



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Julia Heffernan

v

Canberra Health Services
(U2023/2615)

COMMISSIONER MCKINNON

SYDNEY, 17 MAY 2023

Application for an unfair dismissal remedy – application filed out of time – whether an extension of time should be allowed

[1] Ms Julia Heffernan was employed by Canberra Health Services on 28 July 2008 as a Registered Nurse. She resigned from her employment on 15 February 2023 and her resignation was accepted by Canberra Health Services on 17 February 2023, with effect from 1 March 2023. Ms Heffernan submits that she was forced to resign in connection with a dispute about her appointment to a permanent position. This is denied by Canberra Health Services.

[2] On 28 March 2023, Ms Heffernan applied for an unfair dismissal remedy. Her application was filed outside of the 21-day statutory filing period prescribed by s.394(2) of the *Fair Work Act 2009* (the Act). The question is whether additional time should be allowed for Ms Heffernan to make the application to the Commission.

[3] I have decided not to allow additional time for Ms Heffernan to make the application. The application will be dismissed. These are my reasons.

When did the employment come to an end?

[4] Ms Heffernan relies on two alternative dates for her “dismissal” for the purposes of s.394: 1 February 2023, when her temporary contract in the Mental Health, Emergency, Ambulance and Police Collaboration (MHEAPC) unit expired and was not renewed; and 1 March 2023, when her resignation took effect. Canberra Health Services initially argued that the resignation was effective on 24 February 2023 when Ms Heffernan was advised that she was not required to work out the remaining period of her notice and would be paid for that period instead. At the hearing, it conceded that the resignation was effective on 1 March 2023 in accordance with the *ACT Public Sector Nursing and Midwifery Enterprise Agreement 2020-2022* (the Agreement).

[5] Clause 56 of the Agreement relevantly provides:

“... ”

56.2 Where an employee’s employment is to be terminated at the initiative of the employee, the employee will provide written notice of their resignation from the ACTPS to the head of service at least 2 (two) weeks prior to the proposed date of the resignation.

56.3 The period of notice required in subclause 56.2 may be reduced by agreement in writing between the employee and the head of service.”

[6] There is no evidence of any agreement to reduce the period of 2 weeks’ notice required to be given by Ms Heffernan under clause 56.2 of the Agreement in the event of her resignation. While Ms Heffernan was not required to work out part of her notice period, this was the result of a decision taken unilaterally by Canberra Health Services. Canberra Health Services expressly confirmed that the employment would end with effect from 1 March 2023. Accordingly, I agree with the parties that the effective date upon which the employment came to an end was 1 March 2023 at the expiry of the 2 week notice period.

[7] The materials before me do not provide any sufficient basis to finding that Ms Heffernan was instead dismissed when her temporary contract in the MHEAPC unit expired. Even if it did, this would not assist Ms Heffernan for present purposes because it would mean that the delay in lodgement of the application was almost 2 months longer than otherwise agreed. I proceed on the basis that the application was made 6 days late (being 6 days after the expiry of the 21-day application period on 22 March 2023).

Extension of time

[8] Under s.394(2) of the Act, additional time may be allowed to a person to make an unfair dismissal application if the Commission is satisfied that there are exceptional circumstances. The meaning of “exceptional circumstances” was considered and summarised in *Nulty v Blue Star Group*¹:

“[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.”

[9] Section 394(3) of the Act requires that I take into account certain matters when deciding whether to grant additional time for an unfair dismissal application. These are:

- 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,
- 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

[10] *Reason for delay:* Ms Heffernan submits that she first wrote to the Commission on 19 February 2023 to raise a formal complaint but using the wrong form. The Commission’s “prompt” response went to her ‘junk’ folder and she did not see it. Once she did see the response on the day before her application was made, Ms Heffernan submits that she completed the correct form and filed it in the Commission. Ms Heffernan also relies on the distress she was experiencing in connection with the loss of her employment, resulting in her disorganisation and acting in a way that did not “act in her best interests”.

[11] At the time of her resignation, Ms Heffernan was having difficulty meeting the mortgage payments. When her employment with Canberra Health Services came to an end, she decided to sell her house and move to Nowra in the Shoalhaven area of New South Wales. She met with a real estate agent and her house sold quickly, although the first sale fell through. By this time, Ms Heffernan had vacated the property and was going back and forth from Canberra while the house was open for inspection. The house sold again in early April 2023, with the new owners taking occupancy almost immediately. In the meantime, Ms Heffernan secured a lease on a house in Nowra. She was without access to internet and water in the rental property for about one week when she moved in. At the time of the hearing, she had been living permanently in Nowra for about 6 weeks. This suggests that the lack of access to internet and other services occurred after the application had been made to the Commission.

[12] Ms Heffernan also submits that she is a single parent of two children, one of whom has a disability and additional needs. She had to prioritise what was important – supporting and securing the safety of her children in a new home/environment. Once the decision was made to move to Nowra, she also had to arrange for the transfer of NDIS supports for her child to the Shoalhaven area. Ms Heffernan states that she has been diagnosed by her treating psychiatrist with depression and acute stress reaction, although the medical certificates provided do not disclose any detail in relation to her condition.

