



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Christian Eaves**

v

**Orkin Australia Pty Ltd**  
(U2023/1174)

COMMISSIONER WILSON

MELBOURNE, 9 MAY 2023

*Application for an unfair dismissal remedy – s.399A application – s.587 application – Applicant sufficiently compliant with Directions of the Commission – s.399A application dismissed – s.587 application dismissed*

[1] On 14 February 2023, Mr Christian Eaves (the Applicant) made an application for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (the Act) against Orkin Australia Pty Ltd (Orkin or the Respondent). The application was filed by a paid agent, Just Relations Consultants on behalf of the Applicant.

[2] The parties participated in conciliation on 15 March 2023 but the issues in dispute could not be resolved. Consistent with the Commission’s usual practice on these matters, the matter was referred to me for hearing and determination.

[3] Mr Eaves was directed to file an outline of argument, any witness statements and other documentary material he wished to rely on by 4.00PM AEST Wednesday 12 April 2023 however, no material was received from Mr Eaves by this date. On 6 April 2023, prior to the Applicant’s filing date, his representative filed a notice with the Fair Work Commission (the Commission) advising they ceased to act for Mr Eaves.

[4] On Thursday 13 April 2023 my Chambers wrote to Mr Eaves advising that his application was at risk of being listed for non-compliance and directed that he file his materials that day.

[5] The same day Mr Eaves responded to my Chambers advising that since his representative had ceased to act he did not know how to prepare his case. As a result, I considered it appropriate to issue Amended Directions to the parties and to vacate the hearing date following Mr Eaves notification of the reasons for the non-compliance with the Commission’s Directions. On Friday 14 April 2023 Amended Directions were issued to parties. The Amended Directions required the Applicant to file by 4.00PM Monday 24 April 2023. I advised the parties that once I was satisfied the Applicant had filed by the amended filing date, I would then reset the hearing date.

**[6]** On 24 April 2023 Mr Eaves filed materials to my Chambers comprising of an email with a link to an audio recording, and eleven attachments. The attachments included Mr Eaves' account of the incident in January 2023, a document providing Mr Eaves account of incidents in March 2022, August 2022 and December 2022, a document providing Mr Eaves arguments as to why the dismissal was unfair, text message and email exchanges, an instruction manual IND35, a copy of a letter to attend a disciplinary meeting, the termination letter, and transcript of a conversation. A second email was also sent by Mr Eaves concerning his contact with Victoria Police. Mr Eaves failed to provide either communication to the Respondent despite earlier being reminded by my Associate that he must copy the Respondent into any correspondence to my Chambers.

**[7]** As the Respondent had not been copied into the Applicant's emails to the Commission on 24 April 2023, its National Human Resources Manager wrote to my Chambers on 26 April 2023 asking if Mr Eaves unfair dismissal application would be dismissed for his failure to file.

**[8]** On 28 April 2023 my Chambers forwarded both emails from the Mr Eaves to the Respondent and in doing so again reminded Mr Eaves that he must copy the Respondent into any correspondence to my Chambers. In forwarding this correspondence I also amended the Respondent's filing date to 4PM AEST on Friday 12 May 2023 and reset the hearing to 10.00AM AEST on Wednesday 17 May 2023.

**[9]** On 1 May 2023, the Respondent filed applications under ss.399A and 587 of the Act to have Mr Eaves unfair dismissal application dismissed. In response to these applications I indicated to the parties that on the material I had seen so far it may be that the Applicant can be found to be sufficiently compliant however set the matter down for a Mention Hearing on Monday 8 May 2023 to determine the Respondent's applications.

