DECISION

Fair Work Act 2009
s.394—Unfair dismissal

David Goodenough
v
CXN Transport Pty Ltd T/A Con-X-Ion Airport Transfers
(U2022/9169)

DEPUTY PRESIDENT ASBURY BRISBANE, 24 MARCH 2023

Application for an unfair dismissal remedy – Application filed outside of time required in s. 394(2) – Whether a further period to make the application should be granted – A further period granted.

Overview

[1] Mr David Goodenough (the Applicant) applies to the Fair Work Commission (Commission) for an unfair dismissal remedy under s. 394 of the *Fair Work Act 2009* (the FW Act) in respect of the termination of his employment by CXN Transport Pty Ltd T/A Con-X-Ion Airport Transfers (the Respondent). The application was made on 12 September 2022. The Respondent objects to the application contending that it was not lodged within 21 days of the dismissal taking effect, as required by s. 394(2) of the FW Act and further asserts that the Applicant was not unfairly dismissed as the termination of the Applicant's employment was a case of genuine redundancy within the meaning in s. 389 of the FW Act.

[2] Section 394(2) of the Act provides that an application for an unfair dismissal remedy must be made within 21 days after the dismissal took effect or within such further period as the Commission allows under s. 394(2). The parties are in dispute in respect of the date upon which the dismissal took effect and whether the Applicant made his application within the 21-day period. Accordingly, this Decision is concerned only with the determination of whether the application was lodged outside the 21-day period and, if necessary, whether the Commission can be satisfied that there were exceptional circumstances to justify the granting of a further period for the Applicant to make his application.

[3] In his Form F2 Application and oral evidence, the Applicant accepted that he was notified on 15 August 2022 that his position had been made redundant, but he contends that his dismissal took effect on 29 August 2022, the date he received the redundancy payment. If the Applicant's contention is accepted, his application was made within 21 days from the date the dismissal took effect, as the 21-day period expired on 19 September 2022.

[4] In the Form F3 Response filed on 11 October 2022, the Respondent contended that the Applicant was informed on 15 August 2022 that his position was made redundant effective on

that date. The Respondent further asserted that the Applicant was advised on 15 August 2022 that a redundancy payment, which included payment in lieu of notice, would be paid to the Applicant and that this was confirmed in an email sent to the Applicant on that date. If the Respondent's contention is accepted, the application was made 7 days outside the 21-day period and could not proceed unless a further period is granted to the Applicant, pursuant to s. 394(2) of the FW Act.

[5] After the Form F3 Response was filed, correspondence was sent to the Applicant from the Chambers of Vice President Catanzariti on 9 November 2022, requesting his response to the Respondent's contention about the date the dismissal took effect. The Applicant was also requested to provide further reasons as to whether there were exceptional circumstances to warrant a further period being granted and to address the matters set out in s. 394(3) of the FW Act. A brief response was provided by the Applicant on 14 November 2022.

[6] The matter was subsequently allocated to me for determination, and I issued Directions on 28 November 2022 requiring the parties to file any additional material they sought to rely on in relation to whether the application was lodged outside the 21-day period and whether a further period should be granted. On 1 December 2021, the Applicant confirmed by email that he wished to rely on the material he had already provided, and no additional material was provided by the Applicant. On 12 December 2022, the Respondent filed an outline of submissions (amended on 14 December 2022) and the witness statement of Mr Stuart Stratton[1], Director of the Respondent, opposing a further period being granted to the Applicant.

[7] A hearing was conducted by telephone on Friday, 16 December 2022. At the hearing, the Applicant was self-represented and gave evidence on his own behalf. Mr Stratton was also in attendance by telephone from the United Kingdom and gave evidence for the Respondent. Mr C Campbell of Aitken Legal sought permission to represent the Respondent at the hearing and made oral submissions addressing the matters in s. 596 of the FW Act. No objection was raised by the Applicant to the Respondent being legally represented.

[8] Having considered Mr Campbell's submissions, I was satisfied that it would assist the Commission to deal with the matter more efficiently if the Respondent was legally represented at the hearing on the basis that the Respondent's director had been overseas for a period and had not been involved in the preparation of the case. However, I also indicated that I would withdraw permission if the presence of legal representative was not conducive to the efficient conduct of the hearing, having regard to the fact that it was for the Applicant, not the Respondent, to satisfy the Commission that a further period should be granted, if necessary.

