DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Duc Trung Hieu Dinh

v

Integrated Packaging (Aust) Pty Ltd
(U2020/12898)

DEPUTY PRESIDENT BEAUMONT PERTH, 30 OCTOBER 2020

Application for an unfair dismissal remedy – jurisdictional objection – application lodged out of time – no exceptional circumstance.

[1] Mr Dinh applied for an unfair dismissal remedy having been dismissed from Integrated Packaging (Aust) Pty Ltd (the **Respondent**) on 30 July 2020. The Respondent objected to the application on the basis that the application was filed outside the 21-day period prescribed by s 394(2) of the *Fair Work Act 2009* (Cth) (the **Act**). This decision deals with that objection.

[2] Mr Dinh concedes that his application was filed 36 days after the statutory requirement. However, he attributes the delay on his having placed reliance on the representation of the Australian Manufacturing Workers' Union (**Union**) that it would assist him. Mr Dinh notes that English is his second language, having immigrated from Vietnam in 1990. A translator was utilised for the hearing.

[3] Section 396 of the Act provides that the Commission must decide four preliminary matters before considering the merits of an unfair dismissal application. One of those matters is whether the application was made within 21-days after the dismissal took effect. The other three preliminary matters are not presently relevant.

[4] It is not contested that Mr Dinh's application was made out of time. However, for Mr Dinh's application to now proceed, it is necessary for him to obtain an extension of time in which to make the application. Section 394(3) provides that the Commission may allow a further period for the application to be made if it is satisfied that there are exceptional circumstances, taking into account the following:

(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.[1]

[5] The issue before me is whether the circumstances are exceptional, and whether it is fair and equitable for an extension to be granted.

Background

The incident leading to dismissal

[6] On 10 July 2020, Mr Dinh started his shift at the Respondent business at 4.00pm. Mr Dinh was a leading hand. In that position he performed several duties including those of (a) senior machine operator; (b) setting up of machinery before the start of a shift; (c) organising of teams working on the machinery; and (d) quality checking the work of the machine operators and senior machine operators.[2]

[7] Mr Dinh explained that a machine operator is responsible for wrapping products with bubble film using a machine as part of a two-person team and placing the wrapped product onto pallets.[3] A senior machine operator, however, undertakes all the duties of a machine operator but operates the wrapping machinery without the assistance of a second person.[4]

[8] At the start of the shift, Mr Dinh said that the machines appeared to be in good working order.[5] However, during the shift, Mr Dinh observed that Machine 26 was not functioning correctly; it was taking more time to perform tasks and had begun to jam.[6] Mr Dinh said that he investigated the cause of the issues, and discovered that the issues were due to a build-up of debris within Machine 26's cutting mechanism, located on that machine's second level. Mr Dinh said that to fix the problem he slid Machine 26's trim guard down by approximately 100mm, exposed the trim, and cut away the debris build-up around the trim.

[9] The Respondent explained that what Mr Dinh had actually done was to remove two bolts that secured a safety guard in place at one end of the guard, which is part of a piece of equipment known as 'Line 26'. This moved the safety guard away from a roller that is a part of the equipment. According to the Respondent, Mr Dinh did not isolate or stop the equipment before removing the bolts and moving the safety guard. The equipment continued to operate without the safety guard in place.

[10] As Mr Dinh was attempting to fix Machine 26, another employee came up to the second level of Machine 26, placed his hand into where the rollers were located, and then Mr Dinh heard a yell. Mr Dinh said that he pressed the emergency stop button on Machine 26, which caused it to stop operating. He thereafter checked the injured employee and went with him to the First Aid Officer.[7]

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[1] *Fair Work Act 2009* (Cth) s 394(3).

[2] Witness Statement of Mr Duc Trung Hieu Dinh (**Dinh Statement**) [13].

[3] Ibid [9].

[4] Ibid [11].

[5] Ibid [23].

[6] Ibid [23].

[7] Ibid [34].

