstances’ for the purpose of s394(3) has been interpreted to have its ordinary meaning. In *Nulty v Blue Star Group [2011] FWAFB 975* (Nulty) the Full Bench of the Fair Work Australia (as the Commission was formerly known) held at [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.”
14. The Applicant was out of time in making the UD Application for the purposes of section 394(2) of the FW Act and there are no exceptional circumstances, or any circumstances out of the ordinary course, unusual, special or uncommon, based on the factors set out in section 394(3) of the FW Act, that would justify granting an extension of time for the making of the UD Application.
15. Further, at paragraph [15] of the Nulty decision, it was stated that:
- ‘A finding that there are “exceptional circumstances”...is necessary before the discretion to extend time is enlivened. That is, even when “exceptional circumstances” are established, there remains a discretion to grant or refuse an extension of time.’
16. If the Commission finds exceptional circumstances do exist, the Respondent submits that having regard to all the circumstances, the Commission should exercise its discretion not to accept the UD Application out of time.

17. The Respondent deals with each of the requirements of s394(3) below.

Section 394(3)(a) - Reasons for the delay

Chronology

18. On 18 September 2019 the Applicant was notified of the termination.

19. On 9 October 2019 the Applicant alleges she sent an email to the Commission attaching the UD Application for lodgement. The Respondent has not been provided with a copy of this email.

20. On 9 October 2019 the Applicant received an email delivery failure from the Commission containing the error message: 'Message size exceeds fixed limit.'

21. At approximately 8:57pm on 9 October 2019 the Applicant sent an email to the Commission acknowledging that she had received an email delivery failure. In this email she reattached documents claimed to be in support of the UD Application.

22. The Applicant received an email delivery acceptance later that day.

23. The Applicant alleges she sent a further email to the Commission attempting to reattach the UD Application. The Applicant has not provided any evidence to support this.

24. At approximately 8:28am on 14 October 2019 the Commission emailed the Applicant and notified her that the email referred to at paragraph 21 above had not been received until 10 October 2019 and did not constitute a valid unfair dismissal application.

25. At approximately 6:47am on 16 October 2019 the Applicant sent a further email to the Commission attaching the UD Application for lodgement.

26. On 19 November 2019 Vice President Catanzariti wrote to the Applicant in relation to the UD Application being out of time. The letter stated:

"If you think there are exceptional circumstances warranting the grant of an extension of time to file your application, you should provide a written statement within seven days of the date of this letter, explaining why you think I should decide in your favour. Your application will then be listed for hearing to determine the issue based on the material you have provided.

Please consider the matters that the Commission must take into account, which are set out above, and address them in your written statement if you can. You should explain why you consider your circumstances are exceptional and provide any supporting evidence. For example, if you rely on a medical condition as the reason for your delay, you should supply a medical certificate or report which specifically explains why your medical condition prevented you from making your application within time."

27. At approximately 8:48am on 25 November 2019 the Applicant sent an email to the Commission providing her reasons for the delay in lodging the UD Application and attaching some material in support of those reasons.

Reasons for delay

28. The reasons for delay proffered by the Applicant include:

- a. being delayed in preparing the UD Application due to:
 - i. being unaware the dismissal was going to take place;
 - ii. pre-arranged travel plans which meant she was on a long-haul flight and unable to process the termination for the first 48 hour period;
 - iii. upon arriving to the United Kingdom she was notified that her mother was diagnosed with terminal cancer and she was in and out of hospital over the next two week period; and
 - iv. having to care for her two-year old son; and
- b. being delayed in lodging the UD Application:

