



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Kirsten Garousse

v

Equifax Pty Limited

(U2023/2778)

DEPUTY PRESIDENT WRIGHT

SYDNEY, 27 JUNE 2023

Unfair dismissal application filed out of time – circumstances exceptional – extension of time for filing allowed

Introduction and outcome

[1] On 31 March 2023, Mr Kirsten Garousse (**Applicant**) made an application to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for an order granting a remedy, alleging that she had been unfairly dismissed from her employment with Equifax Pty Limited (**Respondent**).

[2] Section 394(2) of the FW Act requires that the application be made within 21 days after the dismissal took effect, or within such further period as the Commission allows.

[3] In her application, the Applicant stated that her dismissal took effect on 10 March 2023. The Respondent stated in its F3 Employer Response (the **response**) that the Applicant's dismissal took effect on 1 March 2023 which is outside of the 21-day period prescribed by s.394(2) of the FW Act.

[4] Before considering the merits of the application or other jurisdictional objections, the Commission must consider whether exceptional circumstances warrant granting an extension of time to file the application.¹ To determine whether there are exceptional circumstances, the factors in subsections 394(3)(a)-(f) of the FW Act are considered.

[5] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[6] After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing for the matter in accordance with s.399 of the FW Act.

[7] In summary, I have found that the Applicant's dismissal took effect on 7 March 2023. The application should have been made on 28 March 2023 to comply with s.394(2)(a) of the FW Act. The application was therefore made 3 days outside of the 21-day limit.

[8] I have found that the circumstances in which the application was made are exceptional, according to the factors in s.394(3) of the FW Act. I consider it fair and equitable that time should be extended, and I therefore grant an extension of time to file the application to 31 March 2023.

Permission to appear

[9] Both the Applicant and the Respondent sought to be represented before the Commission by a lawyer.

[10] Relevantly, s.596(1) of the FW Act provides that a party may be represented in a matter before the Commission by a lawyer or paid agent only with the permission of the Commission.

[11] Section 596(2) provides that the Commission may grant permission for a person to be represented by a lawyer or paid agent in a matter before the Commission only if:

- (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
- (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
- (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

[12] The decision to grant permission is not merely a procedural step but one which requires consideration in accordance with s.596 of the FW Act.² The decision to grant permission is a two-step process. First it must be determined if one of the requirements in s.596(2) have been met. Secondly, if the requirement has been met, it is a discretionary decision as to whether permission is granted.³

[13] I have determined that:

- allowing the Applicant to be represented by a lawyer would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter;
- allowing the Respondent to be represented by a lawyer would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter.

[14] I have therefore decided to exercise my discretion to grant permission for both the Applicant and Respondent to be represented.

[15] Accordingly, at the hearing on 9 June 2023, the Applicant was represented by Mr Arvanitis, Partner at Antunes Lawyers and the Respondent was represented by Mr Allen, Senior Associate at KHQ Lawyers.

Submissions and Evidence

[16] The application filed on 31 March 2023 indicated that the Applicant's dismissal took effect on 10 March 2023. However, the Respondent stated in the response that the Applicant's dismissal took effect on 1 March 2023.

[17] On 15 May 2023, the Fair Work Commission wrote to the Applicant's representative advising that if the information provided by the Respondent is correct, it appears the application is 9 days late and inviting the Applicant to explain why the circumstances surrounding the late filing of the application were exceptional.

[18] On 18 May 2023, the Applicant's representative sent a letter in response to the Commission's correspondence which appeared to accept that the application was late and made submissions about why the circumstances were exceptional. This letter attached correspondence exchanged between the Applicant and Respondent between the period from 10 February 2023 and 17 March 2023.

[19] On 24 May 2023, my Chambers issued Directions and set the matter down for hearing in relation to the issue of extension of time only on 9 June 2023.

[20] The Directions provided that the Applicant had the opportunity to file with the Fair Work Commission and serve on the Respondent any additional material upon which she intended to rely that addresses the matters in s.394(3) of the Act by no later than 4:00pm on Wednesday, 31 May 2023.

[21] On 1 June 2023, the Applicant's representatives advised my Chambers that the Applicant had elected not to file any additional material with the Fair Work Commission for the determinative conference/hearing scheduled for Friday 9 June 2023.

[22] On 7 June 2023, the Respondent filed submissions and documents in accordance with the Directions.