[11] Adding further detail, the Respondent clarified that the other employee, a machine operator, working at Line 26 under the supervision of Mr Dinh, observed Mr Dinh's actions and mirrored Mr Dinh by removing the bolts at the other end of the safety guard, and moving that end of the guard away from the roller. That same employee placed his hand on the roller and subsequently suffered an injury when his hand was pulled in by the roller and caught in the machine. He sustained an injury requiring medical treatment and resulting in an absence from work.

[12] Ms Hopa, the Respondent's Operations Manager, clarified at hearing that the other employee was copying Mr Dinh and was trying to assist him. However, she conceded that the other employee had done this of his own initiative and not on Mr Dinh's instruction. Ms Hopa gave evidence that the other employee involved in the incident had also been dismissed.[8]

[13] Concerning Mr Dinh's ability to converse and read English, Ms Hopa stated she had interacted with Mr Dinh on numerous occasions and had held many conversations with him.[9] She expressed that in her experience Mr Dinh was fluent in English.[10] Furthermore, to the best of her knowledge, Mr Dinh had been issued all work instructions in English, and to the best of her understanding was required to read documents in English including training materials and operating materials, and was required to write in English.[11]

[14] Having conducted an investigation into the matter, and having attended meetings at the Respondent's premises on 14 July 2020 (Mr Dinh was interviewed as part of the investigation),[12] and 29 July 2020 (discussion about the interview and Mr Dinh was asked to sign an incident report),[13] Mr Dinh was dismissed with immediate effect in the meeting held on 30 July 2020. A letter of termination was provided.[14]

Post-dismissal

[15] It was uncontroversial that Mr Dinh was dismissed from his employment and had filed his application for unfair dismissal late. Both parties agreed the application had been lodged 36 days late. The statutory timeframe set by the Act, required the application for unfair dismissal to have been filed by 20 August 2020.

[16] Mr Dinh gave evidence that on 31 July 2020, he sought the services of the Union to assist him with his dismissal. He attended the offices of the Union and met with Mr Alan Lindsey, a lead organiser. He showed Mr Lindsey his letter of termination, informed Mr Lindsey that his dismissal was unfair and Mr Lindsey purportedly informed Mr Dinh that he would be able to help. Mr Lindsey was not called to give evidence. Whilst Mr Dinh said that Mr Lindsey said that he had to apply for an unfair dismissal and that the Union would be able to help with that, at hearing Mr Dinh confirmed that he had not provided instruction to the Union to prepare an unfair dismissal application.

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[8] Witness Statement of Karla Hopa (**Hopa Statement**) [16].

[9] Ibid [6].

[10] Ibid [7].

[11] Ibid.

[12] Dinh Statement [41].

[13] Ibid [48].

[14] Ibid [50].

[17] Evidence showed that on 1 August 2020, Mr Dinh sent to the email address 'alan.lindsey@amwu.asn.au' the investigation incident report. Thereafter, an email dated 5 August 2020, from the address 'Alan.Lindsey@amwu.org.au', shows that 'Alan Lindsey' requested several documents including the letter of investigation, a show cause letter, letter of termination and separation certificate. At hearing, Mr Dinh confirmed that he did not respond to the email of 5 August 2020.

[18] Mr Dinh gave evidence that between 5 August 2020 and 31 August 2020, he was awaiting further updates from the Union, but received no correspondence. At hearing, Mr Dinh's representative acknowledged that Mr Dinh thought this unusual.

[19] On 31 August 2020, Mr Dinh emailed Mr Lindsey requesting an update as to the progress of his request for assistance with the unfair dismissal. Mr Dinh received the following response on that same date:

> As this was a serious safety breach the termination is not unlawful or harsh.
> We have tried to get IPG at two meetings to change their position but this has been unsuccessful.
> Hope all the best in the future and if we hear of any jobs I will advise you.
> All the best
> Alan Lindsey
> Amwu WA

[20] Mr Dinh said that shortly after receiving the abovementioned email dated 31 August 2020, he spoke to his family who said he should find a Vietnamese speaking lawyer to better assist and provide legal advice.[15] On 10 September 2020, Mr Dinh's relatives were said to have found him a lawyer and on 16 September 2020, he met with the same lawyer. A letter of advice was provided on 23 September 2020, and thereafter Mr Dinh instructed the lawyer to file an unfair dismissal application on 25 September 2020.

