



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Gursharan Singh

v

Certis Security Australia Pty Ltd
(U2023/5651)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 4 AUGUST 2023

Application for an unfair dismissal remedy – extension of time – late lodgement due to earlier unfair dismissal claim being determined – earlier application dismissed (no dismissal) – separate dismissal event – delay caused by pressing earlier application and not litigating subsequent dismissal – exceptional circumstances – time for late lodgement extended

[1] On 24 June 2023 Gursharan Singh (Mr Singh or the applicant) applied to the Commission under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) for an unfair dismissal remedy against Certis Security Australia (Certis Security, the respondent or the employer).

[2] Mr Singh was dismissed on 14 April 2023. He claims that his dismissal was unfair. He seeks reinstatement.

[3] It is not in dispute that the application is out of time. Mr Singh seeks an extension of time.

[4] Certis Security oppose the application on jurisdictional and merit grounds. On jurisdiction, it says that time should not be extended.

[5] I issued directions on 13 July 2023.

[6] Mr Singh is self-represented. On 24 July 2023 I granted a request by Certis Security to be legally represented.¹

[7] Materials were filed by Mr Singh and Certis Security.

[8] I heard the extension of time matter by video on 31 July 2023.

[9] I received evidence from Mr Singh².

Facts

First unfair dismissal application

[10] On 17 March 2023 Mr Singh made an unfair dismissal application against Certis Security in which he alleged that he was unfairly dismissed on 14 March 2023³ (the first application). The employer responded by contending that Mr Singh had not been dismissed as alleged.

[11] I conducted a jurisdictional hearing on the first application on 8 June 2023. After reserving my decision, on 14 June 2023 I determined that Mr Singh had not been dismissed on 14 March 2023.⁴ I dismissed the first application on jurisdictional grounds (the jurisdictional decision).

[12] On 24 June 2023 Mr Singh filed a second unfair dismissal application against Certis Security in which he alleged that he was unfairly dismissed one month later, on 14 April 2023⁵ (the second application).

[13] By consent, on 13 July 2023 I directed that evidence adduced in the first unfair dismissal application will, to the extent relevant, be admitted in these proceedings.

[14] Accordingly, the findings of fact at [15] to [64] of the jurisdictional decision are relevant, in varying degrees, to this matter. They need not be repeated.

[15] In particular the findings at [58] to [64] refer to certain events between 14 March 2023 and 14 April 2023.

[16] It is sufficient for current purposes to indicate that Mr Singh was a part-time security officer working at a shopping centre in Adelaide's north-eastern suburbs. The dispute between Mr Singh and Certis Security concerns a changed roster he was required to work when he returned to Australia in early March 2023 from an extended period of leave overseas.

[17] The findings made at [58] to [64] of the jurisdictional decision were:

“Events since application filed

[58] Prior to Certis Security becoming aware of this [*the first*] application, Mr Harms and Mr Singh had a further discussion. Precisely when is not clear from the evidence. Mr Harms believed it was a few days after the 14 March meeting; Mr Singh's notes suggest it was on 21 March. In that discussion Mr Harms suggested a further alternative whereby Mr Singh could be rostered to work at the Myer Centre in the Adelaide city. Mr Harms made this further suggestion in order to resolve the impasse. Mr Singh maintained the view that he did not wish to work at another shopping centre and would not agree to do so unless and until the performance allegations had been dealt with.

[59] On 20 March Mr Singh sent Mr Harms a medical certificate dated 6 March 2023 stating that he was unfit for work from 27 February 2023 to 13 March 2023.

[60] On 27 March Mr Harms emailed Mr Singh asking him why he had filed an unfair dismissal application when “you have not been dismissed and are still employed by us”. Mr Singh replied that he had “been dismissed unfairly from night shift”.

[61] In light of the unfair dismissal application, Mr Koh did not reconvene the meeting to discuss the roster as he had intended. The issue was left to be dealt with by Mr Harms and, at a national level, by Mr Shaw.

[62] On 30 March 2023 Mr Shaw sent Mr Singh a letter requiring him to work shifts as directed.

[63] On 14 April 2023 a disciplinary meeting occurred with Mr Singh on account of his alleged failure to work shifts as directed.

[64] On 14 April 2023, after that disciplinary meeting, Mr Shaw sent Mr Singh a letter advising that he had been terminated effective immediately for failing to comply with a lawful and reasonable direction.”

