[2023] FWC 3216 [Note: An appeal pursuant to s.604 (C2023/8115) was lodged against this decision - refer to Full Bench decision dated 26 April 2024 [[2024] FWCFB 198] for result of appeal.]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Abdul Aboud
v
Nickal Pty Ltd T/A Plan & Grow
(U2023/9816)

DEPUTY PRESIDENT BEAUMONT PERTH, 5 DECEMBER 2023

Application for an unfair dismissal remedy

1 Introduction

[1] On 9 October 2023, Mr Abdul Aboud (the **Applicant**) applied for an unfair dismissal remedy, having been dismissed by Nickal Pty Ltd T/A Plan & Grow (the **Respondent**) on 11 November 2022. The Respondent objected to the application on the ground that the application was filed outside the 21-day period prescribed by s 394(2) of the *Fair Work Act 2009* (Cth) (the **Act**). This decision deals with the out of time objection.

[2] It is important to note from the outset that this is not the first application the Applicant has made in this Commission concerning his dismissal from the Respondent. On 11 November 2022, the Applicant made an application under s 365 of the Act for the Commission to deal with purported general protections contraventions involving dismissal. The Respondent similarly objected to the that application on the basis it had been made outside of the statutory period in s 366(1) of the Act. Whilst the matter proceeded to hearing, it was unnecessary for the Commission to consider whether an extension of time to make the application was warranted under s 366(1)(b) because on 28 July 2023, it was determined that the Applicant's dismissal took effect on 11 November 2022, and hence his application under s 365 was made in time.[1]

[3] On 4 September 2023, the Applicant's general protections application was listed for a private conference pursuant to s 368(1) of the Act. The Applicant submitted that the matter failed to settle and on 26 September 2023 the Commission issued a certificate under s 368 of the Act. That certificate stated that the Commission was satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) had been, or were likely to be, unsuccessful.

[4] On 27 September 2023, the Applicant requested the services of Morgan and Freeman Lawyers to act on his behalf in his 'fair work' matter.[2] On 4 October 2023, a legal representative from Morgan and Freeman Lawyers emailed a Mr Robert Greig, legal

representative of the Respondent, and sought the Respondent's consent for an arbitration.[3] On 6 October 2023, the Respondent advised the Applicant that it refused to consent to an arbitration.[4]

[5] On 9 October 2023, the Applicant filed a notice of discontinuance with respect to his general protections application and later that same day, the Applicant made an unfair dismissal application.

[6] The Applicant's unfair dismissal application was made 311 days after the statutory deadline. The Applicant attributes the delay in filing his application on several factors. However, the predominant factor is that the Applicant did not realise that if a dispute under s 365 remained unresolved at the Commission stage, the dispute would need to be run in the Federal Court if the Respondent declined to arbitrate the dispute in the Commission. The Applicant was emphatic that all along he had wanted the Commission to determine his dispute and had not been advised that an application under s 365 could end up in the Federal Court.

[7] Turning to the application now on foot, s 396 of the Act provides that the Commission must decide four preliminary matters before considering the merits of an unfair dismissal application. One of those matters is whether the application was made within 21-days after the dismissal took effect.

[8] It is not contested that the application was made out of time. However, for the application to now proceed, it is necessary for the Applicant to obtain an extension of time in which to make the application. Section 394(3) provides that the Commission may allow a further period for the application to be made if it is satisfied that there are exceptional circumstances, taking into account the following:

> (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.

[9] The issue before me is whether the circumstances are exceptional and whether it is fair and equitable for an extension to be granted. The parties were content to have the matter determined 'on the papers' and in the absence of a factual dispute, I determined this was the appropriate course. The parties held the view that s 725 was not relevant in the circumstances and I similarly considered this to be the case.

2 Background

[10] The broader context and events leading to the conclusion of the employment and the making of the unfair dismissal application were as follows.

