

[2023] FWC 1613

The attached document replaces the document previously issued with the above code on 4 July 2023.

Three amendments:

Para [80] reference to “ten” has been changed to “eight”.

Para [102] phrase “for part of the delay” has been changed to “for that part of the delay”.

Para [107] reference to “16 April” has been changed to “16 May”.

Carmen Irving  
Associate to Deputy President Anderson

Dated 4 July 2023





# DECISION

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

**Muhammad Ali Qureshi**

v

**Spotless Services Australia Limited**  
(U2023/4369)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 4 JULY 2023

*Application for an unfair dismissal remedy – security officer – failure to report for rostered shifts – custodial detention – date dismissal (if any) took effect – application out of time – extension of time – impact of detention on mental health – attempts to contact employer once released – circumstances exceptional – extension granted*

[1] On 19 May 2023 Muhammad Ali Qureshi (Mr Ali Qureshi or the applicant) lodged an unfair dismissal application under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) in relation to an alleged dismissal by Spotless Services Australia Limited (Spotless, the respondent or the employer).

[2] Spotless filed a response on 7 June 2023.

[3] Mr Ali Qureshi submits that the application is not out of time but, if so, seeks an extension of time.

[4] The employer submits that the application is out of time and opposes an extension.

[5] There is a separate dispute whether Mr Ali Qureshi was dismissed. The extension of time matter was heard and is determined on the basis that the employer's rights are reserved to contend in any subsequent proceedings that Mr Ali Qureshi's employment ceased by contractual repudiation and not dismissal.

[6] This decision deals solely with the out of time issue.

[7] I issued directions on 9 June 2023.

[8] Materials were filed by Mr Ali Qureshi and Spotless.

[9] I conducted a hearing by video on 28 June 2023.

[10] Mr Ali Qureshi gave evidence<sup>1</sup>. Both parties made submissions.

[11] Following the hearing I reserved my decision.

[12] The cases of both Mr Ali Qureshi and Spotless were well presented. Each was respectful to the other. Both parties are to be commended in that regard.

[13] Whilst the evidence was well tested, the facts are largely not in dispute. No issues of credit arise. I found Mr Ali Qureshi to be a conscientious witness whose evidence was given directly and to the best of his recall despite the evident impact on him of the circumstances he recounted.

[14] I have redacted certain content in this decision from publication where it is not relevant to determining the extension of time issue or where potential prejudice outweighs the case for publication. The redacted content is known to the parties.

## **Facts**

[15] I make the following findings.

[16] Spotless provides, amongst other operations, security services to the South Australian government including in its health sector.

[17] Mr Ali Qureshi was employed from 16 May 2022 as a full time security officer.<sup>2</sup> At the time his employment ceased, he worked a five day roster Saturday to Wednesday (inclusive) at the Royal Adelaide Hospital, with Thursday's and Friday's off work.

[18] Mr Ali Qureshi reported to his immediate manager Mr Morris.

[19] Mr Ali Qureshi is an immigrant to Australia. English is not his first language but he speaks clear English.

### *Events 2 April*

[20] On Sunday 2 April 2023 Mr Ali Qureshi worked a rostered shift until approximately 10.00pm.

[21] Upon arriving home Mr Ali Qureshi was spoken to by police and taken to the Port Adelaide Police Station where he was charged with certain offences. He was told that he would remain at the station overnight and be presented to a magistrate the next day.

[22] Mr Ali Qureshi was placed in cells at the police station. His mobile telephone was confiscated. He was permitted to make a telephone call. He called a friend (S).<sup>3</sup> Mr Ali Qureshi's evidence was that he told S of his predicament and, amongst other things, asked S to advise his "friends and family and if possible my work". Mr Ali Qureshi requested this because he was aware that, had he not been detained, he was rostered to work the next day (and throughout that week).

### *Events 3 April to 26 April*

[23] On 3 April Mr Ali Qureshi was presented to a magistrate (by video hearing from the police station). Mr Ali Qureshi had no legal representation. The magistrate ordered that he be remanded in custody.

[24] On 3 April Mr Ali Qureshi was taken to the Adelaide Remand Centre.

[25] Mr Ali Qureshi remained in the Adelaide Remand Centre for twenty-three days.

[26] Mr Ali Qureshi was released from the Adelaide Remand Centre on the evening of Wednesday 26 April 2023. He was released when advised that police charges against him were dropped.