Dinh's submissions

[21] Essentially, Mr Dinh's argument is that the delay was caused by reliance on the Union who did not file an unfair dismissal application. Mr Dinh submitted that after meeting with the Union representative, he could do no further than to rely on, and trust, the Union to assist him with his unfair dismissal concerns. Mr Dinh noted that immediately after he was told by the Union that they could not assist, he took steps to find alternative assistance to help him with making his application.

The Respondent's submissions

[22] The Respondent acknowledged that Mr Dinh had advanced that the reason for the delay was in effect a representative error. Expanding upon this, the Respondent contended that the only reason for the delay was a misunderstanding between Mr Dinh and the Union as to the filing of an unfair dismissal application. The Respondent contended that Mr Dinh's failure to clearly instruct the Union to lodge an unfair dismissal application on his behalf, and his failure to follow up with the Union about the status of his application, did not warrant the granting of an extension.

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[15] Ibid [74].

[23] Concerning the delay between 31 August 2020 and 25 September 2020, the Respondent emphasised that the time taken to source and meet with a legal representative and thereafter file the unfair dismissal application showed a lack of urgency and disregard for the statutory time-frame.

Consideration

[24] There is discretion to extend the 21-day period set by the Act for making an application for an unfair dismissal remedy. That discretion can be exercised only in exceptional circumstances where the matters specified in paragraphs (a) to (f) of s 394(3) of the Act are taken into account. It follows that an applicant has a considerable onus to convince the Commission to exercise the discretion.[16]

[25] In the decision of *Cheyne Leanne Nulty v Blue Star Group Pty Ltd* (**Nulty**),[17] the Full Bench of Fair Work Australia, the predecessor of this Commission, noted that even when 'exceptional circumstances' are established, there remains a discretion to grant or refuse an extension of time.[18] Whilst *Nulty* considered the general protection provisions of the Act, its reasoning is applicable to s 394(3). The Full Bench observed that what it will come down to is a consideration of whether, given the exceptional circumstances found, it is fair and equitable that time should be extended.

[26] The Act does not define 'exceptional circumstances' per se, but guidance can be gleaned from previous decisions. In *Nulty*, the Full Bench said that in order to be exceptional, the circumstances must be out of the ordinary course, or unusual, or special, or uncommon, although they need not be unique or unprecedented.[19] 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, can be considered exceptional.[20]

[27] In the recent decision of *Periklis Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters*,[21] the Full Bench provided clarification regarding the assessment of exceptional circumstances. While the Full Bench considered s 366(1), the observation remains relevant:

> As we have mentioned, the assessment of whether exceptional circumstances exist requires a consideration of *all* the relevant circumstances. No *one* factor (such as the reason for the delay) need be found to be exceptional in order to enliven the discretion to extend time. This is so because even though no *one* factor may be exceptional, *in combination* with other factors the circumstances may be such as to be regarded as exceptional.[22]

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[16] *Cheyne Leanne Nulty v Blue Star Print Group Pty Ltd* [2010] FWA 6989 [20].

[17] [2011] FWAFB 975.

[18] Ibid [15].

[19] Ibid [13].

[20] Ibid.

[21] [2018] FWCFB 901.

[22] Ibid [38].

[28] At the commencement of the hearing, the parties were referred to s 394(3) of the Act, and the meaning of 'exceptional circumstances'. Both were invited to make any further submissions in relation to the question of whether there were 'exceptional circumstances'.