[23] Rather than calling witnesses, both parties relied upon correspondence exchanged between the Applicant and the Respondent in relation to the Applicant's employment at the hearing. 17 items of correspondence were before the Commission, provided by either the Applicant or the Respondent or both parties.

[24] It is unfortunate that neither party provided a complete set of this correspondence to the Commission, nor made submissions addressing the totality of the correspondence exchanged. It is unclear why both parties took this selective approach, especially given that they were legally represented.

[25] Given the deficiencies in both parties' approach to the matter, it has been necessary for the Commission to closely examine the correspondence in order to establish the effective date

of dismissal and consider whether an extension of time should be granted. I have therefore set out the correspondence in some detail below.

[26] On 10 February 2023, the Respondent sent a letter to the Applicant advising of a potential redundancy in relation to her role of Security Investigator.

[27] On 13 February 2023, the Applicant sent an email to Ryan Knepshield, the Respondent's Senior Director Physical Security. Mr Knepshield responded at 9:52am on 28 February 2023, referring to the Applicant being "under consultation for [her] role" and explaining the purpose of the consultation period.

[28] At 11:30am on 28 February 2023, the Applicant sent an email to Mr Knepshield which relevantly provided:

Subsequent to our discussion today I am of the understanding I will be provided with an official notice of redundancy within the next few days and, on receipt of such, my four (4) week notice period will commence.

.....

Additionally, it would be my preference that I am placed on "gardening leave" through my notice period.

[29] At 11:59am on 28 February 2023, Mr Knepshield sent an email to the Applicant which relevantly provided:

Please confirm that I have understood your intention to end the consultation process and I will provide you with notice of redundancy of your position as at 28 February 2023. Your notice period is 4 weeks effective from this date and your final working day will be 1 March 2023 and we will pay you 4 weeks notice in lieu as part of your final redundancy payment.

[30] The Applicant sent the following response at 3:01pm on 28 February 2023:

Hi Ryan,

Given the new queries raised today, and subsequent to the timeliness of the response as well as the potential that I may need to seek further legal advice, it is my position that the consultation period is not finalised.

If the business has a different position on this please let me know.

Many thanks,
Kirsten.

[31] The same day the Applicant was also corresponding with Jo Gray, the Respondent's Human Resources Business Partner.

[32] At 1:24pm on 28 February 2023, in response to a query from the Applicant about leave, Ms Gray sent an email advising that the Applicant's role of Security Investigator would be eliminated effective from 31 March 2023.

[33] At 2:17pm on 28 February 2023, the Applicant wrote to Ms Gray in relation to the termination payment stating, "subject to final confirmation, I *think* my four week notice period will end on or about 31 March 2023."

[34] On 1 March 2023, the Applicant sent an email to Ms Gray advising her intention to get legal advice and requesting that the consultation period be extended to 10 March 2023.

[35] At 12:45pm on 2 March 2023, Ms Gray sent the following email to the Applicant:

Hi Kirsten,

Thanks for your email and for your request to extend your consultation period to 10 March 2023 so that you may obtain personal legal advice.

We have been in consultation with you about the proposed changes to your role since Friday, 10th February 2023. I understand that since that date Ryan has had multiple conversations with you regarding the proposed changes, and has carefully considered your feedback and provided responses to you.

In that period, Equifax advised you of the change, the likely impact on your employment and sought your feedback. We considered and responded to your feedback. We therefore consider that appropriate consultation has occurred and brought the consultation period to a close yesterday, 28 February 2023, and issued you with a confirmation of redundancy letter.

We accordingly consider that you have been afforded the genuine opportunity to consult on this change and that we have addressed your feedback and areas of concern and we thank you for your participation in that process. If you would like to obtain legal advice on the change and your entitlements that is a matter for you, however we confirm that the consultation process has now concluded and that the decision regarding your employment as communicated to you has taken effect.

Thanks and regards

Jo Gray (She/Her)

[36] At 2:56pm on 3 Mar 2023 at 14:56, the Applicant sent the following email to Ms Gray:

Hi Jo,

Would you kindly provide clarity as to your reference that I was provided with a "*confirmation of redundancy letter*" on or about the 28th February?

Whilst I did receive an email from Ryan on that date proposing to close the consultation based on verbal discussions, which I responded "no" to (on the basis of this email trail), I do not believe [sic] I have received any formal letter.