Dismissal

[18] It is not in contest that Mr Singh was dismissed on 14 April 2023 by Certis Security. The reasons for dismissal as stated in the dismissal letter were:⁶

“Termination of Employment

Accordingly, Certis has determined to terminate your employment on the basis of your failure to comply with the lawful and reasonable direction issued to you in the Direction Letter. The termination of your employment is **effective today, 14 April 2023.**”

Proceedings on the first application

[19] The relevant chronology of events in the Commission concerning the first application is as follows:⁷

17 March 2023:	application filed by Mr Singh
23 March 2023:	employer served with application
30 March 2023:	application responded to by employer
18 April 2023:	conciliation; application not settled
9 May 2023:	directions hearing; matter listed for jurisdictional hearing
17 May 2023:	decision refusing employer legal representation
17 May 2023:	third party production application by Mr Singh
19 May 2023:	employer response to production application
19 May 2023:	hearing on production application; not granted (adjourned)

24 May 2023:	submissions on jurisdiction filed by employer
31 May 2023:	submissions on jurisdiction filed by Mr Singh
2 June 2023:	reply submissions filed by employer
8 June 2023:	hearing of jurisdictional objection; decision reserved
14 June 2023:	decision upholding jurisdictional objection; application dismissed

Second unfair dismissal application

[20] On 24 June 2023 Mr Singh filed a second unfair dismissal application against Certis Security in which he alleged that he was unfairly dismissed a month later, on 14 April 2023. It is that application which is the subject of this decision.

[21] The second application was filed seventy-one days after the dismissal was notified and took effect.

[22] As applications under s 394 of the FW Act are required to be filed within twenty-one days of a dismissal taking effect, the second application is fifty days out of time (the delay period being 6 May to 24 June 2023 inclusive).

[23] For the second application to proceed, an extension of time is required.

Submissions

Mr Singh

[24] Mr Singh submits that time for late lodgement should be extended because the circumstances are exceptional. He says that the delay is explained by three factors:⁸

- mental distress from the events that led to dismissal and the dismissal itself;
- that the first application was “already in the attention of the Commission”⁹ and being actively prosecuted when he was dismissed on 14 April 2023 and throughout the delay period; and
- he was “unsure” whether he could lodge multiple applications at the same time and was also unaware that he could have discontinued the first application and make an in-time second application.

[25] Mr Singh submits that he acted promptly after the first application was determined by the Commission.

[26] Mr Singh submits that without an extension of time being granted, he will be denied the opportunity to have the fairness of the employer's decision requiring him to work a different roster reviewed by the Commission.

[27] Mr Singh submits that there is no prejudice to the employer should an extension be granted because it was on notice from the time he filed the first application that he wanted the fairness of its decision about the roster reviewed and that the second application is, in practice, a re-lodgement of the first application.

Certis Security

[28] Certis Security submit that none of the reasons advanced constitute exceptional circumstances individually or collectively.¹⁰

[29] Whilst acknowledging that Mr Singh may have been distressed by the events prior to and at the time of dismissal, Certis Security submit that Mr Singh's claim that he was medically unfit to file proceedings within time is not supported by evidence nor the fact that he was able, in the relevant period, to prosecute the first application.

[30] Certis Security submit that it was Mr Singh's choice to make the first application and maintain its prosecution in the face of the employer informing him on 27 March 2023 (ten days after it was made) that it considered him still employed and in the face of subsequently being dismissed in the course of that litigation. Mr Singh's conduct was unreasonable and put the employer to cost and expense in defending the first application in circumstances where he had not been dismissed.

[31] Certis Security submit that ignorance of the law (in this case whether multiple applications could be filed at the same time or one discontinued and a second filed) is not an acceptable reason for delay. The statutory rule against multiple applications (to the extent it applied) could have been readily overcome had the first application been discontinued once Mr Singh was told that he had not been dismissed on 14 March 2023 as he had alleged. Different dismissals were alleged in the two applications meaning that ignorance of that rule cannot be an acceptable reason for the delay.

Consideration

[32] 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.”