Reasons for the delay in filing the application

[29] Consideration turns to whether Mr Dinh has provided a credible reason for the whole of the period that his application was delayed.[23] The delay required to be considered is the period beyond the prescribed 21-day period for lodging an application.[24] It does not include the period from the date of the dismissal to the end of the 21-day period. The circumstances from the time of the dismissal, however, are considered in order to determine whether there is a reason for the delay beyond the 21-day period and ultimately whether that reason constitutes exceptional circumstances.[25]

Representational error

[30] Where a representative error is a factor said to have contributed to the delay in making the application, it is accepted that the conduct of the applicant nevertheless is to be examined.[26] In *Patrick Morgan McConnell v A & PM Fornataro T/A Tony's Plumbing Service*,[27] a Full Bench decision that considered an out of time application under s 365 of the Act, but which is relevant for present purposes, it was said by the majority:

> Even if representational error was accepted, we consider that the application of the approach set out in *Clark v Ringwood Private Hospital* remains apposite. We have adopted that approach in so far as it was summarised by a Full Bench of the Australian Industrial Relations Commission in *Davidson v Aboriginal and Islander Child Care Agency* in the following terms:
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> > "(i) 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.
> >
> > (ii) 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.
> >
> > (iii) 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 exits where an applicant gives clear instructions to their representative to lodge an application and the representative fails

[23] *Cheval Properties Pty Ltd v Smithers* (2010) 197 IR 403, 408-9.

[24] *Biliana Henderson v Hoban Recruitment Pty Ltd T/A HOBAN Recruitment* [2016] FWC 5041 [10].

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

[26] *Patrick Morgan McConnell v A & PM Fornataro T/A Tony's Plumbing Service* [2011] FWAFB 466.

[27] [2011] FWAFB 466.

> to carry out those instructions, through no fault of the applicant and despite the applicant's efforts to ensure that the claim is lodged.[28]
>
> (iv) 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."

[31] Having been dismissed, Mr Dinh took immediate steps to obtain assistance from the Union of which he was presumedly a member. However, having met with a Representative of the Union, he did not reply to the Representative's request for further documentation and thereafter, did not further engage with the Union until 31 August 2020. For some four weeks, Mr Dinh did not follow up to ascertain the status of his matter with the Representative.

[32] Regarding Mr Dinh's conduct, his legal representative advanced that Mr Dinh was not sitting on his rights waiting for something to be done. He had relied upon the Union to assist him with the unfair dismissal application. In the circumstances, argued Mr Dinh, there was nothing that he could do but rely on the Union's communication.

[33] This is not the case where there has been an error made by the representative from the Union. The evidence shows that the Union had not been instructed to file an unfair dismissal application on behalf of Mr Dinh. So much was clear from Mr Dinh's evidence. Mr Dinh conceded in cross-examination that no such instruction had been given. Come 20 August 2020, were it the case that the statutory timeframe was to be complied with, Mr Dinh's application for unfair dismissal was due to be filed. Mr Dinh made no enquiry at this time with the Union as to the status of his matter. In fact, it was not until 31 August 2020 that Mr Dinh requested an update (having not responded to the email dated 5 August 2020 from Mr Lindsey).

[34] Mr Dinh claimed he could do no further than to rely on and trust that the Union would assist him. I do not accept that proposition. Mr Dinh was not in a position where he could simply abrogate all responsibility for making the application because of the Union's involvement. He had not instructed the Union to make an unfair dismissal application, and from 20 August 2020 up until 31 August 2020 had made no enquiry about the same. Notwithstanding that by this stage, any application made would be late. An argument that Mr Dinh lacked knowledge or was unaware of his legal rights is insufficient in and of itself to constitute an 'exceptional circumstance' within the meaning of the Act.[29]

[35] Legal assistance or representation by a registered organisation is not required to file an application for a remedy for unfair dismissal and, indeed, parties frequently represent themselves in such matters before the Commission. There was nothing to preclude Mr Dinh from checking the statutory timeframe for the making of the application, or at the very least agitating for a response from Mr Lindsey, prior to the date by which the application was required to be file.