**[10]** Following the notification of the Mention Hearing, Mr Eaves sent a series of correspondence to my Chambers. The chronology of those emails is set out below:

| Date/Time         | Subject  |
|-------------------|--|
| 1 May 2023 7.43PM | That he does not know how to provide the required documents and attaching two further documents; a Pest Control Licence letter and a scan of his pest control licence. |
| 1 May 2023 9.38PM | An Outline of Argument   |
| 1 May 2023 9.54PM | An updated Outline of Argument   |
| 2 May 2023 3.30AM | A further updated Outline of Argument  |
| 2 May 2023 4.05AM | Requesting monies owed and attaching two further documents; payslip for 25/1/23-31/1/23 and 1 page of Certificate III urban pest management training agreement         |

**[11]** In light of the correspondence received from Mr Eaves, I caused correspondence to be sent to the Respondent to ask if they pressed their dismissal applications. They responded in the affirmative the following day.

[12] A further series of correspondence was received from Mr Eaves following this. The chronology is again set out below:

| Date/Time         | Subject  |
|-------------------|--|
| 2 May 2023 1.29PM | Email that he intends to continue his case   |
| 2 May 2023 1.31PM | Document List  |
| 2 May 2023 1.51PM | Email stating that he had until 12 May 2023 to provide his material so his submissions are not overdue               |
| 2 May 2023 1.55PM | Email quoting "The Respondent is to file in the FWC, and serve on the Applicant, by 4PM AEST on Friday 12 May 2023:" |
| 2 May 2023 2.15PM | Email asking the cut-off date for submitting evidence  |

[13] In response to the correspondence concerning the filing dates, my Chambers clarified to parties that the Applicants material was to be filed by 4.00PM on 24 April 2023 and the Respondent has until 4.00PM 12 May 2023 to file and serve its material. It also set out that the Respondents dismissal applications were to be heard in a Mention hearing before me on Monday 8 May 2023 and if the unfair dismissal application remained on foot after the Mention Hearing, the parties were directed to participate in a Member Assisted conciliation prior to the hearing date. If settlement is not reached at the conciliation, the matter will proceed to determinative conference/hearing before me on Wednesday 17 May 2023.

[14] Another series of correspondence was received from the Applicant over 2 and 3 May 2023 set out below:

| Date/Time         | Subject  |
|-------------------|--|
| 2 May 2023 5.00PM | Email asking if on appeal can you introduce new information        |
| 2 May 2023 5.01PM | Second email asking if on appeal can you introduce new information |
| 2 May 2023 9.04PM | Email regarding the Worksafe investigation outcome                 |
| 2 May 2023 9.23PM | Email concerning his case and Mention on 8 May 2023                |
| 3 May 2023 3.35AM | Email concerning electrical work                                   |
| 3 May 2023 3.50AM | Email regarding the IND35 instruction manual                       |

[15] Mr Eaves was dismissed on 27 January 2023, having worked for Orkin for slightly less than a year. His job involved visiting client's premises for servicing pest control equipment. On 20 January 2023 Orkin received a complaint from one of its clients about Mr Eaves' conduct toward one of its employees, a 16 year old girl whom he had hugged when she was at work. Mr Eaves described his contact with the person as a "thank you hug" or consensual "victory hug" following assistance Mr Eaves says she gave him in resolving a disagreement he was having with a male colleague about a particular work element that Mr Eaves conjectures as "forcing" him to "illegally install electrical equipment". Orkin views this contact with an

employee of one of its clients as sexual harassment and serious misconduct. After putting allegations to Mr Eaves on 24 January 2023 it dismissed him on 27 January 2023.

[16] A hearing in relation to Orkin’s dismissal applications was convened by me on Monday 8 May 2023, at which Mr Simon Richards, Orkin’s Managing Director appeared, with the company’s National Human Resources Manager, Ms Rachel Thomson. Mr Eaves appeared on his own account.

[17] Each party had the opportunity to make submissions as to their position on the applications.