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

[34] An applicant for an extension of time has an onus to adduce evidence in support of matters which that applicant asserts constitute exceptional circumstances.¹¹

[35] The test of “exceptional circumstances” establishes a “high hurdle” for an applicant.¹² A decision whether to extend time under s 394(3) involves the exercise of a discretion.¹³

[36] 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.”¹⁴

[37] The principles of *Nulty* have been cited with approval by subsequent full benches of the Commission.¹⁵

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

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

[39] 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.¹⁶ 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.¹⁷

[40] 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.¹⁸

[41] 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.¹⁹

[42] The reasons for the delay advanced by Mr Singh are:

- mental distress from the events that led to dismissal and the dismissal itself;
- that the first application was “already in the attention of the Commission” and being actively prosecuted when he was dismissed on 14 April 2023 and throughout the delay period; and
- he was “unsure” whether he could lodge multiple applications at the same time and was also unaware that he could have discontinued the first application and made an in-time second application.

Distress

[43] It is well established that an applicant for an extension of time relying upon a health or medical condition to explain the delay has an obligation to adduce evidence establishing the nature of the health condition and that it materially impacted their capacity to make an in-time application.

[44] It is also well established that mere stress, anxiety or distress following a dismissal will not, without more, be an acceptable reason for delay as such responses are neither unusual nor exceptional.

[45] It would appear that Mr Singh was distressed at the time of dismissal and at the prospect of completing his university studies in the wake of having been dismissed. His email the day following dismissal (15 April 2023) to some of his associates expresses somewhat erratic and concerning thoughts.²⁰

[46] However two factors weigh against the adequacy of this explanation. Firstly, Mr Singh presented no evidence of a medical nature as to the health condition, its severity or impact on his capacity. The only medical certificate in evidence (from proceedings on the first application) is the one Mr Singh produced to the employer on 20 March 2023 stating that he was unfit to work from 27 February 2023 to 13 March 2023. There is no medical evidence relating to the period following 14 April 2023, including during the delay period. Secondly, during the twenty-

one days following dismissal and then throughout the delay period (at least until the hearing on 8 June 2023) Mr Singh had the capacity to actively attend to the first application, prepare submissions on it and participate in conferences and hearings as a self-represented party navigating a contested jurisdictional issue.

[47] Mr Singh's distress at being dismissed on 14 April 2023 does not reasonably explain the delay.

Prosecuting the first application

[48] The 14 April 2023 dismissal occurred four days prior to conciliation on the first application.

[49] During the twenty-one days that followed (until 5 May) Mr Singh was in the conciliation and post-conciliation stages of that application.

[50] During the first five weeks (34 days) of the subsequent delay period Mr Singh was prosecuting the arbitration of the first application including preparing submissions and participating in the jurisdictional hearing.

[51] During the sixth week (days 35 to 40) of the delay period Mr Singh was awaiting delivery of the reserved decision.

[52] During the remainder of the delay period (days 41 to 50) Mr Singh was considering the Commission decision which had dismissed the first application and was deciding his next steps.

[53] That the first application was being actively prosecuted when Mr Singh was dismissed on 14 April 2023 and throughout the delay period is in part an acceptable explanation for the delay, but only in part.

[54] This is because whether prosecution of the first application is a reasonable explanation for the delay bears in part on whether it was reasonable for Mr Singh to delay filing the second application until the jurisdictional objection on the first application was determined. The answer to that question is mixed.

[55] Weighing in favour of Mr Singh is that both the first and second application sought that the same substantive question be determined – the fairness of being dismissed (or allegedly dismissed) for failing to work the new roster. Although each application asserted different dates of dismissal and are separate applications, they were in that respect related matters.

[56] Also weighing in Mr Singh's favour is that the first application was being attentively prosecuted (and the jurisdictional objection actively defended) throughout the delay period and the preceding twenty-one days.

[57] Also weighing in Mr Singh's favour is that until the jurisdictional question was determined Mr Singh did not know whether the Commission agreed with the employer's contention that he had not been dismissed by forced resignation on 14 March 2023. Whilst the grounds on which Mr Singh asserted dismissal by forced resignation were weak given the

findings I made that there had been no resignation but rather only a threat of resignation, and that the employer had not objectively engaged in conduct that forced the resignation or its threat, Mr Singh could not have reasonably known of these findings until the decision was delivered on 14 June 2023.

[58] Further, whilst there was no impediment to obtaining independent advice, Mr Singh had no insight into his prospects given that he was a self-represented applicant defending the jurisdictional challenge.