[13] Ms Heffernan submits that her representative from the Australian Nursing and Midwifery Federation had been supporting her in relation to her dispute with Canberra Health Services but had been absent for a number of weeks for personal reasons and was not able to provide support or advise her on the unfair dismissal process.

[14] Ms Heffernan submits that she was unable to access documents relevant to her application as she no longer has access to her work email. At the same time, Ms Heffernan submits that it took quite a while to dig through years’ worth of emails, from bits she had saved

and emailed to herself. Once she had her laptop set up in Nowra, she was able to get things organised.

[15] Finally, Ms Heffernan submits that she did not know about the concept of constructive dismissal at the time her employment came to an end, and that she found out about it around 19 February 2023 when Mr Carter mentioned it – and also when she went on to the Fair Work website. She researched the matter and had a big discussion with an unidentified male colleague who had been providing her with a lot of assistance in preparing documents, and the like, in relation to the application. She did not realise that her resignation came under the umbrella of unfair dismissal because she has never been involved in anything like this before. At the same time, Ms Heffernan submits that by paying out some of her notice of resignation, Canberra Health Services reduced the amount of time available to her to make the application. My finding that the dismissal took effect on 1 March 2023, at the end of the full 2-week notice period, is sufficient to dispose of this contention.

[16] *Whether the person first became aware of the dismissal after it had taken effect:* Ms Heffernan knew that her employment would end upon the giving of her resignation on 15 February 2023. She also understood that her resignation would be effective from 1 March 2023, in accordance with the Agreement.

[17] *Any action taken by the person to dispute the dismissal:* Ms Heffernan submits that she took continuing action to dispute the dismissal by reference to the action taken to resolve her dispute with Canberra Health Services about her substantive position. From as early as 31 July 2022, Ms Heffernan was contemplating “leaving the service” because of the dispute. On 15 December 2022, she advised that she was “willing to take this to Fair Work Australia if necessary”. On 2 February 2023, Ms Heffernan advised Canberra Health Services that she was seeking a voluntary redundancy and that she would also “need to request an external review from Fair Work Australia” and “workers compensation associated with the stress related illness” she had experienced due to bullying behaviour by two individuals.

[18] On 15 February 2023, Ms Heffernan wrote to Canberra Health Services stating, among other things:

“Please accept this email as my formal resignation from Canberra Health Services. I will not accept the treatment that I have been forced to endure and I will not work for Katie McKenzie. I do not accept that an internal investigation will be an unbiased process and I do not believe that the “conduct issues” noted by Katie are legitimate. I will however continue to escalate this to an external body.”

[19] On 17 February 2023, Canberra Health Services accepted the resignation of Ms Heffernan.

[20] On 19 February 2023, Ms Heffernan sent multiple emails from her work email account to her private email account in connection with this dispute. She also sent an email titled “Complaint” to the Commission. The email sought to “raise a formal complaint” about her treatment by Canberra Health Services, on the basis that she had recently been “forced to resign” after “a prolonged series of issues and after” she had “sought assistance from the Australian Nursing and Midwifery Federation (ANMF)” which then saw the commencement

of a “false preliminary assessment of misconduct” against her. She also advised a belief that she had been “subject to ongoing bullying and harassment” from the same two individuals referred to in her email of 2 February 2023. She advised that she did not wish to work for Canberra Health Services anymore, that her request for voluntary redundancy was reasonable, and that she could not emotionally return to work, even if there was a role for her to come back to.

[21] The Commission responded to Ms Heffernan’s email on 21 February 2023 at 7.36pm, providing information about “Protecting workplace rights and dealing with discrimination”, “How to make a general protections application”, “Who else can help deal with discrimination” and “Where to get advice”, including by reference to the Commission’s Workplace Advice Service.

[22] On 22 February 2023, Canberra Health Services wrote to Ms Heffernan about her resignation, its effective date, a formal complaint made by Ms Heffernan to the Office of the Australian Information Commissioner and an alleged breach by Ms Heffernan of the *Health Records (Privacy and Access) Act 1997*.

[23] At 1.21pm on 27 February 2023, Ms Heffernan replied to the response from the Commission and requested that her case be assigned to someone to have a look at. She advised that she had been in contact with Worksafe ACT, who had recommended that she request someone review her case, and that the “below attachments no longer apply” to her circumstances.

[24] At 2.18pm on 27 February 2023, the Commission responded to Ms Heffernan’s email with information about making dismissal-related applications to the Commission. The email included the following information:

“The Commission can deal with dismissal applications including unfair dismissal and general protections involving dismissal.

An employee is **dismissed** when:

- Their employer ends their employment, or
- They are forced to resign because of their employer’s actions.

Before applying you should check whether you are eligible to make an application. You can check if you are eligible by completing the unfair dismissal or general protections eligibility quiz.

There is a **21-day time limit** for lodging a dismissal application.”

[25] On 28 March 2023, Ms Heffernan replied to the Commission. She said:

“My apologies for the delay in responding to your email. I have just found it in my junk file. I believe that I was forced to resign. Does this make me eligible for an application for unfair dismissal?”