[27] Whilst in remand Mr Ali Qureshi's evidence was that he:

- did not have possession of his mobile phone or access to his contacts on his mobile phone;
- had no access to the internet;
- was under the control and supervision of the authorities; and
- was permitted to make telephone calls but only to persons authorised by the authorities. Mr Ali Qureshi was able to request that he be permitted to call a nominated person. He would then be advised if his request was approved, declined or pending.

[28] Whilst in remand Mr Ali Qureshi requested and was granted permission to speak by telephone to nominated friends whose telephone numbers he knew. A friend sent him an amount of cash by post to allow him to purchase some basic needs.

[29] During his first week in remand Mr Ali Qureshi made a request that he "be permitted to speak to my workplace". Mr Ali Qureshi did not provide the authorities with contact details for a specific Spotless officer as he did not have access to telephone numbers stored on his phone. He made the request via a written request (KEX) system used in remand. His request was neither approved nor declined. At the time of his release, it remained "pending".

[30] Whilst in remand Mr Ali Qureshi's mental health deteriorated. He was seen by a medical specialist and provided a medication plan. He was spoken to in person (jointly) by a social worker and a psychiatrist. According to Mr Ali Qureshi, in that meeting he repeated the request to speak to someone from his workplace.

[31] During his final week in remand Mr Ali Qureshi met with a solicitor. According to Mr Ali Qureshi, in that meeting he again repeated the request that the lawyer speak to someone from his workplace. He was told that the lawyer's priority was to deal with the police charges, not his employment.

[32] Mr Ali Qureshi was discharged from remand at about 8.00pm Wednesday 26 April 2023 after being told the charges were dropped. He was released with his mobile phone returned to him.<sup>4</sup>

[33] Mr Ali Qureshi was collected by a friend (A).

*Action by Spotless*

[34] Mr Ali Qureshi had no contact, directly or indirectly, with Spotless or from Spotless whilst in remand and vice versa.

[35] Spotless was unaware at all relevant times that Mr Ali Qureshi was in remand.

[36] Spotless had rostered Mr Ali Qureshi to work regular shifts on 3, 4 and 5 April and then again in the week of 8, 9, and 10 April 2023.

[37] Mr Ali Qureshi failed to attend these shifts. As no communication had been made to Spotless, it was unaware why Mr Ali Qureshi had not turned up for work.

[38] Unknown to Mr Ali Qureshi, Spotless tried to call Mr Ali Qureshi three times on his mobile telephone on 4 April 2023. There was no answer. Spotless again made further calls on or about 8, 9 and 10 April which again went to voicemail. Voice messages were left but not responded to.

[39] Unknown to Mr Ali Qureshi, and according to the response filed by Spotless in the Commission, a person claiming to be Mr Ali Qureshi's wife telephoned Spotless on 11 April 2023 and asserted that Mr Ali Qureshi was in India for at least a month. I do not make a finding to this effect as Spotless led no evidence concerning that call. My finding is that, if such a call was made as suggested, then the claim that Mr Ali Qureshi was in India was false. He was in Adelaide, being held in remand.

[40] On 11 April 2023 Spotless sent a letter to Mr Ali Qureshi stating that if he did not make contact by 13 April, it would regard him as having abandoned his employment and repudiated his contract. Being in remand, Mr Ali Qureshi did not receive this letter.

[41] On 18 April 2023, after receiving no response from Mr Ali Qureshi, Spotless sent further correspondence in the following terms:<sup>5</sup>

“Dear Ali,

**Re: Your Absence from Duty**

As you are aware from my previous correspondence dated 11 April 2023 you have not reported for rostered shifts, nor made contact with any representatives of Spotless Services Australia Limited (Company) to explain your absence from work since 04 April 2023. This is notwithstanding my request to provide information about your situation by 13 April 2023.

By your conduct you have repudiated your contract of employment.

This letter is to confirm that the Company has elected to accept the repudiation and will record your last day of employment as 03 April 2023.

You will be paid any outstanding monies owed. You are required to make arrangements to return any company property as soon as possible to the level 3 Security Desk, including your security access card.

Should you have any questions, please don't hesitate to contact me,

Yours sincerely,

Brett Morris  
Acting Security Manager"

[42] The letter was sent by email to Mr Ali Qureshi's correct email address.

[43] The letter was also posted. However, the letter was addressed and posted to a former and not current residential address in suburban Adelaide. The posted letter never arrived at Mr Ali Qureshi's current postal address, either whilst he was in remand or subsequently.

[44] Being in remand, Mr Ali Qureshi did not receive the letter of 18 April 2023 electronically or by post. Nor was Mr Ali Qureshi advised by any person of the existence of the letter.