Additionally, I will need to update my banking details. Would you kindly advise where that information is to be directed to?

Kind regards,

Kirsten

[37] At 12:52 on 7 March 2023, Ms Gray sent the following email to the Applicant:

Hi Kirsten,

Thanks for your email.

On Tuesday, 28 February, Ryan Kneppshiled [sic] sent you an email which contained a summary of the consultation discussions that you had on 10, 14, 17 and 28 February and confirmed that the consultation process had come to an end and that you would be provided with notice of the redundancy of your position as at 28 February 2023. The email also confirmed that your final working day would be 1 March 2023 and that your 4 week notice period would be paid in lieu. This email clearly confirmed that your employment was terminated by way of redundancy effective 1 March 2023. The notice referred to in Ryan's email (and also referred to in my email to you on 2 March 2023) was mistakenly not attached to his email. We apologise for this oversight and now **attach** the notice dated 28 February 2023 for your records.

We note that your redundancy payment (including your notice in lieu) was processed last week and you would have received the funds on or around Friday 3rd March 2023.

We confirm that the termination of your employment by way of redundancy took effect on 1 March 2023 and that the consultation period closed as previously communicated to you and will not be reopened.

We again take this opportunity to thank you for your time at Equifax and wish you all the best in your future endeavours.

Thanks and regards,

Jo Gray (She/Her)

[38] Attached to this email was a letter from the Respondent dated 28 February 2023 which had not been previously provided to the Applicant. The letter states, amongst other things:

This letter confirms that as a result of the review and following consultation with you, your role of Security Investigator will become redundant effective on 10 March 2023.

Your notice period is 4 weeks from today and your final day with Equifax will be 1 March 2023. Any remaining period of your notice period not worked by you will be paid to you in lieu as part of your final pay. Your final pay will be processed on 15 March 2023 or earlier.

When did the dismissal take effect?

The Applicant's understanding of the termination date

[39] The Applicant's email, sent at 11:30am on 28 February 2023, indicates that she was of the understanding, following a discussion earlier that day with Mr Knepshield, that she would be provided with an official notice of redundancy within a few days and that her four week notice period would commence on that date. Mr Knepshield's response to the Applicant's email, sent 29 minutes later, did not refute the Applicant's assertions but appeared to suggest that the notice of redundancy could be brought forward to 28 February 2023 if the Applicant confirmed that she intended to end the consultation process.

[40] The Applicant's understanding that she would be provided with an official notice of redundancy within a few days after 28 February 2023 is consistent with her email to Ms Gray, sent at 2:17pm on 28 February 2023, in which she states, "subject to final confirmation, I think my four week notice period will end on or about 31 March 2023".

[41] Ms Gray's response to that email confirmed the Applicant's understanding, by stating that:

I'm aware that it has been confirmed with you that the role you hold, Security Investigator, will be eliminated effective from 31 March 2023. As such, any annual leave owing to you would be paid out and would therefore not be a consideration when assessing your eligibility for long service leave, as you would be leaving Equifax before your 5 year anniversary date.

[42] When read together, the correspondence shows that the Applicant expected to receive notice of termination on or about 3 March 2023 which is four weeks prior to 31 March 2023, the date that both the Applicant and Ms Gray referred to in their respective correspondence. However, the Applicant's reference to "gardening leave" in her email sent at 11:30am on 28 February 2023 to Mr Knepshield suggests that she wished to remain employed during this notice period, rather than a payment being made in lieu thereof and her employment immediately terminating.

[43] Ms Gray's reference to calculation of leave entitlements with respect to the date of the elimination of the Security Investigator role also suggests that the Respondent expected the Applicant to be employed until 31 March 2023.

[44] Ms Gray's email to the Applicant on 7 March 2023 was the first occasion that the Respondent advised the Applicant that her employment had been terminated. Ms Gray's assertions in her email of 2 March 2023 that the Respondent brought the consultation period to a close on 28 February 2023, and issued the Applicant with a confirmation of redundancy letter,

are not supported by the contents of Mr Knepshield's email of 28 February 2023 sent at 11:59am.

Purported notice of termination - Mr Knepshield's email of 28 February 2023

[45] Mr Knepshield's email of 11:59am on 28 February 2023 did not provide a clear and unambiguous termination date. It referred to the Applicant's last working day as 1 March 2023, however it does not automatically follow that this was the effective date of termination.

