DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Ms Nicole Maree Arnold

v

Goodstart Early Learning Limited T/A Goodstart Early Learning
(U2020/11961)

DEPUTY PRESIDENT ASBURY BRISBANE, 18 NOVEMBER 2020

Application for an unfair dismissal remedy – Application filed outside time required in s. 394(2) – No exceptional circumstances established – Extension of time to make application refused – Application dismissed.

Overview

[1] This Decision concerns an application by Ms Nicole Maree Arnold (the Applicant) under s. 394 of the *Fair Work Act 2009* (the Act) for an unfair dismissal remedy in respect of her dismissal by Goodstart Early Learning Limited T/A Goodstart Early Learning (the Respondent). The Applicant was employed as a Group Leader with responsibility for the care of children.

[2] In 2020, the Respondent determined that in addition to providing free influenza vaccinations for all employees, it would make that vaccination mandatory and issued a direction to all employees requiring them to be vaccinated by 29 May 2020. The direction provided a process by which employees with medical reasons for not being vaccinated could seek an exemption. The Applicant objected to being vaccinated on grounds which do not appear to include a medical reason or health related issue and was dismissed on the basis that the Respondent concluded that she had refused to comply with a lawful and reasonable direction.

[3] It is not in dispute that the Applicant's employment was terminated on 13 August 2020 and that the termination took effect on that date. The application was filed in the Commission on 4 September 2020. Section 394(2) of the Act provides that an application for an unfair dismissal remedy must be made within 21 days after the dismissal took effect, or within such further period as the Commission allows pursuant to s.394(3). The period of 21 days ended at midnight on 3 September 2020. The application was therefore lodged 1day after that period had elapsed. The Applicant asks the Commission to allow a further period for the application to be made under s.394(3). The Respondent opposes the grant of a further period.

[4] The Applicant had previously filed submissions on 10 September 2020 responding to correspondence from the Chambers of Vice President Catanzariti seeking reasons why an

extension should be granted having regard to the matters in s.394(2) of the Act. The matter was subsequently allocated to me for hearing and I issued Directions requiring the parties to file any additional material they sought to rely on in relation to whether further period should be granted.

[5] A hearing was conducted on 9 October 2020. The Applicant gave evidence in support of a further period being granted. The Respondent did not file any material and relied on information set out in the Form F3 Employer response to the application and documents appended to the Form F3. Permission was granted for the Applicant and Respondent to be represented by lawyers on the basis that I was satisfied that this would enable the matter to be dealt with more efficiently and no issues of fairness arose.

Approach to whether to allow a further period for filing

[6] Section 394(3) allows the Commission to exercise discretion to grant an extension of time, if the Commission is satisfied there are "exceptional circumstances" taking into account the following:

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

[7] In summary, exceptional circumstances are circumstances that are out of the ordinary course, unusual, special or uncommon but the circumstances themselves do not need to be unique nor unprecedented, nor even very rare. Neither do exceptional circumstances need to be unexpected, although this will frequently be the case. Exceptional circumstances can include a single exceptional matter, a combination of exceptional matters or a combination of ordinary matters which, although individually of no particular significance, when taken together are seen as exceptional. [1]

[8] The assessment of whether exceptional circumstances exist requires a consideration of all of the relevant circumstances having regard to the matters in s. 394(3) of the Act, which must be considered individually and collectively. As a Full Bench of the Commission observed in *Stogiannidis v Victorian Frozen Foods Distributors t/as Richmond Oysters* (considering similar provisions in s. 366(2) of the Act):

> [39] … each of the matters needs to be taken into account in assessing whether there are exceptional circumstances. The individual matters might not, viewed in isolation, be particularly significant, so it is necessary to consider the matters collectively and to ask whether collectively the matters disclose exceptional circumstances. The absence of any explanation for any part of the delay, will usually weigh against an applicant in such an assessment. Similarly a credible explanation for the entirety of the delay, will usually weigh in the applicant's favour, though, as we mention later, it is a question of degree and insight. However the ultimate conclusion as to the existence of exceptional circumstances will turn on a consideration of all of the relevant matters and the assignment of appropriate weight to each.