- i.as, notwithstanding the reasons for the delay in preparing the UD Application, she had attempted to lodge her application with the Commission via email on 9 October 2019 however this failed to deliver due to its size;
 - ii.she subsequently attempted to resend the UD Application documents in support in two separate emails;
 - iii.she was unaware that the subsequent email was not delivered until the email from the Commission on 14 October 2019; and
 - iv.she re-submitted her application on 16 October 2019.
29. Notwithstanding the clear instructions in the Commission's letter to the Applicant dated 19 November 2019, the Applicant failed to provide a detailed Statement containing full particulars for the reasons for the delay. Accordingly, the Respondent can only respond to the reasons for delay contained in the Applicant's email dated 25 November 2019.
30. The Respondent disputes the reasons for delay put forward by the Application.
31. The Applicant was aware of the possibility of her employment ending when the decision was announced on 26 June 2019. While discussions took place with the Applicant about her completing some work from the United Kingdom it was not agreed or finalised.
32. The Applicant's pre-arranged travel plans do not support the finding of exceptional circumstances warranting the granting of an extension of time.
33. The Applicant seeks to rely on her mother's medical condition as part of the reasons for delay but has failed to provide any medical certificates or reports to substantiate this claim. In this regard, the Respondent relies on the finding in Nulty in making the submission that, although the serious illness of a close relative may provide a justifiable basis for an extension of time, the Commission should exercise its discretion not to extend time in circumstances where:
- a. the reasons for delay are not satisfactorily supported by evidence; and
 - b. it is clear that factors other than the Applicant's mother's illness were the true reason for the delay in the lodgement of the UD Application, being the email delivery failure.²⁵
34. The Applicant has failed to provide any evidence relating to her mother's medical condition which would weigh towards a finding of exceptional circumstances, and has further failed to address why she could not lodge the UD Application between 2 and 8 October 2019, noting the Applicant's email to the Commission only states her mother was in and out of hospital for a two week period immediately following the dismissal.
35. It is the Respondent's position that the Applicant:
- a. was aware by the email delivery failure notification on 9 October 2019 that the UD Application had not been successfully lodged;
 - b. did not attempt to resubmit the UD Application; and
 - c. was remiss in failing to take other steps to lodge the UD Application.
36. The Commission provides a number of means by which an unfair dismissal application can be lodged. In addition to electronic lodgement, an unfair dismissal application may be filed in person at the Commission's registry, by post or by phone.²⁶ There is no evidence that the Applicant unsuccessfully attempted to

²⁵ *Nulty v Blue Star Group* [2011] FWAFB 975 at [38].

²⁶ *Fair Work Commission Rules 2013* (Cth), Rule 9; *Kim Hurst v Friendly Care Society t/as Friendly Care Pharmacy Burleigh Heads* [2015] FWC 2732.

utilise any of these options.

37. The technological issues experienced by the Applicant does not amount to exceptional circumstances.
38. Upon becoming aware of the email delivery failure, the Applicant did not make a bone fide attempt to resubmit the UD Application within the required time period.²⁷
39. The Commission notified the Applicant that they had not received an approved unfair dismissal application on 14 October 2019. The Applicant did not respond to that email for a period of two-days. The Applicant has not provided any evidence in relation to the delay in receiving the Commission's email on 14 October 2019 and sending the UD Application for lodgement on 16 October 2019.
40. The Applicant has failed to provide satisfactory evidence of the reasons proffered for delay. There is insufficient evidence for the Commission to make a finding that 'exceptional circumstances' exist based on the reasons for delay, either individually or cumulatively.

Section 394(3)(b) - When the employee became aware of the dismissal

41. The Applicant became aware of the dismissal at the time it occurred, that is, when she was handed the termination letter on 18 September 2019.
42. Notwithstanding the Applicant only becoming aware of the dismissal taking effect on 18 September 2019, she was aware of the possibility of her employment being terminated from 26 June 2019.

Section 394(3)(c) - Any action taken by the former employee to dispute the dismissal

43. The Applicant did not take any action to dispute the dismissal other than her attempt to file an application for unfair dismissal.
44. The Applicant did not dispute that her position ceased to be required.