[36] I consider that it was unreasonable for Mr Dinh to simply place trust in the Union to make an unfair dismissal application in the absence of instructions to do just that, and in circumstances where Mr Dinh did not respond to the email dated 5 August 2020, and failed to follow up with the Union notwithstanding having not heard from them for some four weeks.

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[28] Ibid [35].

[29] *Nulty* [14].

[37] Regarding Mr Dinh's evidence that he speaks English as a second language, I note that a language barrier is not a factor that warrants special consideration. The Fair Work Ombudsman website provides a link that allows for the website to be translated into different languages – Vietnamese being one of those languages. The Commission provides a number of means by which an unfair dismissal application can be lodged. These various methods mitigate language barriers experienced by applicants from non-English speaking backgrounds. In addition to electronic lodgement, an unfair dismissal application can also be made by phone: *Fair Work Commission Rules 2013* Rule 9.

[38] I am unconvinced that there was a representative error made by the Union, and even if there was, I consider such error was an insufficient reason to explain the entire period of the delay.

[39] Having been informed by the Union representative that his dismissal was neither unlawful nor harsh, Mr Dinh then proceeded to seek advice from a legal representative. However, it took some 10 days to locate a Vietnamese speaking lawyer and thereafter, six days to meet with that same lawyer. There was no reason provided to explain why it took 10 days to secure a meeting with the lawyer, and thereafter why it took a further nine days after having met with the lawyer to lodge his unfair dismissal application.

[40] Mr Dinh gave evidence of experiencing great stress and anxiety in the period between the dismissal and the lodging of his unfair dismissal application. Inevitably, losing a job may cause distress. I appreciate that Mr Dinh's circumstances are difficult, yet they are not exceptional.

[41] I have considered the delay as the period beyond the 21-day period. However, regard has been had to the circumstances from the date the dismissal took effect. I am not satisfied that Mr Dinh has made out an acceptable or reasonable explanation for the whole period of the delay in lodging his unfair dismissal application. This weighs against a finding that there are exceptional circumstances.

Whether Dinh became aware of the dismissal after it took effect

[42] At all material times from the time Mr Dinh was dismissed until the date the unfair dismissal application was made, Mr Dinh knew he had been dismissed. I consider this to be a neutral factor.

Action taken to dispute the dismissal

[43] Action taken by the employee to contest the dismissal, other than lodging an unfair dismissal application, may favour granting an extension of time.[30] I have considered all submissions and the evidence in this respect. This includes the evidence from Ms Hopa that she had spoken to Mr Lindsey about Mr Dinh's dismissal, but had informed Mr Lindsey that the Respondent was unwilling to alter its position.

[44] The Respondent submitted that the Union took action to dispute Mr Dinh's dismissal, but it was not clear whether Mr Dinh had instructed the Union to do so, or whether the Union

[30] *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, 299-300.

had done this of its own accord. The Respondent stated that on 6 August 2020, the Union asked the Respondent to reconsider Mr Dinh's dismissal. However, the Respondent noted that it informed the Union it would not, because of the serious nature of the reason for dismissal.

[45] Having considered the evidence and submissions of Mr Dinh and the Respondent, there is sufficient evidence to find that Mr Dinh disputed his dismissal. This weighs in favour of finding exceptional circumstances.

Prejudice to the employer

[46] I cannot identify any particular prejudice that the Respondent would accrue if an extension of time were to be granted notwithstanding the Respondent's submissions in this respect. While the Respondent speaks to having promoted an employee to perform the role previously occupied by Mr Dinh, and thereafter backfilling the role of the successful candidate with a new operator employee, I am unpersuaded that the Respondent would suffer prejudice. I consider this to be a neutral factor in the present case.