*Events 27 April to 12 May*

[45] Upon being released from remand, Mr Ali Qureshi felt traumatised and unwell. Armed with the medication plan he commenced taking an anti-depressant<sup>6</sup> and made an appointment to see his general practitioner Dr Patel. He saw Dr Patel nine days after release, on 5 May. Dr Patel certified Mr Ali Qureshi as unfit for work from 26 April to 12 May inclusive.<sup>7</sup>

[46] Upon release, Mr Ali Qureshi did not feel well enough to go to work even though (as far as he was aware) he would have in the ordinary course been rostered to work on Saturday 29 April and in the week following.

[47] According to Mr Ali Qureshi's evidence, which I accept, once out of remand Mr Ali Qureshi made contact with his friend S and asked if S had made contact with his employer as Mr Ali Qureshi had requested when first in remand. S told Mr Ali Qureshi that he had not done so.

[48] Also, according to Mr Ali Qureshi's evidence, which I accept, in or around the first week of May 2023 on approximately four occasions he sent text messages and made telephone calls to his manager (Mr Morris) and to Spotless's human resources to explain his circumstances. Those messages and calls went unanswered and were not returned.

[49] Upon being released from remand Mr Ali Qureshi also discovered that in light of not having made payments he was in arrears on rent, a car loan, health insurance and his private internet plan. He discovered that his internet had been disconnected due to non-payment. Over

the following week Mr Ali Qureshi made the payments and his internet connectivity was restored.

**[50]** Upon internet connectivity being restored, on or around 4 or 5 May 2023 Mr Ali Qureshi searched his in-box and found emails from Spotless including the email of 18 April 2023 attaching the letter of same date. Thus, it was on or around 4 or 5 May 2023 that Mr Ali Qureshi first learned, by reading that letter, that his employment had ended.

**[51]** In light of his texts and calls to Spotless not being returned, on 7 May 2023 and assisted by a friend (A) Mr Ali Qureshi sent an email to Spotless in the following terms:<sup>8</sup>

“Dear Paul,

I am writing this email to you as I need to inform you regarding the exceptional circumstances I was caught in without my fault.

[REDACTED]

[REDACTED]

However; until the at the night of 2-April-2023 I was arrested by SAPOL and due to their legal formalities they presented me before court and court sent me to Adelaide Remand centre (while issued me with a Prisoner ID: 190101) under detention, and Police prosecution took around 24 days to verify and drop the charges completely.

When I got release on 26-April-2023 from detention, My Health conditions were deteriorated, This whole Time I was not aware that what was going on at my workplace and at my Home. I am currently under treatment from my GP and He has advised me that I am not fit for work until 12-May-2023 and after that I am fully fit to resume with my duties.

It is pertinent to inform that, There are no charges or anything pending, my profile is fully clean, Security License is active, Working with children check is also active. I was under Government custody for their legal requirements, circumstances were exceptional and beyond my control, Therefore; per the Fairworks Laws and principles of my contract with Spotless/Downer group, my Job a security officer at NRAH should be resume from the date I am medically fit to start the work.

I request you to please cooperate with me and I assure you that I shall work with honesty and determination I have been working under your management before.

Kind Regards,



Muhammad Ali Qureshi”

[52] Spotless responded at 12.08pm on 8 April 2023:<sup>9</sup>

“Dear Ali,

I refer you to our letter dated 18 April 2023 sent to your email address and mailed to your home address (copy attached)

In that letter you will note that you repudiated your contract of employment your last day of employment with the company was noted 03 April 2023

Regards,

**Paul Mason**

**HR Advisor RAH & WCH”**

[53] Mr Ali Qureshi immediately replied:<sup>10</sup>

“Hello Paul,

Please read my email again, I did not repudiate anything, I have explained you the circumstances, I was wrongly detained by SAPOL in Remand Centre, There was no one at my home and I didn't have any to communication channels to contact my workplace and inform you people. Therefore Legally and Ethically it is was not in my control, I was detained, As soon I come out of the detention and when it become possible to reply you, I am contacting you now and available.

Please tell me the current state, I can come to office anytime in-person. Its my legal and ethical right to resume with my duties from where it got broken without my consent or control.

Regards,

Muhammad Ali Qureshi”

[54] No further reply was sent by Spotless.

[55] After receiving no further contact from Spotless, and believing that he had been treated unfairly, Mr Ali Qureshi asked his friends for advice. He was told about the right to make unfair dismissal applications.