Section 394(3)(d) - Any prejudice caused to the employer

45. The Respondent will suffer prejudice if the Commission extends the time limit for the Applicant to make the UD Application as it will incur further significant time and cost in defending the UD Application in circumstances where there is no merit to the UD Application.
46. Further, the Respondent submits that if Commission does not find that the Respondent will be prejudiced by allowing the extension of time, the mere absence of prejudice to the Respondent is an insufficient basis to grant an extension of time.

Section 394(3)(e) - Merits of the application

47. In considering the principles applicable to granting an extension of time in *Kornicki v Telstra-Network Technology Group*²⁸, the Commission held:

"The merits of the substantive application. 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."

48. The Respondent submits that the UD Application cannot succeed because the Applicant was dismissed from her employment with the Respondent as a result of genuine redundancy.

²⁷ *Christopher Johnson v Joy Manufacturing Co Pty Ltd t/as Joy Mining Machinery* [2010] FWA 1394.

²⁸ Print P3168, 22 July 1997 per Ross VP, Watson SDP and Gay C.

49. The Respondent repeats and relies on paragraphs 4 to 9 above.
50. Prima facie, the Applicant's UD Application has no merits and weighs against an extension of time being granted.
- Section 394(3)(f) - Fairness between the former employee and persons in similar positions
51. The factor has no relevance to the Application.
- Conclusion
52. A consideration of the factors listed in section 394(3)(a) to (f) does not provide any basis for the Commission to make a finding that exceptional circumstances exist such that the time limit for making the UD Application should be extended.
53. The Respondent requests that the UD Application be dismissed on the ground that it was made out of time, and further, has no merits.”

Consideration of s.394 criteria

Paragraph 394(3)(a) - The reason for the delay

[17] There were 28 days between when the termination of the Applicant's employment took effect and when a valid application was filed with the Commission. Therefore, it was 7 days late.

[18] In its submission the Respondent correctly summaries the Applicant's reasons for delay as follows:

- “The reasons for delay proffered by the Applicant include:
- a. being delayed in preparing the UD Application due to:
 - i. being unaware the dismissal was going to take place;
 - ii. pre-arranged travel plans which meant she was on a long-haul flight and unable to process the termination for the first 48 hour period;
 - iii. upon arriving to the United Kingdom she was notified that her mother was diagnosed with terminal cancer and she was in and out of hospital over the next two week period; and
 - iv. having to care for her two-year old son; and
 - b. being delayed in lodging the UD Application:
 - i. as, notwithstanding the reasons for the delay in preparing the UD Application, she had attempted to lodge her application with the Commission via email on 9 October 2019 however this failed to deliver due to its size;
 - ii. she subsequently attempted to resend the UD Application documents in support in two separate emails;
 - iii. she was unaware that the subsequent email was not delivered until the email from the Commission on 14 October 2019; and
 - iv. she re-submitted her application on 16 October 2019”.

[19] As recently observed by Deputy President Boyce in *Saskia-Lara Cislaghi Lanza v Victory Management Services Pty Ltd*,²⁹

[15] It is important to recognise that the period of the delay that requires

²⁹ [2020] FWC 168.

explanation is the period commencing immediately after the time for lodging an application had expired (in this case 9 October 2019), and ending on the day on which an application is ultimately lodged (in this case 16 October 2019).

[16] That said, it is also important to have regard to any circumstances from the date the dismissal took effect when assessing whether the explanation proffered for the delay is an acceptable or credible explanation.³⁰

[20] In this matter the Applicant filed her valid Form F2 application 7 days after the expiration of the 21-day time limit.

[21] However, as has been explained above, there was an earlier attempt to file a Form F2 application on 10 October 2019 (Australian time). That application, had it not ‘bounced’ back, would have been 1 day late.

[22] A reason for the delay is therefore associated with time zones. That is not an exceptional circumstance. Another reason for the delay is the technological issue. That reason, in and of itself, would unlikely be an exceptional circumstance.