[11] The Applicant was born in Sierra Leone, West Africa, and arrived in Australia in 2010 as a refugee with his family.[5]

[12] He commenced work as a 'casual permanent temporary employee' on 23 October 2019.[6] The Applicant said the time of his suspension, which I will address shortly, he was employed on a permanent full-time basis as a support worker.[7]

[13] In April 2021, the Applicant was asked to participate in an interview due to the Respondent having received an allegation regarding the Applicant and a client at a residential property.[8] The Applicant was advised that the Respondent would be contacting the Western Australian Police to report the allegations that had been made against him and to file a complaint.[9]

[14] The Applicant said that by letter of 20 April 2021, the Respondent advised him that he had been suspended from that date until further notice, pending an investigation of the matter.[10]

[15] The Applicant was arrested and formally charged on 10 June 2021 and on 14 June 2021, he was issued with an 'Interim Negative Notice', which purportedly stopped him from working with children.[11] By 6 August 2021, he had received a Banning Order from the NDIS Commission preventing him from working with people with a disability for a period of two years.[12]

[16] On 6 October 2022, the Applicant was said to have been found not guilty and the charge against him was withdrawn.[13]

[17] Prior to having been found not guilty, the Applicant said he began to suffer from severe mental health issues and his relationship with his wife irretrievably broke down.[14]

[18] Whilst the charges against the Applicant were withdrawn, the Applicant did not hear from the Respondent so he decided to make a claim that would make it possible for him to be compensated for his lost wages and possibly return to work.[15]

[19] The Applicant stated that he contacted the Commission and was advised that he could make an application for an unfair dismissal remedy or for a general protections dispute.[16] The Applicant said he filed both applications on 11 November 2022, but first heard back from the Commission about his general protections application.[17]

[20] On 22 November 2022, the Respondent filed an objection to the Applicant's general protections application to deal with a dismissal dispute on the basis that the application had been made outside of the statutory period.[18]

[21] On 23 February 2023, the Applicant engaged Savannah Legal to represent him at a hearing before the Commission regarding whether his application under s 365 was made out of

time.[19] The hearing appears to have proceeded on 3 May 2023 and on 28 July 2023 the decision issued was that the Applicant had not made his general protections application out of time and therefore it could proceed.

[22] The matter proceeded to a conciliation on 4 September 2023, and between 5 September 2023 and 19 September 2023, the conciliation process did not achieve a settlement of the dispute.[20]

[23] The Applicant said that on 20 September 2023, Savannah Legal informed him that they would no longer act for him and on 26 September 2023, he received a certificate pursuant to s 368 of the Act.[21]

[24] On 27 September 2023, the Applicant emailed Morgan and Freeman Lawyers and requested they act for him.[22] The Applicant said that before the issuance of the certificate he did not know that the Federal Court could decide his application and believed that the application would always be decided by the Commission.[23]

[25] The Applicant expressed that he had wanted the matter to start and finish in the Commission and had never been told that it could end up in the Federal Court if the Respondent and the Applicant did not agree to have it arbitrated before the Commission. The Applicant stated that it was Morgan and Freeman Lawyers who explained this to him.[24]

[26] The Applicant instructed Morgan and Freeman Lawyers to write to the Respondent's lawyers, asking the Respondent to consent to arbitration, which the lawyers did on 4 October 2023. By 6 October 2023, the Respondent's lawyers advised the Applicant's legal representative that consent was not forthcoming.[25]

[27] Morgan and Freeman Lawyers, on behalf of the Applicant, filed a notice of discontinuance on 9 October 2023 and later that day, filed an unfair dismissal application.

[28] The Applicant stated that if the Respondent had told him right at the beginning that he had been dismissed, he would have filed the application for unfair dismissal.

3 Extension of time

[29] Under s 394(2) of the Act, the Commission has the power to extend the time within which an application for unfair dismissal can be made if it is satisfied that there are exceptional circumstances. The meaning of this term was considered by a Full Bench in *Nulty v Blue Star Group Pty Ltd*.[26] In order to be exceptional, the circumstances must be out of the ordinary course, or unusual, or special, or uncommon, although they need not be unique or unprecedented. Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no significance, when taken together, can be considered exceptional.

