



REASONS FOR DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Elizabeth Bell

v

Gippsland Times

(U2021/8475)

COMMISSIONER O'NEILL

MELBOURNE, 19 OCTOBER 2021

Application for an unfair dismissal remedy – extension of time.

[1] These are edited reasons of my decision delivered *ex tempore* and recorded in transcript on 18 October 2021. Ms Bell was employed by Gippsland Times as a journalist. She was employed from March 2017 until she resigned on 26 August 2021. Ms Bell contends that she was forced to resign.

[2] On 22 September 2021, Ms Bell applied for an unfair dismissal remedy. This was 6 days after the expiry of the 21-day period allowed for unfair dismissal remedy applications to be made.¹ Ms Bell's application should have been made by 16 September 2021.

[3] The question is whether additional time should be allowed for Ms Bell to make her application to the Commission.

Extension of time

[4] Additional time can be allowed under section 394(3) of the *Fair Work Act 2009* (Cth) (Act) if there are exceptional circumstances. These are circumstances that are “out of the ordinary course, or unusual, or special, or uncommon” but that “need not be unique, or unprecedented, or very rare”.²

[5] In deciding whether I am satisfied that there are exceptional circumstances, I must consider:

- the reason for the delay,
- whether the person first became aware of the dismissal after it had taken effect,
- any action taken by the person to dispute the dismissal,

¹ *Fair Work Act 2009* (Cth), s.394(2).

² *Nulty v Blue Star Group* (2011) 203 IR 1 at [13].

- prejudice to the employer (including prejudice caused by the delay),
- the merits of the application, and
- fairness as between the person and other persons in a similar position.

Relevant factors

Reason for delay

[6] The Act does not specify what reason for delay might justify granting an extension however decisions of the Commission have referred to an acceptable or reasonable explanation. The absence of any explanation for any part of the delay will usually weigh against an applicant in the assessment of whether there are exceptional circumstances, and a credible explanation for the entirety of the delay will usually weigh in the applicant's favour, however all of the circumstances must be considered.³

[7] Ms Bell says that she lodged her application late because after her employment ended, she moved back to her home in Mt Eliza, and because of the restrictions on non-essential travel in lockdown she was unable to print out her application form. She was also preoccupied with moving, trying to find work, dealing with lockdown and travel difficulties, and preparing for an upcoming knee operation. No detailed evidence was provided to explain how the difficulties she encountered precluded her from lodging her application at any time during the 6-day delay. She also initially felt that she didn't have a strong case, but subsequently thought it was worthwhile making an application.

[8] Whilst I accept that Ms Bell was preoccupied and encountered difficulties following the end of her employment, there was no acceptable explanation for the 6-day delay in making her application. There is nothing exceptional about these circumstances, which many experience after being dismissed from their employment. Ms Bell was able to email her resignation to her employer, and yet says that she was unable to lodge her application because she could not print it out. Ms Bell sought information from various online channels, including the Commission's website, which includes that applications can be lodged by telephone or email.

[9] I am not satisfied that Ms Bell has provided an acceptable explanation for the delay and that is a matter that weighs against granting an extension of time.

Whether the person first became aware of the dismissal after it had taken effect

[10] Ms Bell's act in handing in her resignation, ended her employment. This consideration is not relevant.

Any action taken by the person to dispute the dismissal

³ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFB 901 at [39].

[11] Ms Bell sought guidance on unfair dismissal from various online channels but did not take any action to dispute her dismissal other than lodging her application for unfair dismissal. This is a neutral consideration.

Prejudice to the employer (including prejudice caused by the delay)

[12] There is no evidence of any prejudice to Gippsland Times if Ms Bell is allowed added time to bring her claim. In this case, this is a neutral consideration. The Respondent did not participate in the hearing.

Merits of the application

[13] On the limited information before the Commission, the merits of Ms Bell's application are not strong. She resigned from her employment and would need to establish that she had no choice but to do so. Her reason for resigning was that the company had unreasonably failed to fix problems she was experiencing in connecting to the Respondent's email server, and that this meant she was unable to perform her job adequately. Ms Bell believes that her issues weren't fixed because she had made a bullying complaint some years ago, and believed she was ostracised since doing so. Ms Bell did not suggest that the decision to resign was forced upon her. On the limited material, this is a consideration that weighs against the granting of additional time.

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

[14] In this case, this is a neutral consideration.

Conclusion

[15] In summary, the various factors that I need to consider are either neutral or against providing additional time to Ms Bell. On balance, considering the factors separately and collectively, I am not satisfied that there are exceptional circumstances in this case.

[16] As discussed above, I can only allow additional time for Ms Bell to make her application if there are exceptional circumstances. As there are none, no additional time can be allowed. This means that Ms Bell is not entitled to apply for an unfair dismissal remedy.

[17] The application is dismissed. An order to that effect will be issued separately.



COMMISSIONER

[2021] FWC 6155

Appearances:

E Bell, Applicant.

Hearing details:

2021

Melbourne (by video)

October 18.

Printed by authority of the Commonwealth Government Printer

<PR735021>