DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Maximilian Enthoven
v
Darktrace Australia Pty Ltd
(U2023/2860)

DEPUTY PRESIDENT EASTON SYDNEY, 31 MAY 2023

Unfair dismissal application filed out of time – was the employee dismissed – agreement to allow the employee to resign after he had already been dismissed – when did the dismissal "take effect" – time that the termination of the employment relationship took effect – time that the termination of the contract of employment took effect – delay of payment in lieu of notice – extension of time – delay caused by negotiations regarding outstanding commission payments – not a credible or reasonable explanation for the delay – no exceptional circumstances found – application dismissed.

[1] On 1 March 2023 Mr Maximilian Enthoven was called to a meeting and told that his employment with Darktrace Australia Pty Ltd was terminated. At the meeting Mr Enthoven was given a letter that confirmed that the employment "will be terminated immediately (Effective Date, 1st March 2023)" and that Mr Enthoven's final pay will include two weeks' salary that "will be paid through the next standard pay run." Mr Enthoven was not paid his final termination payment until 30 March 2023.

[2] On 6 March 2023 Mr Enthoven asked Darktrace to allow him to resign. On 7 March 2023 Darktrace agreed and issued a revised letter "accepting" Mr Enthoven's "resignation."

[3] Over the next few weeks Mr Enthoven tried to negotiate his final commission/incentive payment, but no resolution was reached. Mr Enthoven also sought advice from an employment law specialist in relation to his dismissal.

[4] Mr Enthoven did not make his application under s.394 of the *Fair Work Act 2009* until 4 April 2023. Section 394(1) requires Mr Enthoven make his application for an unfair dismissal remedy within 21 days after the dismissal "took effect."

[5] Darktrace raised a jurisdictional objection to the application on the basis that Mr Enthoven had resigned his employment.

[6] If Mr Enthoven was dismissed, and if the dismissal took effect more than 21 days before his application was made, then Mr Enthoven's application was late.

[7] Three key questions arise for determination:
(a) was Mr Enthoven dismissed?
(b) if so, when did the dismissal take effect?
(c) if the application under s.394 was made late, can and should the time for making the application be extended?

[8] For the reasons that follow I find that Mr Enthoven was dismissed, that the dismissal took effect on 1 March 2023, that his application was made late and that there are no exceptional circumstances that would permit an order to extend the time for the making of the application.

Was the Applicant dismissed?

[9] On 1 March 2023 Mr Enthoven was told in a meeting that his employment was immediately terminated - primarily because he had not met his sales target for February 2023 and earlier targets. In the meeting Mr Enthoven tried to save his job by relying on sales that he said were about to crystalise.

[10] On 6 March 2023 Mr Enthoven contacted a regional Human Resources Officer and, in his words, “issued an ultimatum.” Mr Enthoven’s ultimatum was that he be allowed to resign “for professional reasons” and to be paid his owed commissions in order to avoid an unfair dismissal claim. Mr Enthoven provided a letter of resignation, dated 1 March 2023.

[11] The next day Darktrace agreed to allow Mr Enthoven to resign and issued a revised letter confirming his resignation, backdated to 1 March 2023. Darktrace’s letter had all the appearances of an acceptance of Mr Enthoven's resignation and said that Mr Enthoven's "last day in the office/remote working will be 1st March 2023.”

[12] Darktrace submitted that Mr Enthoven was not dismissed because his "resignation was accepted by Darktrace on 7 March 2023 thus rescinding the previous termination by Darktrace in circumstances when payment in lieu of notice had not yet been made."

[13] Darktrace's argument was a little fluid. For a time Darktrace argued that the agreement that Mr Enthoven resign had the effect of rescinding the earlier dismissal and therefore took the cessation of the employment outside of the unfair dismissal jurisdiction. However in the revised letter sent by Darktrace to Mr Enthoven “accepting” his “resignation”, Darktrace referred to a two-week notice period and that Mr Enthoven's "last day in the office/remote working will be 1st March 2023” – which left open the possibility that the termination of the employment was effective on 15 March 2023 and not 1 March 2023.

[14] When addressing the date on which the resignation took effect, vis a vis the 21-day time limit, Darktrace argued that the employment ended on 1 March 2023, that there was no rehiring of Mr Enthoven so that he could resign, but instead there was merely an agreement to change Mr Enthoven's employment records to reflect a resignation.