[23] But, overlaying all of this time period is the fact that the Applicant arrived back in the UK to discover that her mother was dying. The Applicant’s evidence is that,

“My mum was in hospital for 2 weeks, followed by me having to help with getting the right care team and palliative nurses in place for the remaining weeks of her lift at home.”

[24] The Respondent contends,

“The Applicant has failed to provide evidence relating to her mother’s medical condition which would weigh towards a finding of exceptional circumstances, and had further failed to address why she could not lodge a UD Application between 2 and 8 October 2019, noting that the Applicant’s email to the Commission only states that her mother was in and out of hospital for a two week period immediately following the dismissal.”

[25] If the Applicant arrived back in the UK on 21 September 2019 and her mother was in hospital for 2 weeks that takes the time period up to the week commencing 7 October 2019. The Applicant then says she was assisting putting into place care arrangements for her mother.

[26] The fact that:

- a) those arrangements involved palliative care; and
- b) her mother died on 30 November 2019,

is enough to satisfy me that the cancer was aggressive. Having been discharged from hospital into the care of palliative nurses satisfies me that an assessment was made that no other

³⁰ See: *Shaw v Australia and New Zealand Banking Group Limited* [2015] FWCFB 287 at [12] and *Ozsoy v Monstamac Industries Pty Ltd* [2014] FWCFB 2149 at [31] – [33]. See also *Perry v Rio Tinto Shipping Pty Ltd T/A Rio Tinto Marine* [2016] FWCFB 6963.

medical intervention was an option.

[27] Members of the Commission are ‘bound to act “judicially” in the sense that they are obliged to respect and apply traditional notions of procedural fairness and impartiality.’³¹ However, the Commission must also perform its functions and exercise its powers in a manner that:

- a) is fair and just;
- b) is quick, informal and avoids unnecessary technicalities.³²

[28] In the circumstances of this matter, and having regard to the evidence that the Applicant did submit, it would have been shockingly callous of me to require the Applicant to submit more detailed evidence about the time commitment she made to her dying mother. Likely, and understandably, the Applicant sought to maximise her time with her mum.

[29] This is not a case where an applicant prioritised her pre-arranged overseas holiday in preference to completing her unfair dismissal application.

[30] This is a case where, despite:

- a) what she was going through emotionally; and
- b) despite the care she was providing to her mother (albeit with the assistance of health care professionals),

the Applicant:

- i. attempted to submit her application on time (albeit on the last day),
- ii. failed to factor in the time zone difference,
- iii. experienced technological difficulties filing her application,
- iv. inadequately sent a second email in answer to a failure notification; but,
- v. acted relatively promptly when the Commission advised her that her application was incomplete.³³

[31] In combination, these circumstances (her mother’s ill health, the time zone error and the technology difficulties) cause this case to be out of the ordinary course, unusual, and special.

[32] Therefore, this factor weighs in favour of granting the Applicant a further period to make her application.

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

[33] It is uncontested that the Applicant first became aware of the dismissal on 18 September 2019. The Applicant also concedes that around one week after returning to the UK

³¹ *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78, 83.

³² Section 577 of the FW Act.

³³ Transcript PN92.

she became aware of the 21-day statutory timeframe for filing an unfair dismissal claim.³⁴

[34] Therefore, this factor weighs against granting the Applicant a further period to make her application.

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

[35] Other than file this application the Applicant took no action to dispute the dismissal. However, considering when the dismissal occurred the Applicant's lack of action is explainable.

[36] The lack of action taken by the Applicant to dispute the dismissal, considered in context, makes this a neutral factor when considering whether to grant the Applicant a further period to make her application.

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

[37] The Respondent's submissions (above) do not amount to anything other than the usual prejudice associated with delay. Nothing in its submission constitutes any exceptional prejudice.

[38] The prejudice asserted by the Respondent weighs is a neutral factor in determining whether to grant the Applicant a further period to make her application.