> [40] To the extent that the proposition at [29] of the Decision is to be understood as suggesting that an applicant seeking an extension of time 'needs to provide a credible explanation for the entire period', it is, with respect, erroneous. It is not a pre-condition to the grant of an extension of time that the applicant provide a credible explanation for the entire period of the delay. Indeed, depending on the circumstances, an extension of time may be granted where the application has not provided any explanation for any part of the delay."[2]

[9] The delay required to be considered is the period beyond the prescribed 21 day period for lodging an application and does not include the period from the date of the dismissal to the end of the 21 day period.[3] However, the circumstances from the time of the dismissal must also be considered and ultimately a decision made as to whether those circumstances are exceptional.[4] I turn now to consider each of the matters in s.394(3) of the Act in the context of the present application.

Consideration

Reasons for the delay – s.394(3)(a)

[10] For the application in the present case to have been filed within time, it was required to be filed by midnight on 3 September 2020. It was filed at 3.37 pm on 4 September 2020, one day outside the required time. The reason given in the Form F2 Application for the late filing is that the Applicant had difficulty seeking legal assistance due to COVID-19 and law firms not responding to requests for assistance. In a covering email sent with the application the following statement is made:

> "The reason why this application has been filed 1 day out of time is due to the applicant having difficulties with law firms not responding to requests for assistance as a result of COVID-19 business closures and restrictions. This has made it difficult for the applicant to engage a legal representative until today."

[11] On 7 September 2020, the Associate to Vice President Catanzariti sent correspondence to the Applicant advising that the application had been received outside of the 21 day time frame allowed under s. 394(2) of the Act and that the Commission may extend the time period for lodging an unfair dismissal application only if satisfied that there are exceptional circumstances for not lodging the application in time. The correspondence also set out the matters the Commission is required to consider in deciding whether to grant a further period under s.394(3) of the Act.

[12] On 10 September 2020, the Applicant's Representative responded to Vice President Catanzariti's correspondence by filing submissions that were relied on by the Applicant's Representative at the hearing in relation to whether the Applicant should be granted a further period in which to make her unfair dismissal application. The Applicant also gave oral evidence at the hearing. In the submissions the Applicant referred to the following matters to explain the delay and contended that they are exceptional circumstances:

> "The Applicant contacted 5 other law firms seeking legal assistance once she became aware of the dismissal…Each of the 5 other law firms caused significant delay and were unable to assist the Applicant in time.
>
> We are living in the most exceptional circumstances and unprecedented situation of our lifetime and possibly in the history of Australia due to the COVID-19 pandemic. Lawyers are for the most part operating from their homes and operating at significantly reduced capacity. This is causing excessive

> delays to respond to requests for legal advice. This is the reason why the Applicant faced significant delays in getting access to a lawyer to assist her with her unfair dismissal application."

[13] The Applicant's outline of submissions filed on 10 September 2020 detail steps taken by the Applicant in her attempts to seek legal advice and as the Applicant did not file a witness statement (as was required by the Directions) she was permitted to adopt the submissions as her evidence. The Applicant states that on 13 August 2020, the day of dismissal, the Applicant contacted the principal lawyer of the Firm Advocate Me, via Facebook Messenger. The message, tendered by the Applicant was in the following terms:

> "…my name is Nikki I have been fighting against my employer Goodstart Early Learning since April of this year with mandatory vaccinations, we have kept them at bay with notices but today they fired me because I would not consent to being vaccinated, I have seen and listened to your video, love your work and want to get involved. Direct us in the right way please as to where to go now as I wish to take this further but need help and advice as they don't care what they do to us."