[15] Prior to making closing submissions the parties were taken to the key findings of the Full Court of the Federal Court in *Melbourne Stadiums Ltd v Sautner* (2015) 229 FCR 221, [2015] FCAFC 20 (**Sautner**). In its closing oral submission Darktrace properly abandoned the notion that there was no dismissal, recognising that a contract cannot be terminated twice (see *Sautner* at [112]).

[16] There was some debate about when Mr Enthoven's contract of employment ended (see below) but both parties ultimately accepted that the employment relationship ended at Darktrace's initiative.

[17] I find that the employment relationship ended at the initiative of the employer and therefore Mr Enthoven was dismissed.

When did the dismissal take effect?

[18] There were a number of similarities between the circumstances of Mr Enthoven's dismissal and the circumstances in Sautner's case. Both men had written contracts of employment that allowed the employer to end the employment and make a payment in lieu of notice.

[19] Mr Enthoven's written contract of employment including the following term:

> "The Company shall also at its direction be entitled to terminate your employment without notice on making you a payment of your basic salary (less tax and other statutory deductions) in lieu of notice."

[20] Mr Sautner's contract included the following (per *Sautner* at [120]):

> "7.1 … The Company may, in its absolute discretion, elect to terminate this Agreement by providing remuneration in lieu of the appropriate term of notice."

[21] After Melbourne Stadiums told Mr Sautner that his employment was terminated with immediate effect, and before it had paid any money in lieu of notice, Melbourne Stadiums discovered further incidents of misconduct that allowed it to dismiss Mr Sautner without giving any notice or payment in lieu of notice. Melbourne Stadiums did not make a payment in lieu of notice and Mr Sautner sued for breach of contract. In Mr Sautner's claim much turned on whether the termination of the contract of employment was effective before the employer had made a payment in lieu of notice.

[22] The majority in *Sautner* recognised that a contract cannot be terminated twice, and that if the contract was lawfully terminated it cannot be "resuscitated and then re-terminated upon some ground not known at the time of the termination" (at [112]). The majority found at [122]:

> "The termination under the employment contract required, in order to be effective, payment of the six months' pay in lieu of notice. This never occurred and there was therefore no termination under cl 7.1."

[23] Mr Sautner sued in contract and the time at which the employment relationship ceased was material to his claim. The majority in *Sautner* implicitly accepted that the employment relationship had ceased at the earlier time even though the contract of employment was still on foot (see *Sautner* at [126] and [130]). Justice White specifically noted the distinction between the employment relationship and the employment contract:

> "In ascertaining the legal effect of these events, it is appropriate to keep in mind the distinction between termination of an employment relationship, on the one hand, and termination of the employment contract, on the other. That distinction is well recognised: *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] HCA 25; (1946) 72 CLR 435 at 454 and 469, *Visscher v Giudice* [2009] HCA 34; (2009) 239 CLR 361 at [53] and [55]; *Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 312 ALR 356 at [3]. In *Visscher*, the plurality referred at [53] to the statement of Brennan CJ, Dawson and Toohey JJ in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 427:
>
> > "It does not appear to have been doubted in this country that a wrongful dismissal terminates the employment relationship notwithstanding that the contract of employment may continue until the employee accepts the repudiation constituted by the wrongful dismissal and puts an end to the contract."

[24] The letter given to Mr Enthoven on 1 March 2023 confirming the termination of his employment said:

> "I regret to inform you that it has been determined that your employment with Darktrace Australia Pty Ltd (the Company), will be terminated immediately (Effective Date, 1st March 2023). We have reviewed your performance as well as your general conduct and have been disappointed by both. Therefore, we have made the difficult decision to terminate your employment.
>
> With effect from your termination date, you will no longer be entitled to any further compensation, monies or other benefits from the Company, including coverage under any benefits plans or programs sponsored by the Company.
>
> Your final salary, including your full pay to date plus two week's salary and 3.5 days accrued annual leave, subject to all withholdings and deductions as required by law, through effective date of termination will be paid through the next standard pay run…"

[25] Mr Enthoven was not paid the two weeks' pay in lieu of notice until 30 March 2023, presumably being "the next standard pay run" referred to in the termination letter.

[26] For a time Mr Enthoven relied on the Court's finding in *Sautner* to argue that the termination of his employment was not effective until the payment in lieu of notice was made, and therefore that his application made on 4 April 2023 was within time.

[27] The difficulty with Mr Enthoven's argument is that it does not account for the possibility that employment *relationship* ended on 1 March 2023, even if the *contract of employment* did not end until Darktrace made a payment in lieu of notice.