[59] However, weighing against the reasonableness of this explanation is that that, in objective terms, the first application was misconceived and Mr Singh's defence of the jurisdictional challenge was largely unarguable once the facts were established. Very few of the core facts were in dispute.

[60] Further, from the moment of the jurisdictional challenge Mr Singh was on notice that the merit of his application could only be considered if he was found to have been dismissed on 14 March 2023.

[61] Also weighing against Mr Singh is that Mr Singh was told by the employer on 27 March 2023 that he was still employed when he was asked by Mr Harms why had he filed an unfair dismissal claim when still employed. Further, the dismissal two weeks later ought reasonably have alerted Mr Singh to the fact that, at least as far as the employer was concerned, he had been employed until 14 April 2023 and not dismissed earlier.

[62] Whilst these considerations have force, they have to be balanced against the fact that an employer asserting the fact of no dismissal does not necessarily make it so, and that the concept of dismissal by forced resignation is recognised as a dismissal under the FW Act.

[63] In short, Mr Singh was so focussed on the prosecution of his first application that he did not turn his mind to the lawfulness of multiple applications (with different dismissal dates) or the desirability of discontinuing the first application and filing fresh in-time proceedings once he had plainly been dismissed on the employer's initiative.

[64] However, once the hearing had taken place, it was not unreasonable for Mr Singh to await the Commission's decision on the first application (a period of six days 8 to 14 June) before deciding on further action.

[65] Nor do I find that Mr Singh delayed unreasonably in making the second application in the ten days that followed the jurisdictional decision on the first application (15 to 24 June). In this period Mr Singh was entitled to digest the jurisdictional decision and consider his options. He was also dealing with his university studies.

[66] That the first application was being actively prosecuted when Mr Singh was dismissed on 14 April 2023 and throughout the delay period is in part but only in part an acceptable explanation for the delay.

Ignorance of the law

[67] Mr Singh relies on his lack of knowledge as to whether he could have lodged a second unfair dismissal application after 14 April 2023 whilst the first was before the Commission or whether he could have discontinued the first once dismissed on 14 April 2023 and then filed an in-time second application within twenty-one days.

[68] I take into account that Mr Singh is an international student with no specialist expertise in Australian employment law and was navigating his rights on his own behalf.

[69] However, it is well established that mere ignorance of unfair dismissal laws (such as time frames or eligibility) is not in and of itself an acceptable reason for delay. To this I add ignorance of the right to discontinue an application in the wake of a jurisdictional objection to the fact of dismissal.

[70] This is not an acceptable explanation for the delay.

[71] Considered overall, the reasons for delay somewhat but only somewhat weigh in favour of a finding of exceptional circumstances.

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

[72] The dismissal was notified in clear and unequivocal terms on 14 April 2023. From the time he read the letter of 14 April 2023, Mr Singh was aware of the dismissal and its reason.

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

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

[74] That Mr Singh commenced the first application three months prior to the second application and that it raised, in practice, the same substantive dispute about the fairness of the roster change notified in early March 2023 clearly put Certis Security on notice that the fairness of its decision to dismiss Mr Singh for failing to work a different roster was the subject of litigation.

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

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

[76] If time is extended, Certis Security would incur time and effort in responding to a second unfair dismissal claim.

[77] That said, the prejudice to the employer is not unique save that it has already had to defend (and successfully so) a jurisdictional issue on the first application.

[78] However, that prejudice is mitigated by the fact that the second application is not met with a jurisdictional challenge, and that a merits hearing did not occur on the first application despite it being founded on the dispute over the same roster change albeit a different date of alleged dismissal and an assessment of the events that followed 14 March 2023.

[79] In any event, the absence of prejudice would not itself be a reason to grant an extension.²¹

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

Merits (s 394(3)(e))

[81] A hearing on merits would concern the fairness of the employer's decision to dismiss Mr Singh for failing to work a different roster to the one he worked before he was granted leave to travel overseas. It will also concern the fairness of the employer's decision-making process in directing that the new roster be worked in advance of dealing with Mr Singh's view that alleged performance concerns should have been transparently discussed with him, the source of those alleged performance concerns, and in deciding to dismiss when the roster was not worked as directed.

[82] Whilst I have heard some evidence on these matters, the evidence is incomplete particularly as it relates to events beyond 14 March 2023.

[83] Given this, it is not safe to express a provisional view on the merits.

[84] This is a neutral consideration.