[30] In the decision of *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd*,[27] the Full Bench provided clarification regarding the assessment of exceptional circumstances. While the Full Bench considered s 366(1), the observation remains relevant:

> As we have mentioned, the assessment of whether exceptional circumstances exist requires a consideration of *all* the relevant circumstances. No *one* factor (such as the reason for the delay) need be found to be exceptional in order to enliven the discretion to extend time. This is so because even though no *one* factor may be exceptional, *in combination* with other factors the circumstances may be such as to be regarded as exceptional.[28]

[31] It is uncontroversial that where an applicant seeks to pursue an application under s 394 in lieu of s 365 of the Act in relation to their dismissal, the appropriate course is for the Applicant to discontinue the s 365 application and file an application under s 394. Of course, in such circumstances, the appropriate procedure and other requirements under the Act for the making of the s 394 application will need to be met and an extension of time sought in accordance with ss 394(2) and (3) of the Act.[29]

[32] Prior to determining the matter, the parties were referred to s 394(3) of the Act, and the meaning of 'exceptional circumstances'. Both were invited to make submissions in relation to the question of whether there were 'exceptional circumstances' by reference to those factors in s 394(3) of the Act. Each of these factors are considered below.

3.1 Reason for the delay

[33] The Act does not specify what reason for delay might tell in favour of granting an extension. However, decisions of the Commission have referred to an acceptable or reasonable explanation.[30] The absence of any explanation for any part of the delay will usually weigh against an applicant in the assessment of whether there are exceptional circumstances. A credible explanation for the entirety of the delay will usually weigh in the applicant's favour however, *all of the circumstances* must be considered.[31]

[34] The relevant period required to be considered under s 394(3)(a) is the period after the 21-day timeframe for lodging the application.[32] However, the circumstances from the time of the dismissal are considered to determine whether there is a reason for the delay beyond the 21-day period and, ultimately, whether that reason constitutes exceptional circumstances.[33]

[35] The fundamental reason for the delay in making the unfair dismissal application was the Applicant's lack of knowledge that he would need to pursue the general protections application in the Federal Court if it remained unresolved at the Commission stage and the Respondent declined to arbitrate it in the Commission. The Applicant had expressed that it was, at all times, his preference for the matter to remain in the Commission.

[36] In *Soubra v Adapt-a-Lift Group Pty Ltd* (**Soubra**),[34] the applicant made an unfair dismissal application, withdrew the application, and then made a general protections application out of time – based on their preference regarding the type of application to pursue. At paragraph [19], it was said:

> I do not accept that a purely preferential decision to pursue an alternative cause of action because it would have more merit and prospects of success if it were a general protections claim constitutes an acceptable reason for delay. In *Brian Turner v Metropolitan Fire and Emergency Services Board*, Deputy President Dean considered an extension of time application for an Applicant who made an unfair dismissal application within the statutory time limit, but subsequently discontinued and filed a general protections application outside the statutory time

> limit. While Mr Turner claimed that he had obtained advice which led him to mistakenly lodge an unfair dismissal claim, the Deputy President found that there was no reason given or evidence adduced to support the assertion that the unfair dismissal application was an incorrect or invalid application.

[37] At paragraph [20] in the decision of *Soubra*, it was also said:

> The Applicant has similarly elected to discontinue the UD Application and pursue the Application. That election was not made because the UD Application could not proceed, but because the Applicant saw "*more merit and prospects of success"* in the Application. That is not a credible explanation for the whole, or a part, of the period of delay in this matter.

[38] In *Biddle v Miele Australia Pty. Ltd*,[35] a decision which was appealed but permission to appeal refused, the applicant made an application to deal with general protections contraventions involving dismissal. The applicant's dismissal had taken effect on 24 April 2023 and the general protections application was made on 9 May 2023. The applicant conceded that in discussions with his initial legal representative he was presented with the choice between making an unfair dismissal application or a general protections application, and he chose to make the general protections application because he considered an unfair dismissal was not going to provide the best remedy for him.