Evidence and Submissions

[9] The background to the application is that the Applicant was initially engaged by the Respondent as a contractor in 2011 and commenced employment with the Respondent in the position of General Manager from 31 December 2012. The Respondent operates a business of airport passenger shuttles to and from major airports on the east coast of Australia. The Applicant stated that he was instrumental in the growth of the business over 11 years of service and was offered a share incentive scheme which allowed the Applicant to accrue 1% of the Respondent's shareholding per annum for a period of 5 years. In November 2021, the

Respondent agreed to allow the Applicant to call on the option to purchase an accrued 5% shareholding in the Respondent.

[10] Mr Stratton stated that due to the COVID–19 pandemic, the business was significantly impacted and most of its staff members, including the Applicant, were stood down from March 2020. The Applicant began receiving JobKeeper payments through the Respondent from March 2020 until the JobKeeper scheme ceased in March 2021 and the Applicant remained stood down thereafter.

[11] Mr Stratton also stated that the Applicant subsequently approached the Respondent to initiate discussions in relation to alternate options for receiving a consistent income. Mr Stratton's evidence is that it was at that point that the option of making the Applicant's position redundant and providing the Applicant with a redundancy payment was first considered by the Respondent. However, due to an extreme downturn in the business in the previous 12 months, the Respondent did not have sufficient capital to pay the Applicant's full redundancy pay entitlements. Ultimately, the Respondent came to an arrangement with the Applicant whereby there would be a calculation of half of the Applicant's redundancy payment entitlement which was converted into an equivalent annual leave entitlement that was then paid progressively to the Applicant at a reduced rate of earnings.

[12] In addition to receiving his annual leave entitlements in accordance with the arrangement, another arrangement was made to engage the Applicant to perform marketing, franchisee management and sales duties on a temporary part-time basis from April 2021. In February 2022, Mr Stratton said that he had a conversation with the Applicant in which he expressed uncertainty and concern about the future operational need for the Applicant's substantive position as a General Manager.[2] Mr Stratton also said that in March 2022 the Applicant ceased performing his part-time duties and by the pay period commencing 9 May 2022, the Applicant had exhausted his annual leave entitlements.

[13] Between March 2022 and July 2022, Mr Stratton said that the Applicant was on an extended period of sick/personal leave.[3] The Applicant gave evidence that while he was on sick leave, he provided the Respondent with medical certificates on a fortnightly basis to cover each fortnightly period of his leave, with the final medical certificate covering the period up to 4 August 2022. Mr Stratton said that by the end of July 2022, the Applicant's personal leave balance had been exhausted. At the hearing, the Applicant said that in early August 2022, he expected that he would return to work when his sick leave came to an end on 4 August and that he made inquiries with the Respondent as to whether he was to resume his position as the General Manager or be employed at the same rate as the new Marketing Manager who had been performing the role while he was on sick leave, or alternatively, whether he was to be made redundant by the Respondent.

[14] On 2 August 2022, the Applicant had several exchanges of emails with Ms Peterson, Chief Financial Officer of the Respondent, disputing the calculation of his leave balance and the payslip for the pay period ending 31 July 2022. Mr Stratton was copied into those emails. In the email sent by the Applicant at 3:41 pm on 2 August 2022, the Applicant stated:

> "Sorry also I think that CXN has a morale (sic) if not legal (not sure how fairwork will regard this but my attorney seems positive) re the leave at 120k per annum versus 65k per annum (as I never signed a

reduction in pay and as no redundancy was offered I feel that the 398 day leave is application at 120k rate??

Over to you Stuart?

If I want to start work again (if my [health team] agree) can we all agree I come back at the same hourly rate as Lidia? (higher or lower irrelevant) Seems fair? If not please advise my redundancy accordingly

Kind regards,
David Goodenough
Marketing/Franchise Manager"

[15] In response to a proposition from me that the Applicant knew by 2 August 2022 that his employment was going to be terminated when he suggested to the Respondent that either the Respondent should make him redundant or appoint him to a different role, the Applicant said that after the conclusion of his sick leave on 4 August 2022, he notified the Respondent that he planned to return to work but was waiting for instructions from the Respondent. On 11 August 2022, the Applicant corresponded with Mr Stratton, noting that no response had been provided by the Respondent to his email of 2 August 2022. In the email of 11 August 2022, the Applicant stated:

"Good afternoon Stuart,

As I have had no response to this email can I please formally request a reply? I am happy to resume work however as the General Manager position is now redundant "in your words" and will not be in the foreseeable future please offer me the marketing position (same rate a (sic) Lidia) or the GM position back or make my position redundancy (sic) as per the law.

Could I please receive a formal reply within 48 hours?"