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

[85] This issue does not arise in this matter.

Conclusion

[86] The period of delay (fifty days) is significant in the context of a statutory period requiring claims to be made within twenty-one days.

[87] The reason for delay weighs in part in favour of Mr Singh. He was litigating an unfair dismissal claim which was being actively prosecuted and which, at its core, sought to raise the dispute he wanted independently adjudicated by the Commission. As such it was understandable that the first application was his focus and that the prospect of filing a second application or discontinuing the first in lieu of a second did not cross his mind even once he had been plainly dismissed on the employer's initiative. That the employer was on notice from the outset that the fairness of its decision to require a new roster to be worked by Mr Singh and that his refusal to do so was the subject of litigation weighs materially in favour of Mr Singh.

[88] However, that the first application was, in objective terms, misconceived on jurisdictional grounds and that the jurisdictional impediment to a merits hearing could have readily been removed by discontinuing the first application once Mr Singh was plainly dismissed on 14 April 2023 and by filing a fresh in-time application without jurisdictional risk weighs against Mr Singh.

[89] Other considerations are largely neutral or irrelevant.

[90] This is a finely balanced matter. It is unusual that a person brings a late unfair dismissal claim two months after being dismissed in circumstances where they were litigating the substantive dispute via an earlier but misconceived unfair dismissal application that was dismissed because the applicant had not been dismissed when he claimed he had, but subsequently was so dismissed.

[91] Considered overall, the combination of circumstances are exceptional. The discretion to extend time is enlivened.

[92] I consider it appropriate to exercise the discretion in favour of doing so. This is because at all times Mr Singh has sought to have the merits of his dismissal (or alleged dismissal) dealt with via an unfair dismissal claim. The employer has been on notice of that fact since the first application was filed on 17 March 2023. Although I take into account that the employer will have to bear further cost and expense in dealing with the second application, Mr Singh has been attentive to the litigation he has commenced. Without an extension of time being granted, the merits will remain unresolved despite proceedings concerning the substantive dispute over his refusal to work the roster being before the Commission on Mr Singh's initiative since 17 March 2023.

[93] As time for late lodgement has been extended, application U2023/5651 will proceed to conciliation and if not resolved, determined on its merits.

[94] An order²² giving effect to this decision is issued in conjunction with its publication.



DEPUTY PRESIDENT

Appearances:

Mr G Singh, *on his own behalf*

Ms A Kunc, *with permission* on behalf of Certis Security Australia Pty Ltd with Mr G Shaw and Mr J Koh of Certis Security Australia Pty Ltd

Hearing details:

Adelaide (by video)
31 July

Printed by authority of the Commonwealth Government Printer

<PR764776>

¹ Email 'Chambers – Anderson DP' 24 July 2023

² A1 Statement of Mr Singh 18 July 2023

³ U2023/2209

⁴ [\[2023\] FWC 1375](#)

⁵ U2023/5651

⁶ R2

⁷ MFI1

⁸ Written Submissions 18 July 2023

⁹ Ibid paragraph 10

¹⁰ Respondent's Outline of Submissions 27 July 2023

¹¹ *Smith v Canning Division of General Practice* [\[2009\] AIRC 959](#)

¹² *Lombardo v Commonwealth of Australia as represented by the Department of Education, Employment and Workplace Relations* [\[2014\] FWCFB 2288](#) at [21]

¹³ *Halls v AR & MA McCardle & Sons Pty Ltd and Ors* [2014] FCCA 316

¹⁴ [\[2011\] FWAFB 975](#) at [13]. See also *Cheval Properties Pty Ltd t/as Penrith Hotel Motel v Smithers* [\[2010\] FWAFB 7251](#) at [5]

¹⁵ *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]

¹⁶ *Manoj Ellikuttige v Moonee Valley Racing Club Inc* [\[2018\] FWCFB 4988](#) at [30] and [36]

¹⁷ *Stogiannidis v Victorian FroAli Qureshien Foods Distributors Pty Ltd t/as Richmond Oysters* [\[2018\] FWCFB 901](#), [39] – [40]

¹⁸ *Stogiannidis* (Ibid); *Elliott v LEAP Legal Software Pty Ltd t/a LEAP Legal Software* [\[2018\] FWCFB 3288](#)

¹⁹ *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](#)

²⁰ A2

²¹ *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 at 299-300

²² [PR764775](#)