[39] The applicant ceased his engagement of his initial legal representative because he believed the representative had not adequately addressed his concerns regarding disability discrimination in the Form F8, and he subsequently had two barristers advise him his general protections application did not present an arguable case – advice with which the applicant disagreed. Nevertheless, he discontinued his general protections application when he realised he could not explain the nature of the application as it pertained to his circumstances and made an unfair dismissal application (late).

[40] It was said at paragraph [29] of *Biddle*: '[t]he test for representative error is not whether the Applicant received good or bad advice, it is whether his representative's action or inaction caused the delay.'

[41] In the case before me, it was the Applicant who initially decided to pursue a general protections application. While the Applicant expressed he had wanted the matter to start and finish in the Commission and that he had never been told that a general protections application could end up in the Federal Court or that it could only continue in the Commission if both the Respondent and the Applicant agreed to have it arbitrated, it is well accepted that mere ignorance of the law would not be a sufficient basis for the grant of additional time.[36]

[42] The evidence does not suggest that the Applicant was inappropriately advised such that there was representative error. On receipt of the Respondent's jurisdictional objection to his general protections application, the Applicant states he engaged a legal representative who represented him at hearing in respect of the jurisdictional objection (in which he was successful) and in private conference. Whilst the general protections application did not settle at conference and his initial legal representative declined to act further, it was the Applicant who ultimately engaged Morgan and Freeman Lawyers and instructed them to seek the Respondent's agreement to arbitrate the application under s 365 of the Act. Had the Respondent agreed to the arbitration, I consider it more likely than not that the Applicant would not have proceeded

to make the application that is now on foot. It was not the case that the Applicant considered the general protections application so fundamentally flawed that it was without merit or that his legal representatives held the same view – after all the Applicant's new legal representative sought the consent of the Respondent to arbitrate, on their client's behalf. It was simply the Applicant's preference to have the general protections application remain within the confines of the Commission, and when that was not possible, he veered toward making the unfair dismissal claim.

[43] The delay is not a result of the wrong jurisdiction or an incorrect application having been made, but that the Applicant simply held a view regarding the jurisdiction of the Commission, which he preferred over the Federal Court. Overall, this does not support a finding of there being a credible reason for the delay.

[44] The Respondent submits that a review of the Applicant's original Form F8 in C2022/7507 and a cursory account of the events would make obvious that the general protections application was highly problematic, albeit it does not admit that an unfair dismissal application was a more appropriate pathway to dispute the termination of employment. The Respondent does however concede that it might have been understandable for the Applicant to wait for the period after the jurisdictional hearing on the general protections application on 3 May 2023 until the decision was issued on 28 July 2023, before making a decision to discontinue the general protections application. However, as was stated in *Soubra*, I do not accept that a purely preferential decision to either pursue an alternative cause of action because it would have more merit and prospects of success if it were an unfair dismissal claim[37] or to await the outcome of one interlocutory step to thereafter determine whether an alternative course is advisable, constitutes an acceptable reason for delay.

[45] Another of the reasons that appears to have been relied upon by the Applicant for the late making of his unfair dismissal application, was the status of his health.

[46] The Applicant provide one medical certificate dated 31 July 2023, which stated the following:

> **Prognosis** – Estimate how long the symptom(s) will affect the patient's capacity to work or study.
> Less than 3 months.
> …
> **Capacity to work or study**
> In my opinion the patient is/has been unfit for work /study from 31/07/2023 to 31/09/2023.

[47] The Applicant provided a further medical certificate, which stated:

> **Prognosis** – Estimate how long the symptom(s) will affect the patient's capacity to work or study.
> Less than 3 months.
> …
> **Capacity to work or study**
> In my opinion the patient is/has been unfit for work /study from 20/10/2023 to 20/01/2024.