[18] In its oral and written submissions Orkin argued Mr Eaves had repeatedly failed to follow the Commission’s directions, including by not forwarding material to it and that even on his version of events the conduct for which he had been dismissed was admitted. It also argued that an ongoing police investigation supported findings of misconduct by the Applicant. The Applicant argued that his lack of compliance with the Commission’s direction was due to his lack of knowledge of the Commission’s procedure, that he was now self-represented and that his lack of computer familiarity meant he had difficulties accessing important material from the Commission.

[19] Through his various submissions Mr Eaves has submitted that his conduct – involving contact with a young staff member of Orkin’s client – was consensual and not capable of being characterised as misconduct, and that the police investigation had not progressed because of these matters.

[20] In considering dismissal applications made by the Respondent, I am required to consider the criteria in ss.399A and 587, which I now do.

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

**“399A Dismissing applications**

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

(a) failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or

(b) failed to comply with a direction or order of the FWC relating to the application; or

(c) failed to discontinue the application after a settlement agreement has been concluded.

....

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

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

[22] Section 587 of the Act provides as follows:

**“587 Dismissing applications**

(1) Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if:

- (a) the application is not made in accordance with this Act; or
- (b) the application is frivolous or vexatious; or
- (c) the application has no reasonable prospects of success.

Note: For another power of the FWC to dismiss an application for a remedy for unfair dismissal made under Division 5 of Part 3 2, see section 399A.

(2) Despite paragraphs (1)(b) and (c), the FWC must not dismiss an application under section 365 or 773 on the ground that the application:

- (a) is frivolous or vexatious; or
- (b) has no reasonable prospects of success.

(3) The FWC may dismiss an application:

- (a) on its own initiative; or
- (b) on application.”

[23] The words ‘without limiting when the FWC may dismiss an application’ in s.587(1) of the Act make clear that the jurisdiction of the Commission to dismiss an application is not restricted to the circumstances set out in ss.587(1)(a), (b) and (c).

[24] The Full Bench in *Sayer v Melsteel Pty Ltd*<sup>1</sup> held that s.587(1) provides for the dismissal of a matter where the applicant has failed to prosecute their case without examining the merits. Further, clarification was provided by the Full Bench in *Viavattene v Health Care Australia*<sup>2</sup> in which it was stated at [39]:

“There is no legislative or common law requirement pursuant to which the Commission must persevere with an application in circumstances where the applicant’s conduct clearly demonstrates an unwillingness to participate in proceedings commenced at his or her initiative. It is important to bear in mind that there is respondent to the application for relief and the objects of Part 3-2 (Unfair Dismissal) provide that the unfair dismissal provisions of the FW Act are intended ‘to ensure that a ‘fair go all round is accorded to both the employer and employee concerned’ (s.381).”

[25] While the Applicant failed to file his material by the first filing date of 12 April 2023, I am satisfied this situation was contributed to at least in part through the ceasing to act of his representative, as well as his lack of familiarity with the Commission's processes and expectations. I considered at the time for these reasons that it was appropriate to grant the initial extension of time to the Applicant for the filing of his material owing to his representative ceasing to Act prior to his initial filing date.

[26] Mr Eaves filed material by the amended filing date of 24 April 2023, although this material did not take the form of an outline of submissions or witness statement. Nonetheless the material sets out the gravamen of the Applicant's case and provides adequate information for the Respondent to provide its defence of the application.

[27] Correspondence from Orkin on 1 May 2023 drew attention to the fact that Mr Eaves had not provided his submissions to them and had not provided a "genuine 'outline of argument'", a "signed and dated statement of evidence for any witness to be called" and a document list, all as directed. The same correspondence sought the dismissal of the originating decision pursuant to s.399A and s.587. In response to Orkin's correspondence the parties were advised the same day that the applications would be heard by me on 8 May 2023.

[28] Mr Eaves then filed numerous other documents and assertions, all very short, between 2 and 8 May 2023.

[29] The relevant sections of the Act are set out above.