[28] As the majority in *NSW Trains v James* (2022) 316 IR 1, [2022] FWCFB 55 at [45] concluded, the expression "employment … has been terminated" in s.386(1)(a) means termination of the employment relationship and/or termination of the contract of employment.

[29] Mr Enthoven conceded in his final submissions that his reliance on *Sautner* was misplaced and that his dismissal took effect on 1 March 2023. Mr Enthoven's concession was properly made.

[30] As such I find that the effective date of Mr Enthoven's dismissal was 1 March 2023 and therefore that his application was not made within the 21 days specified in s.394(1).

Section 394 – Exceptional Circumstances

[31] Recognising that the application was made outside of the time limit in s.394, I must next consider whether there were exceptional circumstances that would allow an order extending the time by which Mr Enthoven must make his application. If there were no exceptional circumstances, then there is no power to grant an extension of time.

[32] The Commission may only allow a further period if it is satisfied that there are "exceptional circumstances" (per s.394(3)). The Full Bench in *Nulty v Blue Star Group Pty Ltd* (2011) 203 IR 1, [2011] FWAFB 975 described exceptional circumstances as follows:

> "[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.
>
> …
>
> [15] A finding that there are "exceptional circumstances", taking into account the matters specified in paragraphs 366(2)(a) to (e), is necessary before the discretion to extend time is enlivened. That is, even when "exceptional circumstances" are established, there remains a discretion to grant or refuse an extension of time. That discretion should be exercised having regard to all the circumstances including, in particular, the matters specified in paragraphs 366(2)(a) to (e) and will come down to a consideration of whether, given the exceptional circumstances found, it is fair and equitable that time should be extended."

[33] The exceptional circumstances requirement establishes a 'high hurdle' for applicants to overcome (see *Diotti v Lenswood Cold Stores Co-op Society t/a Lenswood Organic* [2016] FWCFB 349 at [16] (**Diotti**), *Ivan Cowen v Renascent Regional Pty Ltd* [2021] FWCFB 2606 at [24]).

[34] Section 394(3) specifically requires the Commission to take into account the following matters when considering whether there are exceptional circumstances, viz:

> "(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."

[35] The factors listed in s.394(3), considered separately or in combination, might constitute exceptional circumstance, even if no single factor is exceptional (per *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* (2018) 273 IR 156, [2018] FWCFB 901 (**Stogiannidis**)).

Reason for the delay

[36] I am required to take into account "the reason for the delay". The test invariably applied is whether an applicant has a 'credible or reasonable' explanation for the delay. The reasonableness of an explanation is not measured in a vacuum: firstly it must be assessed as part of an inquiry into whether exceptional circumstances exist, and then secondly in deciding whether the Commission should exercise its discretion to grant the extension.

[37] Recognising that the reason for delay is only one of several factors to be considered, it is not *essential* that an applicant provide a credible or reasonable explanation for the delay (per *Stogiannidis* at [30]-[40] and *Keith Long v Keolis Downer t/as Yarra Trams* (2018) 279 IR 361, [2018] FWCFB 4109 at [36] (**Yarra Trams**)). That said, if an applicant does not have a credible explanation the Commission is generally less likely to find that exceptional circumstances exist (at least exceptional circumstances that support an extension of time).

[38] A good, credible or even reasonable explanation for delay might ultimately count for nought if the Commission is not satisfied that exceptional circumstances exist. Indeed, many applicants with good, credible explanations for delay do not receive an extension of time because they cannot establish that exceptional circumstances exist.

[39] The Commission must consider the reason for the delay over the whole of the period between the dismissal and the commencement of the proceedings, rather than just the period after time limit has expired (per *Diotti* at [31]).

[40] Mr Enthoven sought advice from an employment law specialist before the end of the 21-day period but did not engage that law firm because he was not prepared to put money in trust. After the 21-day period had expired Mr Enthoven sought unpaid representation from

another organisation but that organisation declined to represent him. His delay in seeking representation is not a good explanation and does not constitute exceptional circumstances.

[41] As described above, from 6 March 2023 onwards Mr Enthoven tried to settle his claims against Darktrace.

[42] It is generally good that litigants try and resolve their claims prior to commencing legal proceedings. In many jurisdictions litigants are required to take genuine steps to resolve disputes before civil proceedings are instituted (see *Civil Dispute Resolution Act 2011*). However these pre-litigation steps must be taken in the context of the strict and relatively tight timeframe set by s.394. Settlement discussions are generally encouraged, but not at the expense of compliance with the time limits.