Merits of the application

[47] The nature of the matter is such that consideration must be given to whether the application was made within the time period required in s 394(2) and whether an extension of time in which to make the application should be provided. These are initial matters to be considered before the merits of the application.

[48] In *Kornicki v Telstra-Network Technology Group*, [31] the Full Bench of the Australian Industrial Relations 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 Full Bench said:

> 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.[32]

[49] Concerning the substantive application, the merits have not been fully tested. This is not out of the ordinary. Evidence on the merits is rarely called at an extension of time hearing. As a result, the Commission 'should not embark on a detailed consideration of the substantive case' for the purpose of determining whether to grant an extension of time to the applicant to lodge his application.[33]

[50] The factual contentions and the merits of the application more generally would need to be scrutinised, including under cross-examination, if an extension of time were granted and the matter proceeded.

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[31] Print P3168, 22 July 1997 per Ross VP, Watson SDP and Gay C.

[32] Ibid.

[33] *Kyvelos v Champion Socks Pty Ltd*, Print T2421 [14]; *Ms Kristen Collier v Saltwater Freshwater Arts Alliance Aboriginal Corporation* [2016] FWC 2899.

[51] However, I observe that by Mr Dinh's own evidence, it appears that he had committed a serious safety breach such that it would constitute a valid reason for dismissal in most circumstances. While issues have been raised such as the training that Mr Dinh received on Machine 26 and safety training in general, and that he did not instruct the other worker to undertake the action he did, it remains the case that Mr Dinh 'slid down the trim guard'. Further, given the other employee sustained an injury, it is apparent that Mr Dinh did not isolate Machine 26 given that he had to press an emergency stop button on hearing the employee yell. Having been promoted to the position of leading hand, and having held a position in the business for some years, in all the circumstances it was entirely reasonable for the Respondent employer to have expected Mr Dinh to have isolated or stopped Machine 26 prior to undertaking the remedial action to fix the fault. His failure to do so, would, on balance, constitute a valid reason for dismissal. Further, it appears from the evidence of Mr Dinh and the Respondent, that procedural fairness was afforded.

[52] In all the circumstances, I am persuaded that Mr Dinh has not established that his substantive application was not without merit. His actions constituted a disregard for his safety and that of others. This consideration, therefore, does not weigh in favour of an extension of time.

Fairness between the person and other persons in a similar position

[53] The Deputy President in *Morphett v Pearcedale Egg Farm*,[34] considered this criterion and said:

> [C]ases of this kind will generally turn on their own facts. However, this consideration is concerned with the importance of an application of consistent principles in cases of this kind, thus ensuring fairness as between the Applicant and other persons in a similar position, and that consideration may relate to matters currently before the Commission or matters which had been previously decided by the Commission.[35]

[54] The Respondent submitted that this was a neutral consideration. Mr Dinh's representative advanced that Mr Dinh was unaware of a case where another person was in a similar position as Mr Dinh. I am satisfied that the issue of fairness as between Mr Dinh and other persons in a similar position is not a relevant consideration in the circumstances of this particular matter and is, therefore, a neutral factor in determining whether to grant an extension of time.

Conclusion

[55] Having considered the matters referred to in paragraphs [24] – [54] above, I am, on balance, not satisfied that there are exceptional circumstances warranting an extension of time for Mr Dinh's application to be made. This remains the case even if I was wrong regarding my evaluation of the merits of the application.

[56] There is no satisfactory explanation for the whole period of the delay in making the application and the other factors are predominantly neutral, with the exception of one that weighs in further. In this respect, the totality of the evidence is insufficient to ground a finding

[34] [2015] FWC 8885.

[35] Ibid [29].

that Mr Dinh's circumstances were out of the ordinary course, unusual, special or uncommon. Furthermore, I do not consider that it would be fair and equitable to grant an extension.

[57] The application for unfair dismissal is therefore filed outside the time allowed by the Act and is dismissed. An Order[36] will be issued with this decision

DEPUTY PRESIDENT

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[36] PR724149.