[14] The response to this email was an invitation to the Applicant to join a class action and was not received by the Applicant until 25 August. The Applicant contended that this "knocked out 12 days" from the 21 day period. The Applicant also provided details with varying degrees of particularity, of other law firms from which she had sought assistance. The Applicant said that she contacted a second firm on 17 August to connect with a law group of six lawyers. On 21 August a representative of the firm advised the Applicant that all of these lawyers were "too busy with other matters to help". On 22 August the Applicant contacted a third law firm and on 24 August 2020 was advised that the firm was "too busy to help for 3 months". The Applicant contacted a fourth law firm on 25 August and was informed the firm was unable to assist. On 28 August 2020, the Applicant contacted a fifth law firm seeking assistance and was advised no one was available for 3 months. The Applicant also states that on 1 September 2020, she was informed by a lawyer from the third firm that she had contacted that a barrister with whom he had scheduled a meeting on 3 September was no longer able to meet with him to discuss the Applicant's matter.

[15] On 4 September 2020, the Applicant consulted with Mr Nathan Buckley of G&B Lawyers. Mr Buckley filed the Applicant' unfair dismissal application that day, being one day outside of the time it was required to be filed pursuant to s.394(2). It was submitted that had the Applicant contacted Mr Buckley in the first instance her application would have been made within the required time. It was also submitted that the current COVID-19 Pandemic has made access to legal services very difficult for some people.

[16] I do not accept that the Applicant has advanced a reasonable explanation for the delay in filing her application. Firstly, the Applicant's explanation for the delay is predicated on the erroneous proposition that it was necessary that she engage a law firm to assist her with an unfair dismissal application and that her inability to obtain assistance constitutes an exceptional circumstance. Contrary to the Applicant's submission, representation by a lawyer or a paid agent in an unfair dismissal application is more of an exception than a rule and is subject to permission being granted by the Commission. The Commission's discretion to grant permission is confined and subject to the considerations in s. 596 of the Act.

[17] There is nothing out of the ordinary course, unusual, special or uncommon about an unrepresented person making an unfair dismissal application. Indeed, the Object of Part 3 – 2 of the Act which deals with unfair dismissal includes the establishment of procedures that are quick, flexible and informal. It is also the case that dismissed persons with language and

literacy skills that are of a lesser standard to those of the Applicant, manage to file an unfair dismissal application in the required form, within the time frame provided for in s. 394(2). The Form F2 Application is structured in a question and answer format specifically to assist such persons.

[18] The Applicant is not a person who has obvious literacy issues. In this regard, I note that the Applicant managed to send lengthy email correspondence to her employer prior to her dismissal which was appended to the Form F3 Response filed by the Respondent. Although some of the correspondence is bizarre, it does not evidence any issues with respect to literacy. For example, in that correspondence, the Applicant refers to herself in the following terms:

> "I am Nicole Maree Arnold, in that I am Nicole-Maree of the blood of the House of Arnold, relying upon the King James Version of the Holy Bible, Romans chapter 2 verse 11, which states: "For there is no partiality with God. I am not the Government created entity or person, nor am I, a ward of the State. The Book of James Chapter 5 Verse 12 clearly states; "But above all my brethren, do not swear, either by heaven or by earth or with any other oath let your Yay be Yay and your Nay be Nay". Therefore I shall not be compelled to swear oaths, my word is my bond.
>
> I am a woman, I am a non-combatant, non-belligerent civilian. I hold no title or Military Rank, including but not limited to: Miss, Ms or Mrs."

[19] In justification of her non-consent to being vaccinated, or to being compelled to vaccinate, the Applicant cited: The Forced Labour Convention, 1930, No. 29, Article 2; the Nuremberg Principles No III and IV being a Convention which Australia has Signed and Ratified; and/or the Commonwealth of Australia Constitution Act 1901, Commonwealth, Section 51, XXIIIA. The Applicant also cited the Universal Declaration of Human Rights, High Court judgements, articles found in medical journals and definitions drawn from a range of dictionaries and other sources in support of her position.

[20] In short, the Applicant was not affected by any special disadvantage that made legal representation necessary or desirable so that her inability to obtain legal representation is a matter that is capable of being considered to be an exceptional circumstance. If the Applicant could send emails of the kind she sent to the Respondent and conduct the necessary research to do so, there is no reason why she could not have applied herself to researching remedies for unfair dismissal and making the necessary application within the required time.