[43] It is important to recognise that there was no further discussion or negotiation about Mr Enthoven's dismissal after 7 March 2023. Mr Enthoven did not, for example, seek reinstatement or even challenge the fairness of the dismissal in any way. He proposed a compromise in relation to the fact that he was dismissed, and Darktrace agreed to that compromise almost immediately.

[44] After 7 March 2023 the negotiations were only about the quantum of Mr Enthoven's alleged outstanding commission payments, which are a separate matter to the dismissal itself. Mr Enthoven has six years to commence proceedings to recover any amounts that he thinks are owing to him and his pursuit of those claims is not a proper reason for delaying his unfair dismissal application.

[45] On 16 March 2023 Mr Enthoven requested a review of Darktrace's position regarding commissions and made the following comment/threat by email:

> "I would like to request a further review, could the commissions team please outline at least when these payments would have been due? Otherwise I must write a formal letter of demand within 21 days of departure to begin mediation/arbitration with Fair Work Australia. This will be Tuesday the 21st, and so I must have a final answer by Monday and will respectfully challenge it if unchanged…"

[46] In other words, Mr Enthoven was trying to negotiate his commission payments, but with the 21-day time limit squarely in his sights.

[47] In his F2 Application form filed on 4 April 2023 Mr Enthoven sought the following remedy:

> "**2.1 What outcome are you seeking by lodging this application?**
>
> I am no longer seeking for my dismissal to be reversed, as the company has allowed my resignation to take effect instead of a humiliating termination.
>
> I am seeking the second half of my owed commissions, which Darktrace withhold for more than 12 months after the date a deal closes…"

[48] Mr Enthoven's priority objective in his post-employment dealings with Darktrace and in his application to the Commission has been to recover commission payments allegedly outstanding.

[49] Mr Enthoven's decision to try and negotiate a settlement of his commission claims instead of commencing an unfair dismissal application is not a credible or reasonable explanation for the delay.

[50] In his closing submissions Mr Enthoven referred to, for the first time, matters of mental health as a reason for his delay. Specifically Mr Enthoven said that after his dismissal he was "paralysed to act". No medical evidence was provided to support this proposition and it is contrary to the evidence in the proceedings. Mr Enthoven was active in pursuing his commission payments, and in seeking legal advice. I reject this submission.

[51] In taking into account all of the above, Mr Enthoven's explanations for the delay do not point towards the existence of exceptional circumstances. More so, even if I were to find that there were exceptional circumstances, Mr Enthoven's explanations for the delay do not support the granting of an extension of time.

Merits of the application

[52] Section 394(3)(e) requires that I take into account "the merits of the application" when considering whether there are exceptional circumstances and the extension of time more generally.

[53] In this context it is sufficient that an applicant establish that his claim is not without merit. The weight to be given to this consideration is dependent on the extent to which there is merit in the substantive application.

[54] There was significant hostility between the parties and each led extensive evidence to try and cast the other in a poor light. I am satisfied that Mr Enthoven's claim is not without merit and make no further findings or even observations about the matters raised.

[55] I consider the merits of the application to be a neutral consideration.

Other factors

[56] In my view the other factors identified in s.394(3) are also neutral considerations. First, Mr Enthoven was notified of the dismissal on the same day that it took effect (s.394(3)(b)), and therefore had the benefit of the full 21-day period to lodge an application. Secondly, there is no evidence of prejudice to the employer (s.394(3)(d)). Thirdly, I am not aware of any persons or cases that are relevant to the question of fairness as between Mr Enthoven and other persons (s.394(3)(f)). I note that Mr Enthoven took steps to challenge the dismissal (s.394(3)(c)), however that challenge was quickly resolved.

The mandatory factors collectively

[57] In this case none of the above matters considered individually point towards there being any exceptional circumstances. For completeness I am not satisfied that there are exceptional circumstances after reviewing the above matters collectively (per *Stogiannidis* at [38]-[39]).

Conclusion

[58] Having regard to the matters I am required to take into account under s.394(3), and all of the matters raised by Mr Enthoven, I am not satisfied that there are exceptional circumstances. Because I am not satisfied that there are exceptional circumstances, there is no basis for me to allow an extension of time. I decline to grant an extension of time under s.394(3).

[59] Accordingly, the application for an unfair dismissal remedy must be dismissed (PR762670).

DEPUTY PRESIDENT

Appearances:

Mr *M Enthoven*, Applicant
Mr *J Furniss*, for the Respondent

Hearing details:

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