[46] It is feasible that an employee might remain employed during a period that the employer does not require the employee to attend work, and therefore that any termination takes effect at a date later than the last day that the employee attends work. This is particularly so given the Applicant's stated preference to be placed on "gardening leave" during the notice period.

[47] In addition, Mr Knepshield's email of 11:59am on 28 February 2023 indicated that notice of termination was conditional on the Applicant confirming that she intended to end the consultation process. This did not occur.

[48] Mr Knepshield invited the Applicant to confirm his understanding that the Applicant intended to end the consultation process. The use of the phrase "and I will" immediately after this invitation is significant. "I will" indicates some future action by Mr Knepshield. The use of the word "and" implies that the future action is contingent upon confirmation of the end of the consultation process being conveyed by the Applicant.

[49] If the Applicant had confirmed that she intended to end the consultation process, the future action signified by the words "I will" was that Mr Knepshield would provide the Applicant with notice of redundancy of the Applicant's position as at 28 February 2023. According to Mr Knepshield, the giving of notice would be followed by the Applicant's final working day being 1 March 2023 and the Applicant being paid four weeks' notice in lieu as part of her final redundancy payment.

[50] However, the Applicant did not provide the confirmation sought by Mr Knepshield. In fact, the Applicant specifically advised Mr Knepshield in her email of 3:01pm on 28 February 2023 that her position was that the consultation period was not finalised, and that the Respondent should let her know if it had a different position on this.

[51] If the Respondent disagreed with the Applicant's position that the consultation period was not finalised, it should have responded to this effect. It did not do so until two days later when Ms Gray sent an email to the Applicant on 2 March 2023.

[52] It follows that notice of termination was not provided by the Respondent in Mr Knepshield's email of 28 February 2023 and that the employment relationship remained on foot. This was the case even if the Applicant's last day of work was 1 March 2023 (however there is no evidence before me in relation to this matter).

Ms Gray's email of 2 March 2023

[53] Ms Gray's email dated 2 March 2023 failed to provide any notice of termination or further clarification in relation to the Applicant's employment status and termination date.

[54] Furthermore, contrary to Ms Gray's advice of 2 March 2023, the Applicant was not issued with a confirmation of redundancy letter on 28 February 2023.

[55] It is not in dispute between the parties that the confirmation of redundancy letter, although dated 28 February 2023, was not provided to the Applicant until 7 March 2023 despite the Applicant requesting it on 3 March 2023.

[56] The Applicant's emails to Ms Gray on 28 February, 1 and 3 March 2023 are consistent with a belief that she remained employed by the Respondent, that she would be issued with four weeks' notice of termination on or about 3 March 2023 and that she would potentially remain employed until the conclusion of that notice period on 31 March 2023.

[57] Ms Gray's email to the Applicant dated 7 March 2023 is the first occasion that the Respondent confirmed that the Applicant's employment had been terminated and advised that the termination date was 1 March 2023. Ms Gray incorrectly asserted that Mr Knepshield's email of 28 February 2023 clearly confirmed that the Applicant's employment was terminated by way of redundancy effective 1 March 2023.

[58] The Respondent's claims that Mr Knepshield's email was clear and that it advised that the Applicant's employment was terminated by way of redundancy effective 1 March 2023 are both incorrect.

[59] It is concerning that the Respondent did not provide the confirmation of redundancy letter to the Applicant either on 28 February 2023 or immediately upon the Applicant advising that she had not received it on 3 March 2023. No evidence was adduced at the hearing which establishes that the purported confirmation of redundancy letter existed before it was issued to the Applicant on 7 March 2023.

Ambiguity of the confirmation of redundancy letter

[60] The confirmation of redundancy letter itself is ambiguous and confusing. The letter does not confirm a termination date. It states that the Applicant's final day is 1 March 2023, her role of Security Investigator will become redundant effective on 10 March 2023, her notice period is four weeks from 28 February 2023, any remaining period of the Applicant's notice period not worked by the Applicant will be paid to her in lieu as part of her final pay and that the Applicant's final pay will be processed on 15 March 2023 or earlier.