[48] The Applicant described in some detail the repercussions arising from the criminal charge, such as having been purportedly shunned by those in the Sierra Leone community, the break-down of the relationship with his wife and an ongoing sense of shame. While it is apparent that the Applicant's circumstances were undeniably challenging, and an applicant's medical condition can be so significant that it affects their mental capacity to prepare and file an application with the Commission, in *Underwood v Terra Firma Pty Ltd* (**Underwood**),[38] the Full Bench accepted a finding at first instance that the applicant had failed to positively demonstrate that his depressive illness had an impact on his mental capacity so as to prevent him from making the application within 21 days. The Full Bench affirmed a finding at first instance that the medical evidence 'did not positively demonstrate that the Appellant's depressive illness had an impact on his mental capacity so as to prevent him from lodging the application within the 21 day time frame' and also the finding at first instance that no exceptional circumstances were established.[39]

[49] In the case before me, whilst the Applicant brings medical evidence in the form of a medical report to support his incapacity, it is apparent from his evidence that he was not so incapacitated that he could not participate in a jurisdictional hearing, attend a conference or conferences held under s 368 if the Act, and engage and instruct legal representatives. As such, I am not satisfied that this provides a credible explanation for the period of the delay.

[50] The Applicant also lays blame at the feet of the Respondent, explaining that if the Respondent had informed him right at the beginning he had been dismissed he would have filed an unfair dismissal application and the Commissioner would have, on 3 May 2023, ruled that the application as not out of time. The issue that arises for the Applicant regarding this contention is that the general protections application that he brought before this unfair dismissal application was also predicated on there having been a dismissal. Therefore, I am unpersuaded that the Respondent's failure to advise of the termination of employment (as identified in *Aboud v Nickal Pty Ltd* (**Aboud**)),[40] resulted in the Applicant making the 'wrong' application in the first instance.

[51] To the extent that the Applicant relies upon speaking English as a second language, the Applicant has nevertheless been assisted by legal practitioners since in or around the time the Respondent made its jurisdictional objection to the general protections application, and has had the benefit of advice and guidance.

[52] For the reasons set out above, I am not satisfied that the reasons for the delay advanced by the Applicant constitute a plausible reason for part of the period of the delay or for the whole period of the delay. This therefore weighs against a finding of exceptional circumstances.[41]

3.2 Whether the person first became aware of the dismissal after it had taken effect

[53] As is evident from the decision of *Aboud*, the Applicant was not aware that he had been dismissed until 11 November 2022. This was some time after the Applicant was, in all probability, dismissed, according to *Aboud* at paragraph [34]. I therefore consider this to be a factor that weighs toward a finding of exceptional circumstances.

3.3 Action taken by the person to dispute the dismissal

[54] Action taken by the employee to contest the dismissal, other than lodging an unfair dismissal application, may favour granting an extension of time.[42] I have considered all submissions and the evidence in this respect.

[55] I consider there to be insufficient evidence to support the finding that the Applicant challenged his dismissal. However, in the circumstances, I am content to find this a neutral factor.

3.4 Prejudice to the employer

[56] Having considered the submissions of the parties on this factor, I consider that the factor of 'prejudice' is a neutral consideration in all the circumstances. Whilst I do not consider the grant of an extension of time would prejudice the Respondent, it is to be appreciated that the mere absence of prejudice to the employer is an insufficient basis to grant an extension of time.[43]

3.5 Merits of the application

[57] In *Telstra-Network Technology Group v Kornicki*,[44] the Full Bench of the Australian Industrial Relations Commission considered the principles applicable to the extension of time discretion under the former s 170CE(8) of the *Workplace Relations Act 1996* (Cth). In that case the Full Bench said in respect to the merits of an application:

> If the application has no merit, then it would not be unfair to refuse to extend the time period for lodgement. However we wish to emphasise that a consideration of the merits of the substantive application for relief in the context of an extension of time application does not require a detailed analysis of the substantive merits. It would be sufficient for the applicant to establish that the substantive application was not without merit.[45]

[58] Evidence on the merits is rarely called at an extension of time hearing. As a result, the Commission 'should not embark on a detailed consideration of the substantive case' for the purpose of determining whether to grant an extension of time to an applicant to lodge her or his application.[46] The merits of the application more generally would need to be scrutinised. This of course, would include consideration of the circumstances of the dismissal if an extension of time were granted and the matter proceeded. I note in this matter that with respect to the merits of the application, the parties have touched very little on the substantive merits of the Applicant's unfair dismissal application. It is for this reason that I have concluded this factor to be one that is neutral.