[26] Ms Heffernan submits that she did not see the Commission's email of 27 February 2023 until one month later, on 27 March 2023 (the day before she applied to the Commission). Once she did, she acted promptly to make the application to the Commission.

[27] *Prejudice to the employer (including prejudice caused by the delay)*: There is no specific prejudice to Canberra Health Services if the application proceeds 6 days late. For the most part, the evidentiary dispute is well documented because of the volume of correspondence between the parties leading up to the cessation of employment.

[28] *Merits of the application*: There is no dispute that Ms Heffernan resigned from her employment. The only dispute is whether she was forced to do so because of the conduct, or a course of conduct, of Canberra Health Services. While the case is arguable, it is not strong. There is evidence that the decision to resign was a considered one, taken by Ms Heffernan on or prior to 15 February 2023 in the context of both a long running dispute with Canberra Health Services about her substantive role and a more recent allegation of misconduct due to the disclosure of personal information. There is sufficient material to indicate that Canberra Health Services may have overlooked relevant and important information that would have enabled it to resolve the dispute with Ms Heffernan and avoid her resignation. But that would not be sufficient to overcome the likely jurisdictional barrier to Ms Heffernan's application, on the basis that she was not dismissed.

[29] *Fairness as between the person and other persons in a similar position* does not appear to me to be a relevant criterion in this case. While Ms Heffernan refers to other cases where the Commission has granted an extension of time for individuals experiencing mental health issues, as well as those who have made a genuine attempt to lodge their applications in time and those experiencing technical issues, each case turns on its own facts and circumstances. I am not aware of any specific case that is on all fours with this.

Conclusion

[30] I am prepared to accept that there are exceptional circumstances in this case arising from the combination of factors affecting Ms Heffernan at or around the time of her resignation. She was under sufficient financial pressure that a decision was made to sell and move from Canberra to Nowra. She is a single mother with children, one of whom has special needs. She was experiencing distress associated with the inability to resolve the dispute with Canberra Health Services about her substantive role, despite her long period of service, and was receiving treatment from a psychiatrist. In addition, Ms Heffernan did not see the information provided to her by the Commission about unfair dismissal until one month after it was sent, apparently because it went to her "junk" mail folder.

[31] However, I do not consider this to be a case where it is appropriate to exercise my discretion to extend the time for filing the application. This is both due to what appears to be a significant jurisdictional impediment (the resignation of Ms Heffernan), and my view that Ms Heffernan only decided to make an unfair dismissal application when she received the email from the Commission on 27 March 2023 and asked, in response, if she was "eligible" to apply.

[32] Prior to this time, Ms Heffernan had been considering leaving Canberra Health Services for many months. She had sought a voluntary redundancy, which had not been forthcoming.

She was aware of “Fair Work Australia” (a common misnomer for the Commission) from at least 15 December 2022. She had taken many steps to try and resolve her dispute with Canberra Health Services, but she did not take active steps after 19 February 2023 to dispute her dismissal until receipt of the Commission’s email more than one month later.

[33] As a tertiary educated professional undertaking doctoral studies, Ms Heffernan was both capable of doing, and did, her own research on the Commission’s website before she made this application. Her complaint to the Commission on 19 February 2023 was lengthy and articulate. It spoke to her alleged mistreatment due to seeking the assistance of the ANMF, and of alleged bullying and harassment. While the words “forced to resign” were used, Ms Heffernan also confirmed that she did not wish to return to Canberra Health Services. No mention of unfair dismissal was made.

[34] The landing page of the Commission’s website highlights the options available to a person to “Apply or lodge” an application. It refers to the “Common Issue” of “Unfair Dismissal”. Less obvious, but also available on the landing page, is the option to “Contact Us”. Through this page, one can navigate to an email address for the relevant State or Territory registry of the Commission. Ms Heffernan’s first contact with the Commission was by email to the Canberra registry. I find that Ms Heffernan made a choice about how she wished to bring her concerns to the Commission, including the choice not to apply for an unfair dismissal remedy at that time and instead to send in her complaint, on the understanding that as Worksafe ACT had suggested, someone would “review” it. This finding is consistent with the notable absence of any discussion between the ANMF and Ms Heffernan in relation to the option of unfair dismissal on the materials, and the submission of Ms Heffernan that she was not aware of the option until 27 March 2023. I do not accept that Ms Heffernan could not have commenced her application on 19 February 2023, had this been her preference.

[35] Of the reasons given for delay, some are more persuasive than others and overall, I am not persuaded that there is an adequate explanation for why the application was not made in time. The absence of material prejudice to Canberra Health Services and the neutral considerations of knowledge about the fact of termination and fairness as between others in a similar position take the matter no further. I have discussed above the lack of active steps to dispute the dismissal after 19 February 2023, and my concern as to the merits of the case.

[36] On balance, I decline to allow additional time for Ms Heffernan to make the application.

Disposition

[37] The application is dismissed.



COMMISSIONER

Appearances:

J Heffernan on her own behalf.

M Chilcott, ACT Government Solicitor, for the respondent.

Hearing details:

2023.

Sydney (by video):

May 8.

Final written submissions:

May 14.

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¹ [2011] 203 IR 1 at [13].