[21] Secondly, the attempts to obtain legal representation relied on by the Applicant occurred before 3 September 2020 when the Applicant was required to file her application. While the period prior to 3 September 2020 is relevant, the focus is on the period after the application was required to be filed. On the Applicant's own evidence, she was informed on Monday 1 September 2020, that a lawyer from the third firm that she had contacted had not been able to arrange a meeting with a barrister to discuss her case which had been mooted for 3 September 2020. Leaving aside the fact that it was unnecessary for a lawyer to be involved in filing the application, much less a barrister, on the Applicant's evidence this is the same lawyer the Applicant contacted on 22 August and whom the Applicant states informed her on that date, that his firm would be unable to assist her for a period of three months. On her own evidence, the Applicant can have had no basis to wait for that advice.

[22] In any event, that option was exhausted on Monday 1 September 2020 and the Applicant did not file her application until Thursday 4 September 2020. The Applicant provides no explanation for the delay between Wednesday 3 and Thursday 4 September other than that Thursday 4 September was the date upon which she consulted her current lawyer Mr

Buckley. Thirdly, the Applicant's first attempt to contact a lawyer was directed to a lawyer that was obviously involved in generalised campaign on social media and a class action and indicated support for the action being organised rather than seeking a remedy in relation to the Applicant's dismissal. Further, this did not cost the Applicant twelve days while awaiting a response as is asserted in submissions on her behalf. The Applicant's own evidence, in the form of the submission she adopted in the hearing in relation to whether a further period to make her application should be granted, indicates that the Applicant did not await a response from Advocate Me Lawyers but instead sought further assistance from another firm on 17 August 2020.

[23] Fourthly, there is no evidence that there is anything exceptional about the fact that a number of law firms indicated that they were not able to represent the Applicant. None of the firms cited COVID-19 as the reason for this and it is at least equally probable that the law firms from which the Applicant sought assistance chose not to align themselves with her views or declined to represent her for other reasons.

[24] The explanation for the delay provided by the Applicant is not reasonable and this is a matter that weighs against the grant of a further period in which to make the application.

Whether the person first became aware of the dismissal after it had taken effect – s.394(3)(b)

[25] It is not in dispute that the Applicant became aware of the dismissal on the date that it took effect – 13 August 2020 – as evidenced by the Applicant's Form F2 and submissions. Accordingly, the Applicant had the benefit of the full 21 days from when her dismissal actually took effect to make her application. In this regard the matter does not weigh in favour of the grant of a further period in which to make the application. I have determined to treat this as a neutral consideration.

Any action taken by the person to dispute the dismissal – s.394(3)(c)

[26] The Applicant sent lengthy correspondence to the Respondent before she was dismissed, taking issue with the lawfulness and reasonableness of the Respondent's vaccination policy on numerous grounds I have referred to above. There is also evidence (in correspondence appended to the Respondent's Form F3 Response) that at the end of the meeting where the Applicant was informed of her dismissal, the Applicant's support person said: "Righto see you in court." There is no evidence that the Applicant took any action to dispute her dismissal after it took effect, other than seeking legal advice and later filing an unfair dismissal application. However, the Applicant certainly placed the Respondent on notice that she vehemently disputed its vaccination policy and the Respondent should reasonably have known that the Applicant's dismissal would not be the end of her dispute.

[27] Given that the delay in filing the application is one day, I have treated this consideration as a neutral factor on the basis that this is not a case where the Applicant emerged from left field after a lengthy period and sought to dispute a dismissal and the events leading to the dismissal, which had hitherto not been disputed.

Prejudice to the employer (including prejudice caused by the delay) – s.394(3)(d)

[28] I cannot identify any prejudice that would accrue to the Respondent, other than the usual prejudice of being required to defend the application if I decided to allow a further

period within which the application could be made. The delay is not extensive so that there would be any difficulty involving recollection of events or availability of relevant witnesses. By itself the absence of prejudice would not warrant a conclusion that there are exceptional circumstances nor provide a proper foundation to grant an extension of time under s.394(3) of the Act. However, the absence of prejudice does favour the Applicant, and weighs in favour of a further period being granted. I also consider that this consideration is neutral.