Paragraph 394(3)(e) - The merits of the application

[39] In the matter of *Kornicki v Telstra-Network Technology Group*³⁵ the Commission considered the principles applicable to the extension of time discretion under the former s.170CE(8) of the *Workplace Relations Act 1996* (Cth). In that case the Commission said:

“The merits of the substantive application. If the application has no merit then it would not be unfair to refuse to extend the time period for lodgment. 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.”³⁶

[40] The Commission, as presently constituted, adopts this reasoning of the Full Bench of the former Commission in relation to the consideration of merits.

[41] Accordingly, in conformance with the accepted practice in relation to jurisdictional hearings I do not, in this decision, embark upon a detailed consideration of the substantive case. In a jurisdictional hearing the Commission is not in a position to make findings of fact on contested issues. That is an assignment to be undertaken by the Commission during the substantive hearing.

³⁴ Transcript PN111.

³⁵ Print P3168, 22 July 1997 per Ross VP, Watson SDP and Gay C.

³⁶ Ibid.

[42] The preliminary factual contest between the Applicant and the Respondent is the jurisdictional question whether the termination of the Applicant's employment was a genuine redundancy. If it was then the Applicant is excluded from the unfair dismissal jurisdiction.

[43] Under s.389(1) of the FW Act, a person's dismissal was a case of genuine redundancy if:

- (a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[44] However, under s.389(2) of the FW Act a dismissal is not a case of genuine redundancy if it would have been reasonable in all of the circumstances to redeploy the person within:

- a) the employer's enterprise, or
- b) the enterprise of an associated entity of the employer.

[45] These are not factual disputes that can be resolved at a jurisdictional hearing. However, as the evidence presently stands, it seems more likely than not that the Respondent will be able to establish that the Applicant's position as a part of the joint venture (as opposed to her duties relating to AIMS) was no longer required as a result of the dissolution of the joint venture and that it consulted with her in accordance with its obligations under the *Banking, Finance and Insurance Award 2010*.

[46] However, there is insufficient material before me to form any preliminary view about whether the application of s.389(2) would render the dismissal not a case of genuine redundancy.

[47] If the Applicant can establish, to the satisfaction of the Commission, that it would have been reasonable in all the circumstances to redeploy her (within the Respondent or a related body corporate) then the Respondent's jurisdictional objection would be defeated. It may be difficult to establish this in circumstances where the Applicant was taking 4 months leave of absence. Although the Applicant contends that an agreement had already been reached³⁷ about the same before the termination of her employment came out unexpectedly at 4.45pm on 18 September 2019.³⁸

[48] Even if the jurisdictional objection is defeated that does not mean the dismissal would be held to be unfair. The Commission would then need to consider the application of s.387 of the FW Act. It may be that the Applicant could establish that the termination of her employment was harsh, unjust or unreasonable.

[49] Consequently, for present purposes the Commission, as presently constituted, is satisfied that the Applicant's case is not one that is without merit or lacking in any substance.

³⁷ Transcript PN133.

³⁸ Transcript PN104.

[50] Because the Applicant's case is not without merit or lacking in any substance this factor weighs in favour of granting her a further period to make her application.

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

[51] The parties agreed that this factor is not relevant.

Conclusion

[52] When the s.394(3) factors are considered in totality, I am satisfied that they demonstrate circumstances that are out of the ordinary course, unusual, and special. Consequently, they are exceptional circumstances.

[53] For the reasons set out above, on balance, the Commission is satisfied that there are exceptional circumstances warranting the Applicant being allowed a further period for her application to be made (i.e. being granted an extension of time to lodge her application).

[54] An Order [PR716277] to this effect will be issued with this decision.

[55] Further directions will be issued for the filing and serving of materials in relation to the genuine redundancy jurisdictional objection.



COMMISSIONER

Appearances:

The Applicant for herself.

Mr A Dearden, solicitor at Hall & Wilcox Lawyers, for the Respondent.

Hearing details:

2020.

24 January.

Sydney.

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