[30] Determination of an application to be dismissed pursuant to s.399A invites an exercise of discretion on the part of the Commission. Such discretion may be exercised only upon application from a former employer and if satisfied that the "applicant has unreasonably ... failed to comply with a direction or order of the FWC relating to the application".

[31] While I am satisfied there is a valid application before me made by Orkin, I am not satisfied it can be found that Mr Eaves unreasonably failed to comply with directions given to him.

[32] In the performance of its functions and exercise of its powers the Commission is required to do so in a manner that "is fair and just" and "is quick, informal and avoids unnecessary technicalities" (s.577). It must also take into account in relation to an unfair dismissal that an object of Part 3 – 2 is that the procedures and remedies therein are "intended to ensure that a 'fair go all round' is accorded to both the employer and employee concerned" (s.381(2)).

[33] There is little doubt that Mr Eaves attempted to set out in his 24 April 2023 filings what he thought were the pertinent elements of his claim and the things that would support it. I also take into account his explanation that he was unfamiliar with the Commission's procedures and had difficulty accessing PDF documents that contained critical information about his obligations to advance his case. I accept that his filings were not in the expected form and did not include a witness statement identified as such. He has not consistently provided his material to the Respondent. In these regards though Mr Eaves is not an orphan amongst other unfair dismissal applicants; in my experience perhaps a quarter to a third of all unrepresented

applicants who proceed to arbitration do not provide strictly complying filings. Even sophisticated parties with corporate legal representation do not always automatically serve their documents on the other side. Mr Eaves' documents and service of them on the Respondent may not conform with what may be presented by a represented party, however to reject them on that basis would be me failing to accord him the opportunity provided by the Part's Objects and would be failing to perform my functions in manner that is quick, informal and avoiding unnecessary technicalities.

[34] It also cannot be said from the materials Mr Eaves has filed that Orkin lacks an understanding of the matters he may put forward in arbitration. They may think his arguments lack merit, are not supported by evidence, are simply not on point, or are offensive however those things are at this stage of the proceedings matters for conjecture.

[35] Orkin submits about its s.587 application that Mr Eaves' originating application is frivolous or vexatious and/or has no reasonable prospects of success.

[36] The safeguard against the making of frivolous applications, both under s.587 and elsewhere has been stated as being for the reason that such applications are not "consistent with the objects of the Act that applications that do not have a sound basis are made and that they consume time, resources and costs of parties who are required to participate in them".<sup>3</sup> Whether an application is found to be vexatious will require an examination of motives:

"[29] The question of whether an application was made 'vexatiously' looks to the motive of the applicant in making the application. It is an alternative ground to the ground that the application was made 'without reasonable cause' and may apply where there is a reasonable basis for making the application. In *Nilsen v Loyal Orange Trust*<sup>7</sup> (Nilsen) North J observed that this context requires the concept of vexatiousness to be narrowly construed. His Honour went on to state that an application will be made vexatiously 'where the predominant purpose ....is to harass or embarrass the other party, or to gain a collateral advantage'.<sup>8</sup> Deane and Gaudron JJ made a similar observation in *Hamilton v Oades*<sup>9</sup> in which they said:

"The terms 'oppressive' and 'vexatious' are often used to signify those considerations which justify the exercise of the power to control proceedings to prevent injustice, those terms respectively conveying, in appropriate context, the meaning that the proceedings are 'seriously or unfairly burdensome, prejudicial or damaging' and 'productive of serious and unjustified trouble and harassment'."<sup>4</sup>

[37] A conclusion that an application "had no reasonable prospect of success" should only be reached with extreme caution in circumstances where the application is manifestly untenable or groundless or so lacking in merit or substance as to be not reasonably arguable.<sup>5</sup> Further:

"Whether an application is made without reasonable cause may be tested by asking, on the facts apparent to the applicant at the time the application was made, whether there was no substantial prospect of success"<sup>6</sup>

[38] At this time Orkin has provided its initial response form, the Form F3 and is yet to file its material responding to Mr Eaves case.