[56] On or around 12 May 2023 Mr Ali Qureshi telephoned the Commission enquiries line. He was advised that unfair dismissal applications could be made but that if he was out of time then applications could only proceed if there were exceptional circumstances. On or around this time Mr Ali Qureshi also attended personally to the Commission registry and was advised the same.

*Events 13 May to 19 May*

[57] Aware of the right to make unfair dismissal claims but wanting to do so in a correct manner and after researching the jurisdiction, on or about 13 May 2023 Mr Ali Qureshi together with friend A began preparing an unfair dismissal application.

[58] Mr Ali Qureshi, frustrated that his earlier calls to Spotless had not been responded to but still believing that a discussion with Spotless about what had happened could restore his employment and avoid having to take legal action, made one further attempt to speak to Mr Morris.

[59] Using his friend's telephone, on or around 16 May 2023 he called Mr Morris. Mr Morris answered. Mr Ali Qureshi was told that his employment had ended because he hadn't turned up for work after multiple attempts to contact him. Mr Morris told Mr Ali Qureshi that it had been suggested to Spotless that he had been in India. Mr Ali Qureshi repeated that he had been in remand, not in India. The call ended without resolution.

[60] On or around this time Mr Ali Qureshi had a further consultation (remotely) with Dr Patel.

[61] On 19 May 2023 Mr Ali Qureshi considered his application complete. He lodged it on-line. His application stated that it was out of time but that he did not know the exact date his dismissal took effect.

[62] Spotless was not aware of the unfair dismissal claim until notified by the Commission once the application had been made. On 7 June 2023 the employer filed a response. The employer stated that Mr Ali Qureshi was not dismissed but that his employment came to an end when it accepted contractual repudiation by Mr Ali Qureshi. The employer stated that its notification of employment ending was made on 18 April 2023 backdated to 3 April 2023.

[63] On 14 June 2023 Mr Ali Qureshi had a further (in person) consultation with Dr Patel. Dr Patel certified Mr Ali Qureshi as suffering "depression and anxiety disorder" and that he had been on prescribed medication since 5 May 2023.

## **Submissions**

### *Mr Ali Qureshi*

[64] Mr Ali Qureshi submits that his application is not out of time because time starts from 4 or 5 May 2023 when he first read the 18 April 2023 letter from Spotless.

[65] In the alternative, Mr Ali Qureshi submits that time for late lodgement should be extended because the circumstances are exceptional. He says that the delay is explained by two factors:

- that he was in remand until the evening of 26 April 2023 and unaware of his alleged dismissal. He says he did not have the capacity to directly contact the employer whilst in remand; and

- that in the period after being released from remand he was medically unwell and made unsuccessful attempts to contact Spotless despite being unwell.

[66] Mr Ali Qureshi submits that he acted promptly after being aware of the right to pursue an unfair dismissal claim but needed to take enough time to file his application correctly.

[67] Mr Ali Qureshi submits that his case is strong on merit because the employer could have but did not try to contact his next of kin before deciding to dismiss and decided to dismiss on a mistaken belief that he was in India and failed to check the veracity of that claim.

### *Spotless*

[68] Spotless submit that Mr Ali Qureshi was not dismissed. It says that acceptance of contractual repudiation is not a dismissal within the meaning of the FW Act.

[69] Noting that its contention that Mr Ali Qureshi was not dismissed is reserved, on the extension of time issue, Spotless submit that Mr Ali Qureshi was notified that his employment had ceased by letter sent electronically and by post on 18 April 2023. Spotless submit that this is the date dismissal took effect, if there was a dismissal.

[70] Spotless submit that whilst it accepts that Mr Ali Qureshi was in remand until 26 April 2023, this does not explain the delay period. It submits that during the delay period and immediately prior Mr Ali Qureshi was not in remand, was home, and had internet connection. It submits that he could have but failed to file an application on time.

[71] Spotless submit that Mr Ali Qureshi's claim that he was medically unfit is not supported by sufficient evidence. It submits that a doctor's certificate that he was unfit to work until 12 May 2023 does not mean that he was unfit to make a claim. It points to his emails of 7 and 8 May as evidence that he was able to articulate his position. It submits that no certificate of unfitness exists for the period immediately after 12 May. It submits that the medication the doctor states Mr Ali Qureshi was taking does not necessarily render a person unfit to function or make claims.