The merits of the application – s.394(3)(e)

[29] In the matter of *Kornicki v Telstra-Network Technology Group*[5] the Commission considered the principles applicable to the exercise of the discretion to extend time under s.170CE(8) of the *Workplace Relations Act 1996* (Cth). In that case the Commission 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."[6]

[30] The Applicant's submission address merit in some detail. A major feature of those submissions is the proposition that reasonable adjustments should have been made to accommodate the Applicant's refusal to be vaccinated. It is strongly arguable that the case law cited in the Applicant's submissions is irrelevant to the present case, on the basis that it deals with accommodation in relation to incapacity based on mental or physical disability. In the present case the Applicant did not refuse to be vaccinated for any apparent medical reason. It is also the case that the Respondent's policy in relation to mandatory vaccination provides for a process whereby employees who have medical grounds for refusing to be vaccinated can seek accommodation in relation to their circumstances. The Applicant does not appear to have availed herself of this process as part of her refusal to consent to vaccination and it is arguable that she cannot claim that reasonable accommodation should have been made when she did not seek such accommodation on reasonable grounds.

[31] Accordingly, I do not consider that the merits of the Applicant's case are so apparent that they should be weighed in favour of the grant of a further period in which to make her application for an unfair dismissal remedy. In reaching this conclusion I have considered the submissions filed on behalf of the Applicant and adopted by her as her evidence, and the material filed by the Respondent in its Form F3 Response to the application which includes its vaccination policy and the Applicant's responses to the attempts of the Respondent to secure her compliance with that policy.

[32] While I do not go so far as to say that the Applicant's case lacks merit, it is my view that it is at least equally arguable that the Respondent's policy requiring mandatory vaccination is lawful and reasonable in the context of its operations which principally involve the care of children, including children who are too young to be vaccinated or unable to be vaccinated for a valid health reason. *Prima facie* the Respondent's policy is necessary to ensure that it meets its duty of care with respect to the children in its care, while balancing the needs of its employees who may have reasonable grounds to refuse to be vaccinated involving the circumstances of their health and/or medical conditions. It is also equally arguable that the Applicant has unreasonably refused to comply with a lawful and reasonable direction which is necessary for her to comply with the inherent requirements of her position, which involves the provision of care to young children and infants.

[33] In all of the circumstances, I consider that merit is at best, a neutral consideration in deciding whether a further period should be granted for the Applicant to make her application for an unfair dismissal remedy

Fairness as between the person and other persons in a similar position – s.394(3)(f)

[34] It is not clear whether this criteria requires consideration by the Commission of the position of other persons dismissed by the same employer or whether it also contemplates that the Commission consider the position of other persons generally who have sought further periods in which to make applications on similar grounds. The first approach may be relevant in cases where a number of employees are dismissed at the same time or by the same employer and some of those employees are granted a further period and some are not. The second approach may require comparison of the circumstances of a particular applicant whose case is being considered by a member of the Commission to be compared with those of applicants in other cases considered by other members of the Commission where a further period is sought on the same or similar grounds.

[35] The parties have not placed any evidence before me in relation to other employees of the Respondent who are in the same position as the Applicant nor any other case involving employees of other employers. Accordingly, this matter is a neutral consideration.

Conclusion

[36] Having regard to the matters I am required to take into account under s. 394(3) of the Act, I am not satisfied that there are exceptional circumstances in this case. This is so whether the various circumstances are considered individually or together. The application for a further period is refused and the Applicant's unfair dismissal application must therefore be dismissed. An Order to that effect will issue with this Decision.

DEPUTY PRESIDENT

Appearances:

Mr N Buckley of G&B Lawyers on behalf of the Applicant.

Mr M Procter of Franklin Athanasellis Cullen on behalf of the Respondent.

Hearing details:

9 October 2020.

By telephone.

Printed by authority of the Commonwealth Government Printer

<PR724502>

---

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

[2] *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* [2018] FWCFB 901 at [39] – [40].

[3] *Stoginniadis* op. cit. at [22].

[4] *Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank* [2015] FWCFB 287.

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

[6] Ibid.