[61] One interpretation of the letter is that the Applicant's termination date was 1 March 2023 and that she would be paid 19 days in lieu of notice as part of her final pay. An alternative interpretation of the letter is that the Applicant's termination date was 10 March 2023, that she was paid but not required to attend work from 2-10 March 2023 and that she would be paid 12 days in lieu of notice as part of her final pay.

Notice of termination takes effect when communicated to the employee

[62] Section 117(1) of the FW Act prohibits an employer from terminating an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given). Exclusions from this requirement are provided in s.123, none of which apply to the current circumstances.

[63] In this case, the Respondent did not communicate the dismissal to the Applicant until 7 March 2023. The date of dismissal in that email was said to be 1 March 2023, however that cannot be the effective date of dismissal in light of s.117(1) because it predates the Respondent's email dated 7 March 2023.

[64] It is well established that for the purposes of s.394(2)(a), a dismissal at the initiative of the employer does not take effect unless and until it is communicated to the employee who is being dismissed.⁴

[65] The Respondent produced evidence that it provided the Applicant with payment in lieu of notice on 3 March 2023.

[66] The Respondent relied upon *Siagian v Sanel Pty Limited*⁵ as authority for the proposition that when an employer provides an employee with payment in lieu of notice, this a clear indication that the termination will take effect immediately. However, unlike the current case, the employer in *Siagian v Sanel Pty Limited* communicated verbally to Mr Siagian that his employment was terminated and handed him a piece of paper headed "Statement of Earnings on termination" and a cheque. The Court found that the termination of Mr Siagian's employment took effect on 29 March 1994 because of the communication of termination on that date, combined with the payment in lieu of notice.

[67] In this instance, the payment in lieu of notice on 3 March 2023 occurred prior to 7 March 2023, the date that the Respondent advised the Applicant that her employment was terminated. The payment in lieu of notice on 3 March 2023 therefore does not support the Respondent's contention that the dismissal took effect on 1 March 2023.

[68] Having regard to the provisions of the FW Act, the authorities referred to above and by the parties and the Respondent's email communication to the Applicant on 28 February, 2 March and 7 March 2023, I find that the effective date of dismissal is 7 March 2023.

When was the application made?

[69] It is not in dispute, and I so find, that the application was made on 31 March 2023.

Was the application made within 21 days after the dismissal took effect?

[70] As the Full Bench has stated in relation to a general protections application but equally applicable here, "[t]he 21 day period prescribed... does not include the day on which the dismissal took effect."⁶

[71] As I found above, the dismissal took effect on 7 March 2023. The final day of the 21-day period was therefore 28 March 2023 and ended at midnight on that day. As I found above, the application was made on 31 March 2023.

[72] The application having not been made within 21 days of the date on which the dismissal took effect, I need to consider whether it was made within such further period as the Commission allows.

Should the Commission allow a further period for the application to be made?

[73] Under s.394(3) of the FW Act, the Commission may allow a further period for an unfair dismissal application to be made if the Commission is satisfied that there are exceptional circumstances, taking into account:

- (a) the reason for the delay; and
- (b) whether the Applicant first became aware of the dismissal after it had taken effect; and
- (c) any action taken by the Applicant 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 Applicant and other persons in a similar position.

[74] Each of the above matters must be considered in assessing whether there are exceptional circumstances.⁷

[75] I set out my consideration of each matter below.

Reason for the delay

[76] For the application to have been made within 21 days after the dismissal took effect, it should have been made by midnight on 28 March 2023. The delay is the period commencing immediately after that time until 31 March 2023, although circumstances arising prior to that delay may be relevant to the reason for the delay.⁸

[77] The reason for the delay is not in itself required to be an exceptional circumstance. It is one of the factors that must be weighed in assessing whether, overall, there are exceptional circumstances.⁹

[78] An applicant does not need to provide a reason for the entire period of the delay. Depending on all the circumstances, an extension of time may be granted where the applicant has not provided any reason for any part of the delay.¹⁰

[79] The Applicant submitted that the delay was caused by confusion and uncertainty about the date of dismissal, given that the Respondent had initially represented to the Applicant that the redundancy would take effect on 31 March 2023 then later on 10 March 2023.

[80] In their letter dated 18 May 2023, the Applicant's representatives also relied upon representative error as a reason for the delay. However, the Applicant did not file any evidence in support of this submission and as such, this was not pressed at the hearing.