3.6 Fairness as between the person and other persons in a similar position

[59] The criterion of 'fairness as between the person and other persons in a similar position', was considered by the Deputy President in *Morphett v Pearcedale Egg Farm*, where it was said:

> [C]ases of this kind will generally turn on their own facts. However, this consideration is concerned with the importance of an application of consistent principles in cases of this kind, thus ensuring fairness as between the Applicant and other persons in a similar position, and that

consideration may relate to matters currently before the Commission or matters which had been previously decided by the Commission.[47]

[60] I am not satisfied that the criterion of fairness between the Applicant and other persons in a similar position weighs strongly in favour of either party based on the submissions filed and as such I consider it a neutral consideration.

4 Conclusion

[61] The test of exceptional circumstances in s 394(3) of the Act is a stringent one. Having considered each of the statutory criteria and all the circumstances of the matter, there is one factor that weighs toward a finding of exceptional circumstances and one which does not. When the totality of the evidence is considered however, I am not satisfied that there are exceptional circumstances that support an extension of time. An Order[48] dismissing the application issues concurrently.

[62] While the conclusion reached goes against the Applicant in this case, it should not be interpreted that the Applicant's circumstances leading up to and after his dismissal were not challenging or stressful. It is simply the case that the circumstances presented are not exceptional for reasons given and it follows that it is not fair and equitable to grant the extension.

DEPUTY PRESIDENT

Matter determined on the papers.

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<PR768992>

[1] *Aboud v Nickal Pty Ltd* [2023] FWC 1862 (**Aboud**).

[2] Witness Statement of Abdul Aboud, [57].

[3] Ibid [63].

[4] Ibid [64].

[5] Ibid [4], [6].

[6] Ibid [4].

[7] Ibid [14].

[8] Ibid [8].

[9] Ibid [9]–[10].

[10] Ibid [12].

[11] Ibid [19].

[12] Ibid [21].

[13] Ibid [26].

[14] Ibid [22]–[23].

[15] Ibid [31].

[16] Ibid [33].

[17] Ibid [41].

[18] Ibid [43].

[19] Ibid [44].

[20] Ibid [52].

[21] Ibid [55].

[22] Ibid [57].

[23] Ibid [58].

[24] Ibid [60].

[25] Ibid [64].

[26] (2011) 203 IR 1, 5 [13].

[27] (2018) 273 IR 156 (**Stogiannidis**).

[28] Ibid 165 [38].

[29] *Ioannu v Northern Belting Services Pty Ltd* (2014) 245 IR 279, 286 [31].

[30] Ibid 165 [39].

[31] Ibid.

[32] *Long v Keolis Downer* (2018) 287 IR 361, 371 [40]

[33] *Shaw v Australia and New Zealand Banking Group Ltd* (2015) 246 IR 362, 366 [12].

[34] [2020] FWC 5366 (**Soubra**).

[35] [2023] FWC 1972.

[36] See, eg, *Stork v ABN Group Vic P/L* [2023] FWCFB 68, [7].

[37] *Soubra* (n 34) [19].

[38] [2015] FWCFB 3435.

[39] Ibid [16].

[40] *Aboud* (n 1) [39].

[41] *Stogiannidis* (n 27).

[42] *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, 300.

[43] Ibid.

[44] (1997) 140 IR 1.

[45] Ibid 11.

[46] *Kyvelos v Champion Socks Pty Ltd* (Australian Industrial Relations Commission, Giudice J, Acton SDP and Commissioner Gay, 10 November 2000) [14]; *Collier v Saltwater Freshwater Arts Alliance Aboriginal Corporation* [2016] FWC 2899, [37]–[38].

[47] [2015] FWC 8885, [29].

[48] PR768993.