[72] Spotless submit that it will incur prejudice in defending a late claim in circumstances where it has strong grounds on merit to contend that Mr Ali Qureshi had abandoned his employment and repudiated his contract by failing to attend work. Spotless submit that Mr Ali Qureshi did not take all reasonable steps to notify his managers or supervisors of his circumstances whilst in remand or in the days immediately following his release.

[73] Whilst respectful of Mr Ali Qureshi's plight, Spotless submit that none of the reasons advanced constitute exceptional circumstances individually or collectively.

### **Consideration**

[74] Unfair dismissal applications must be made within twenty-one days of a dismissal taking effect unless time is extended.

### *Date alleged dismissal took effect*

[75] Leaving aside whether Mr Ali Qureshi was dismissed when Spotlight accepted what it says was contractual repudiation, the first issue to determine is, if Mr Ali Qureshi was dismissed, when did the dismissal take effect?

[76] It is well established that a dismissal does not take effect until it is communicated to the person dismissed in clear and unambiguous terms<sup>11</sup> or where communication in those terms is “reasonably accessible” to the person dismissed.<sup>12</sup>

[77] Spotlight’s letter of 18 April 2023 is expressed in clear and unambiguous terms.

[78] In the ordinary course, a letter by an employer notifying that employment has ceased that is sent by email is reasonably accessible to the person dismissed when the email is received in that person’s correctly addressed and last known in-box.<sup>13</sup> In this case, it is not in dispute that the email was received in Mr Ali Qureshi’s in-box that same day (18 April).

[79] However, as noted by a full bench of this Commission in *Ayub*, “there may be circumstances in which mere receipt of an email may not constitute a reasonable opportunity to become aware of a dismissal - for example when the employee has not read the email because of an incapacitating illness or is legitimately unable to access their email for other reasons.”

[80] In the unusual circumstances of this matter I am not satisfied that the email of 18 April 2023 was reasonably accessible to Mr Ali Qureshi on that day. On the day it arrived in his in-box Mr Ali Qureshi was in remand in the custody of the State. He remained in remand that day and during the eight days that followed. The evidence is that Mr Ali Qureshi had no access to the internet or his in-box whilst in remand, either of his own motion or by permission. The evidence is that he was allowed to make authorised telephone calls with permission of the authorities, but making a telephone call is not the same as a reasonable capacity to access an email in-box.

[81] Nor do I consider that it was reasonable, in the circumstances, for Mr Ali Qureshi to have requested either the social worker or psychiatrist or solicitor with whom he met whilst in remand to be asked to access and then trawl through his in-box on his behalf. Aside from it being unclear whether they would have been granted such rights, those persons were present for specific purposes associated with Mr Ali Qureshi’s well-being and legal rights, not to inform Mr Ali Qureshi of what emails he had or had not received.

[82] However, I consider that Mr Ali Qureshi had reasonable access to his in-box from the time he was released from remand. Whilst I take into account that his personal internet connection was deactivated for approximately the one week that followed and also that he was clearly traumatised by the experience of being detained and was feeling unwell, it was reasonably open to Mr Ali Qureshi to request access to his in-box by using a friend’s internet service or a public internet service. Mr Ali Qureshi did not do so. He waited until his internet connectivity was restored.

[83] Given that Mr Ali Qureshi was not released from remand until the evening of 26 April 2023, this capacity to access his in-box with assistance from his friends or a public internet service only realistically existed from 27 April 2023 onwards.

[84] Accordingly, I conclude that the 18 April 2023 letter by Spotless was not “reasonably accessible” (within the meaning of the relevant authorities) to Mr Ali Qureshi until 27 April 2023. I find that this was the date Mr Ali Qureshi’s dismissal (if he was dismissed) took effect.

[85] That being so, the application was filed twenty-two days after the dismissal took effect. It is one day out of time. The delay period is the one day of 19 May 2023. If the application is to proceed, an extension of time is required.

*Extension of time*

[86] Section 394(3) of the FW Act provides:

**“394 Application for unfair dismissal remedy**

...

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

- (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.”

[87] The application can only proceed if the applicant can establish that “exceptional circumstances” exist within the meaning of s 394(3).

[88] An applicant for an extension of time has an onus to adduce evidence in support of matters which that applicant asserts constitute exceptional circumstances.<sup>14</sup>

[89] The test of “exceptional circumstances” establishes a “high hurdle” for an applicant.<sup>15</sup> A decision whether to extend time under s 394(3) involves the exercise of a discretion.<sup>16</sup>

[90] I apply s 394(3) in the context of the Full Bench decision in *Nulty v Blue Star Group Pty Ltd*:

“[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.”<sup>17</sup>

[91] The principles of *Nulty* have been cited with approval by subsequent full benches of the Commission.<sup>18</sup>

[92] I now consider each of the factors in s 394(3).