[81] The Respondent submitted that:

- the Applicant was on notice from 28 February 2023 that her position was being made redundant
- the materials filed established that the Applicant's dismissal took effect on 1 March 2023
- the termination was reinforced by correspondence on 3 March 2023
- the Applicant received a termination payment on 3 March 2023
- if there was any confusion by the Applicant as to the date that her termination took effect, it was clarified by Ms Gray's email dated 7 March 2023 and the letter dated 28 February 2023 (received on 7 March 2023)

[82] The application alleged that the dismissal took effect on 10 March 2023. The response alleged that the dismissal took effect on 1 March 2023. As noted above I have not accepted either the Applicant's or Respondent's contentions in this regard and have found that the dismissal took effect on 7 March 2023.

[83] I accept that the Applicant was on notice from 28 February 2023 that her position was to be made redundant, but this does not assist in determining the date of dismissal.

[84] I accept that there was confusion and uncertainty about the date of dismissal which was caused by multiple communication failures on the part of the Respondent including:

- The Respondent's invitation to the Applicant on 28 February 2023 to confirm her intention to end the consultation process and the subsequent disregard of the Applicant's response.
- Ms Gray's communication to the Applicant that the redundancy of her position would take effect on 31 March 2023.
- The Respondent's failure to refute the Applicant's stated understanding that her four week notice period would end on or about 31 March 2023.
- Ms Gray's incorrect characterisation of Mr Knepshield's email of 28 February 2023 as terminating the Applicant's employment by way of redundancy effective 1 March 2023.
- The Respondent's failure to provide the purported notice of redundancy dated 28 February 2023 to the Applicant on:
 - 28 February 2023;

- 2 March 2023 when Ms Gray wrote to the Applicant; and
- 3 March 2023 when the Applicant requested a copy
- The Respondent's acceptance that the purported notice of redundancy dated 28 February 2023 was provided to the Applicant for the first time on 7 March 2023.

[85] Perhaps the most significant communication failure was Ms Gray's advice on 7 March 2023 that the Applicant's employment was retrospectively terminated with effect from 1 March 2023. Given that it could not be true that the termination date was 1 March 2023 and that Ms Gray's email was accompanied by a purported notice of redundancy, which as noted above is ambiguous and referred to the redundancy taking effect on 10 March 2023, I accept that there was a sound (albeit erroneous) basis for the application alleging that the dismissal took effect on 10 March 2023 and the application being lodged on 31 March 2023.

[86] While communication issues arise between employees and employers from time to time in the ordinary course of workplace relations, the provision of notice of termination of employment is usually a significant and challenging life event for an employee and therefore should be properly communicated and managed by the employer.

[87] In addition, an employer who decides to terminate the employment of an employee would generally be concerned to ensure that this decision is properly implemented, given the impact on the employee and the legal consequences which potentially flow from the end of an employment relationship.

[88] I find that the multiple failures by the Respondent to accurately and clearly communicate such a significant event as the date of termination to the Applicant highly unusual and inconsistent with contemporary workplace relations standards. The Respondent's actions in this regard amount to exceptional circumstances which weigh in favour of the extension of time being granted.

Did the Applicant first become aware of the dismissal after it had taken effect?

[89] Ms Gray's email to the Applicant dated 7 March 2023 is the first occasion that the Respondent confirmed that the Applicant's employment was terminated. I have found that the dismissal took effect on 7 March 2023, so it follows that the Applicant became aware of the dismissal when it took effect.

[90] However, given that I have also found that there was confusion and uncertainty about the date of dismissal which was caused by multiple communication failures on the part of the Respondent, I find this matter to be finely balanced and as such it neither weighs in favour or against an extension of time being granted.

What action was taken by the Applicant to dispute the dismissal?

[91] In the Respondent's Outline of Argument, the Respondent stated that from 28 February 2023 to 17 March 2023, the Applicant corresponded with the Respondent and continued to dispute the redundancy of her position. The documents provided show this to be the case.

[92] During the hearing, the Respondent submitted that during the period of this correspondence, there was nothing to prevent the Applicant from also advancing her unfair dismissal claim and she ought to have done so. Given that I have found that there was confusion and uncertainty about the date of dismissal which was caused by multiple communication failures on the part of the Respondent, there is a plausible explanation about why the Applicant did not file the application until 31 March 2023.

[93] I therefore find that the Applicant's actions in disputing the dismissal in corresponding with the Respondent from 28 February 2023 to 17 March 2023 favours an extension of time being granted.