[39] It relies on that response, as well as other matters including that “[t]he applicant’s former representative has advised the applicant he “can’t win” and the applicant has in his own words advised the commissioner “I’ll never win””. I take those contentions to be matters stated in Mr Eaves’ various materials presently before me. The source and context of those statements are not what they may seem to Orkin. On 13 April 2023 the Applicant stated various things to the Commission, including that:

“In the end my lawyer (sic) said if they are willing to lie then we cant win, we can not prove/disprove something that does not exist, and [the Commission] will not except (sic) most of my evidence due to it being emails/text messages and recorded through an auto transcriber” (underlining added).

and

“I have gone through your cases, unless I get a different judge I’ll never win, unless there is a way to get an automatic appeal right now there is very little I can do” (underlining added)

[40] These statements do not evidence either that the Applicant has received advice to the effect that his case is hopeless or that he otherwise concedes his case has no reasonable prospects.

[41] There is insufficient material before me that would allow findings either that the Applicant’s case is frivolous or vexatious, or has no reasonable prospects of success. There is nothing beyond vigorously worded emails to the Commission that would support the proposition that his core claims of unfairness are made with a motive of harassing or embarrassing the Respondent, although it must be said that some of his peripheral claims are at the least offensive to Orkin as well as disrespectful to the Commission. Those matters though are likely not relevant to the matters in s.387, which sets out the test for establishment of unfairness, and do not require determination. There is also insufficient material before me that would lead to a finding that Mr Eaves’ application is manifestly untenable, groundless, or so lacking in merit or substance as to be not reasonably arguable.

[42] The conduct that led Orkin to dismiss Mr Eaves appears agreed to a significant extent, with the dispute between the parties being whether such constitutes sexual harassment or serious misconduct. Those are matters of evidence and submission, with the Applicant adamant that his contact with the client’s employee being something other than misconduct and Orkin equally adamant that the only possible characterisation is serious misconduct. I do not say through this decision that Mr Eaves’ conduct may not meet these tests, or that his case in these regards has good prospects. The consideration in s.587 is not whether a case has good prospects, but whether there are “no reasonable prospects of success”, and the material presently before the Commission would suggest a case above that which may be regarded as groundless. Objectively the facts contended by the parties and as presently revealed to the Commission could be seen in either direction. The extent to which Orkin chooses to rebut these and other contentions made by Mr Eaves is not yet known by me, and in any event is plainly a matter for Orkin.



[43] After considering all of the material, Orkin's applications under s.399A and s.587 are dismissed.

[44] Mr Eaves unfair dismissal application will proceed as programmed with Orkin to file its material by 4.00PM AEST Friday 12 May 2023 and determinative conference/hearing to take place on 17 May 2023. A Member Assisted Conciliation is programmed for 16 May 2023 at 3.00PM AEST.



COMMISSIONER

*Appearances:*

*Mr C. Eaves* for himself

*Mr S. Richards* and *Ms R. Thomson* for the Respondent

*Mention Hearing details:*

Melbourne (via video conference);  
8 May;  
2023.

Printed by authority of the Commonwealth Government Printer

<PR761592>

---

<sup>1</sup> [\[2011\] FWAFB 7498](#) at [19].

<sup>2</sup> [\[2013\] FWCFB 2532](#).

<sup>3</sup> *Bradford Newbond v GM Holden Ltd* [\[2016\] FWCFB 321](#), [19].

<sup>4</sup> *Church v Eastern Health* [\[2014\] FWCFB 810](#).

<sup>5</sup> *Baker v Salva Resources* [\[2011\] FWAFB 4014](#), 211 IR 374, [10].

<sup>6</sup> *Vassalo v Easitag Pty Ltd* [\[2021\] FWCFB 3974](#), [9]; with approval of *Chapman v Ignis Labs Pty Ltd* [\[2021\] FWCFB 932](#) at [14].