*Reason for the delay (s 394(3)(a))*

[93] The reason for delay in lodging an application is a factor that must be considered. The FW Act does not specify what reason or reasons for delay might fall in favour of granting an extension although decisions of the Commission have referred to an acceptable or reasonable explanation.<sup>19</sup> The absence of an explanation for any part of the delay will usually weigh against an applicant. Similarly, a credible explanation for the entirety of the delay will usually weigh in an applicant’s favour, though it is ultimately a question of degree and insight.<sup>20</sup>

[94] However, a reasonable explanation for the delay is not needed for the whole of the period of delay or may in fact not be required at all if the circumstances are otherwise exceptional.<sup>21</sup>

[95] The period of delay that requires explanation is the period commencing immediately after the time for lodging an application has expired, ending on the day on which an application is ultimately lodged. That said, regard may be had to any circumstances from the date the dismissal took effect when assessing whether the explanation for delay is acceptable or credible.<sup>22</sup>

[96] The reasons for the delay advanced by Mr Ali Qureshi are:

- that he was in remand until the evening of 26 April 2023;
- that in the period after being released from remand he was medically unwell;
- that in the period after being released from remand he made multiple attempts to contact Spotless despite being unwell, and was awaiting their reply; and
- once it was apparent that Spotless would not restore his employment, he took action to ascertain his rights and prepare a claim with assistance from a friend.

[97] I accept the submission by Spotless that in this matter the period Mr Ali Qureshi was in remand is not the delay period and that in any event a period in custody or remand is not a fact which by itself represents an exceptional circumstance justifying an extension of time.<sup>23</sup>

[98] However, this is a matter where regard is to be had to the circumstances prior to the delay period in order to assess whether the explanation for delay is acceptable or credible. The period that Mr Ali Qureshi was in remand is relevant to the explanation for delay in that it contextualised what followed. It was a period of prolonged detention. That detention clearly caused anxiety and stress such that whilst in detention Mr Ali Qureshi was seen to by a mental health specialist. Upon his release and throughout the delay period Mr Ali Qureshi was unwell, was on prescription medication and in the care of his general practitioner.

[99] The second explanation has some merit though evidence of the extent of Mr Ali Qureshi's medical condition is limited and his treating doctor was not called to give evidence. Whilst I consider that Mr Ali Qureshi's unwellness did not, of itself, act to render him incapable of lodging an application (evidenced by the content of his emails of 7 and 8 May 2023), it explains in part the gradual steps he took whilst adjusting back into non-custodial life. He tried to communicate with Spotless, tried to understand the employer's correspondence once he read it, and took advice on his rights. These steps were gradual, orderly and rational, tempered by his fitness to do so.

[100] The anti-depressant that Mr Ali Qureshi commenced taking after being released from remand specified possible side effects that include "sedation".<sup>24</sup> I accept Mr Ali Qureshi's evidence that in the days following taking the medication he was drowsy and sleeping. That evidence is consistent with a sedative effect of an anti-depressant. Whilst I agree with Spotless that the medical evidence presented by Mr Ali Qureshi is not of itself compelling, I do not accept the employer's submission that that the prescription medicine he was prescribed to take did not include a potential impact on cognitive impairment. A person sedated is cognitively impaired for at least that period of time.

[101] The third reason has merit. That Mr Ali Qureshi took multiple steps in early May 2023 to text and phone the employer and to then communicate by email is a strong indication that he was genuine in seeking dialogue. It was not reasonable for Mr Ali Qureshi to commence litigation while he was undertaking those steps. That he telephoned Mr Morris on 16 May, three days before making the claim, is an indication that he sought to exhaust all options prior to commencing litigation.

[102] As to the fourth reason, Mr Ali Qureshi did take a full week after being advised by the Commission of a right to file an unfair dismissal claim (even a late one). I take into account that Mr Ali Qureshi had no legal training, was relying on assistance from a friend, was still re-adjusting after twenty-three days in detention and quite appropriately made a final call to Mr Morris. However, the application could have been filed earlier (making it on time). The explanation for not doing so was that Mr Ali Qureshi was preparing the application carefully to ensure it was in correct form, in the correct jurisdiction and accompanied by relevant information. This is somewhat, but only somewhat, a convincing explanation for that part of the delay.