What is the prejudice to the employer (including prejudice caused by the delay)?

[94] The Applicant submitted that no particular prejudice to the Respondent can be identified. I find that prejudice to the Respondent is a neutral consideration in this matter.

What are the merits of the application?

[95] The competing contentions of the parties in relation to the merits of the application are set out in the filed materials.

[96] Having examined these materials, it is evident that the merits of the application turn on contested points of fact, evidence in respect of which would be heard and weighed in a hearing of the merits of this matter if an extension of time were granted. It is well established that, "it will not be appropriate for the Tribunal to resolve contested issues of fact going to the ultimate merits for the purposes of taking account of the matter in s.366(2)(d)"¹¹ and the same applies to s.394(3)(e).

[97] In the absence of a hearing of the evidence, it is not possible to make any firm or detailed assessment of the merits. The Applicant has an apparent case, to which the Respondent has an apparent defence.

[98] In the circumstances, I find that it is not possible to make an assessment of the merits of the application.

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

[99] Neither party brought to my attention any relevant matter concerning this consideration and I am unaware of any relevant matter. In relation to this factor, I therefore find that there is nothing for me to weigh in my assessment of whether there are exceptional circumstances.

Is the Commission satisfied that there are exceptional circumstances, taking into account the matters above?

[100] I must now consider whether I am satisfied that there are exceptional circumstances, taking into account my findings regarding:

- (a) the reasons for the delay, being confusion and uncertainty about the date of dismissal which was caused by multiple communication failures on the part of the Respondent
- (b) the Applicant becoming aware of the dismissal when it took effect
- (c) the actions taken by the Applicant to dispute the dismissal, by corresponding with the Respondent during the period from 28 February to 17 March 2023
- (d) no issue of prejudice to the employer being identified
- (e) the merits of the application being unable to be determined ahead of a hearing of the evidence; and
- (f) no issue of fairness arising as between the Applicant and other persons in a similar position.

[101] Briefly, 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.¹² Exceptional circumstances may 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 can be considered exceptional.¹³

[102] The reasons for the delay and the actions of the Applicant to dispute the dismissal weigh in favour of a finding of exceptional circumstances. The matters in subsection 394(3)(b) and (d)-(f) are neutral considerations.

Conclusion

[103] Having regard to all of the matters at s.394(3) of the FW Act, I am satisfied that there are exceptional circumstances.

[104] Being satisfied that there are exceptional circumstances, the Commission may consider whether to allow a further period for the application to be made.

[105] Having regard to those exceptional circumstances and the object stated at s.381(2) of the FW Act to ensure that a “fair go all round” is accorded, the Commission is satisfied that it is appropriate to extend the period for the application to be made to 31 March 2023 and I order accordingly.

[106] The matter will be shortly listed for directions.



DEPUTY PRESIDENT

Appearances:

T Arvanitis, for the Applicant
J Allen, for the Respondent

Hearing details:

2023.
By Video using Microsoft Teams,
9 June.

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¹ Lisha Herc v Hays Specialist Recruitment (Australia) Pty Limited [\[2022\] FWCFB 234](#) at [15]

² Warrell v Fair Work Australia [2013] FCA 291.

³ Ibid.

⁴ Ayub v NSW Trains [\[2016\] FWCFB 5500](#) at [36]

⁵ (1994) 54 IR 185

⁶ Singh v Trimatic Management Services Pty Ltd [\[2020\] FWCFB 553](#), [10]. See also *Acts Interpretation Act 1901* (Cth) s 36(1) as in force on 25 June 2009; *Fair Work Act 2009* (Cth) s 40A.

⁷ Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd [\[2018\] FWCFB 901](#), [39].

⁸ Shaw v Australia and New Zealand Banking Group Ltd [\[2015\] FWCFB 287](#), [12] (Watson VP and Smith DP).

⁹ Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd [\[2018\] FWCFB 901](#), [39].

¹⁰ Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd [\[2018\] FWCFB 901](#), [40].

¹¹ Nulty v Blue Star Group Pty Ltd [\[2011\] FWAFB 975](#), [36].

¹² Nulty v Blue Star Group Pty Ltd [\[2011\] FWAFB 975](#), [13].

¹³ Nulty v Blue Star Group Pty Ltd [\[2011\] FWAFB 975](#), [13].