[103] However, considered overall, the reasons for delay materially weigh in favour of a finding of exceptional circumstances.

*Awareness of the dismissal taking effect (s 394(3)(b))*

[104] As noted, the alleged dismissal did not take effect until its notification was reasonably accessible to Mr Ali Qureshi on 27 April 2023. As the employer's letter was not read by Mr Ali Qureshi until a week later, he did not in fact become aware that his employment had ended until 4 or 5 May 2023.

[105] From the time he read the letter of 18 April 2023, Mr Ali Qureshi was aware of the reason (though strongly in disagreement with it). Two weeks lapsed between Mr Ali Qureshi becoming so aware and filing the application.

[106] In the circumstances, this is a neutral factor.

*Action taken to dispute dismissal (s 394(3)(c))*

[107] Mr Ali Qureshi genuinely felt wronged by his employment ending. As noted, almost immediately after reading (in the first week of May 2023) the letter of 18 April he telephoned, texted and then emailed Spotless to explain what had happened and to seek reversal of the decision to accept what the employer considered to be repudiation of contract. His initial calls and texts were not answered, returned or replied to. That was a choice made by Spotless. Mr Ali Qureshi's email of 7 May 2023 was replied to albeit without Spotless engaging in the dialogue he sought. Spotless simply re-attached its letter of 18 April. Mr Ali Qureshi's telephone call of 16 May 2023 was answered, but only where Mr Ali Qureshi had used a friend's phone to make the call.

[108] The immediacy of the steps taken by Mr Ali Qureshi to dispute his employment ending once he knew of that fact, the multiplicity of methods he used to try to explain his position, the content of his emails of 7 and 8 May 2023 and his plea to Mr Morris on 16 May collectively indicate that Spotlight was clearly on notice at least twelve days before the application was filed that the fairness of its decision to advise that his employment had ended was in dispute.

[109] This factor weighs in favour of a finding of exceptional circumstances.

*Prejudice to the employer (s 394(3)(d))*

[110] If time is extended, Spotlight would incur time and effort in responding to an unfair dismissal claim.

[111] That said, the prejudice to the employer is not unique.

[112] However, the absence of prejudice would not itself be a reason to grant an extension.<sup>25</sup>

[113] In the circumstances, this is a neutral consideration.

*Merits (s 394(3)(e))*



[114] Any further proceedings on the application will concern the employer's further jurisdictional point that acceptance of contractual repudiation is not a dismissal within the meaning of the FW Act.

[115] If the application proceeds to a merits hearing, Mr Ali Qureshi's unfair dismissal application appears to concern whether Spotless, at the time it decided to accept alleged contractual repudiation, acted fairly in doing so.

[116] Not having heard evidence from Spotless of the effect on its operations of Mr Ali Qureshi not attending work as rostered, on its attempts to contact Mr Ali Qureshi or on the timing of its decision to accept alleged repudiation (including the timing, content and impact of any call claiming that Mr Ali Qureshi was in India), it is not safe to express even a provisional view on the merits.

[117] This is a neutral consideration.

*Fairness between persons in similar position (s 394(f))*

[118] This issue does not arise. Claims by Mr Ali Qureshi in his reply submission that other persons have been employed or re-employed by Spotless after a period of mental stress are hearsay, assertion and irrelevant given the self-evidently unique factual circumstances of this matter.

## **Conclusion**

[119] The period of delay (one day) is short.

[120] The reason for delay weighs materially in favour of a conclusion of exceptional circumstances. That Mr Ali Qureshi also took active steps prior to making the application to put Spotless on notice that he disputed its advice that he was no longer employed also weighs in favour. Other considerations are neutral or not relevant.

[121] Considered overall, I am satisfied that the combination of circumstances resulting in the late lodgement are exceptional. It is unusual that an employee is placed in custody for a twenty-three day period with the consequence that upon release they discover their employment to have ended. Whilst a custodial period is not, of itself, a basis to extend a statutory time limit, that unusual circumstance was a traumatic experience that gave rise to Mr Ali Qureshi being unwell and on medication when released whilst, at the same time, trying to ascertain what had happened to his job, trying to explain his position to his employer and then being left with the challenge of making a legal claim without any particular expertise in doing so.

[122] A decision to extend time is discretionary. Having found that exceptional circumstances exist, there are no discretionary reasons not to do so. It is appropriate to do so.

[123] For completeness, I indicate that I would have reached the same conclusion had I found the alleged dismissal to have taken effect on 18 April 2023 (when Spotless sent its email of same date). In those circumstances the application would have been out of time by ten days.

Whilst taking into account a longer delay period, I would still have found the overall circumstances exceptional warranting an extension of time.

### **Disposition**

[124] There being exceptional circumstances and it being appropriate to do so, the time for lodgement of application U2023/4369 is extended so as to enable further proceedings to be conducted.

[125] Mr Ali Qureshi's application will proceed to conciliation and, if unable to be resolved and remaining pressed, to a hearing on all remaining issues. That will include the employer's further jurisdictional argument (no dismissal).

[126] An order<sup>26</sup> giving effect to this decision is issued in conjunction with its publication.

### **Concluding observation**

[127] Before concluding, the evidence in this matter suggests a less than acceptable level of sensitivity by custodial authorities to the circumstances where a person in remand seeks to communicate that fact to their employer in order to explain their absence or salvage their job. That Mr Ali Qureshi's request to contact his employer remained 'pending' for a prolonged period is, if correct, a matter that had potential to cause unjustness to both him and his employer. Whilst noting that I have only heard Mr Ali Qureshi's evidence on those matters and have neither sought nor received evidence from the authorities responsible for the Adelaide Remand Centre, the findings and observations made in these reasons are drawn to the attention of custodial authorities for appropriate consideration.



DEPUTY PRESIDENT

*Appearances:*

Mr A Ali Qureshi *on his own behalf*

Mr A Lynch, *with permission*, with Ms H Valente *of and on behalf of* Spotless Services Australia Limited

*Hearing details:*

Adelaide (by video)  
27 June 2023

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<sup>1</sup> A1 Statement 15 June 2023; A2 Statement in F2 Application; A3 Statement in Reply Submission; A4 Statement in email of 7 May 2023

<sup>2</sup> A11 New Employee Hire Forms

<sup>3</sup> S is an abbreviation used in this decision for the name provided by Mr Ali Qureshi in evidence

<sup>4</sup> A10 'Prisoner Pay Discharge Form'

<sup>5</sup> A5

<sup>6</sup> R7

<sup>7</sup> A6

<sup>8</sup> A12

<sup>9</sup> A13

<sup>10</sup> A14

<sup>11</sup> *Mihajlovic v Lifeline Macarthur* [2013] FWC 9804; *Goodenough v CXN Transport Pty Ltd* [2023] FWC 715, [32] and [34]

<sup>12</sup> *Ayub v NSW Trains* [2016] FWBFC 5500, [50] (Ayub)

<sup>13</sup> *Ibid*

<sup>14</sup> *Smith v Canning Division of General Practice* [2009] AIRC 959

<sup>15</sup> *Lombardo v Commonwealth of Australia as represented by the Department of Education, Employment and Workplace Relations* [2014] FWCFB 2288 at [21]

<sup>16</sup> *Halls v AR & MA McCardle & Sons Pty Ltd and Ors* [2014] FCCA 316

<sup>17</sup> [2011] FWAFB 975 at [13]. See also *Cheval Properties Pty Ltd t/as Penrith Hotel Motel v Smithers* [2010] FWAFB 7251 at [5]

<sup>18</sup> *John Mamur v Coles Group Supply Chain Pty Ltd* [2020] FWCFB 4954 at [7] and [19]; *Dennis Obel v Central Desert Regional Council* [2021] FWCFB 167 at [6]

<sup>19</sup> *Manoj Ellikuttige v Moonee Valley Racing Club Inc* [2018] FWCFB 4988 at [30] and [36]

<sup>20</sup> *Stogiannidis v Victorian FroAli Qureshien Foods Distributors Pty Ltd t/as Richmond Oysters* [2018] FWCFB 901, [39] – [40]

<sup>21</sup> *Stogiannidis* (*Ibid*); *Elliott v LEAP Legal Software Pty Ltd t/a LEAP Legal Software* [2018] FWCFB 3288

<sup>22</sup> *Shaw v Australia and New Zealand Banking Group Limited* [2015] FWCFB 287 at [12]; *Czoy v Monstamac Industries Pty Ltd* [2014] FWCFB 2149 at [31] – [33]; *Perry v Rio Tinto Shipping Pty Ltd T/A Rio Tinto Marine* [2016] FWCFB 6963

<sup>23</sup> *Thomas v Breezway Australia Pty Ltd* [2016] FWCFB 5173

<sup>24</sup> R7 page 4

<sup>25</sup> *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 at 299-300

<sup>26</sup> [PR763874](#)