[16] Mr Stratton replied to the Applicant the following day apologising for the delay and indicating that he was waiting on advice and was hoping to provide a response to the Applicant in the following week. On 15 August 2022, Mr Stratton emailed the Applicant advising him of the redundancy of his "role", as follows:

"Hi David,

In response to your email (without prejudice), we wish to inform you, your role at Con-x-ion has been made redundant due to the Covid Downturn and the affect (sic) that it has had on our business.

We have calculated your redundancy to be as per the below up to the 4/8/2022 and the final figure will be adjusted when finalised:

Hourly Rate	$32.90			
Redundancy	4/08/2022			
Start date	31/12/2012			
Years in service	9.60			
Weeks redundancy	16		608	$20,003.20
Weeks notice	5		190	$6,251.00
Long Service Leave			311.28	$10,258.88
			Total Owing to DG	**$36,513.08**

David I'm sorry that we are in this position and we appreciate the work you have put in at Conxion over the years, we wish you all the best with your future endeavours. Please feel free to reach out for a chat anytime I'm always available on the phone.

Kind Regards
Stuart Stratton"

[17] In relation to the email of 15 August 2022, I put the proposition to Mr Stratton during his evidence, that nowhere did it indicate that the Applicant's employment was ended, or that the redundancy took effect, on 15 August 2022. I also questioned Mr Stratton as to why the amounts shown in the email were calculated up to 4 August rather than 15 August, if the Applicant's employment ended on 15 August 2022. Mr Stratton said that the Applicant had no further income after 4 August and his understanding was that there was no leave or any payment due to the Applicant after that date, as he did not perform any work after 4 August. Mr Stratton said that the last medical certificate provided by the Applicant covered a period up to 4 August and by that point, the Applicant had exhausted his sick leave entitlements.

[18] It is common ground that following the email of 15 August 2022, the Applicant and Mr Stratton had a meeting on 22 August 2022. Mr Stratton's evidence of that meeting is that he and the Applicant discussed various issues, including the buyback of the 5% shareholding from the Applicant and the "redundancy package". Mr Stratton said that at the meeting, the Applicant continued to dispute the calculation of the redundancy payment set out in the email of 15 August 2022, but at no point did the Applicant say anything to Mr Stratton that caused Mr Stratton to believe that the Applicant thought that he remained employed by the Respondent. Mr Stratton said he left the 22 August meeting with the impression that the only matter in dispute was the redundancy pay, and not that the Applicant considered that he remained employed by the Respondent at that time. Also at the meeting, Mr Stratton collected from the Applicant the company vehicle which had been provided to the Applicant as part of his role. In response to a question from me about what Mr Stratton said to the Applicant at the meeting to confirm that his employment ended on 15 August, Mr Stratton said he referred to what he said in his email of 15 August.

[19] The Applicant's recollection of the 22 August meeting was that Mr Stratton suggested to him that if he was willing to sell his 5% of shares back to the company, the Respondent would increase his redundancy payment which would give him a tax advantage. During an exchange with the Applicant, I sought an explanation as to the basis on which the Applicant claimed to be unaware that the Respondent considered his employment terminated prior to the 22 August 2022 meeting, given that at that meeting he returned his company vehicle and negotiated the details of his redundancy payment, including the sale of his shares back to the company. In response, the Applicant said that "*I knew I was dismissed, but the question is when*" and in his mind "*until such time they pay me, I believe I was still* '*on the clock*'".

[20] On 22 August 2022 after the meeting, the Applicant sent a text message to Mr Stratton stating "*I have decided not to accept your offer, please proceed with the redundancy as emailed prior…I'd also like a (sic) request a separation certificate. Thanks*' On 25 August 2022, Mr Procter of Aitken Legal, sent a letter to the Applicant on behalf of the Respondent, on the basis that it was without prejudice save as to costs. The letter was filed by the Applicant with his response to the correspondence from the Chambers of the Vice President. In the letter, the Applicant was advised, among other things, that:

> "We are currently taking our client's instructions in relation to your employment and our client's decision that your role was no longer required and as such redundant, which we understand was confirmed with

you on 15 August 2022. We note that you have indicated your intention to 'contest' the redundancy and/or the redundancy severance package confirmed with you in that correspondence of 15 August, although it is not clear to us (or our client) what you consider is contestable."

[21] On 25 August 2022, the Applicant replied to Mr Procter by email stating:

"Thank you for your email, so the thing is that my advice it (sic) to follow all instructions from Fairwork Australia, as no payout has yet been made I can't challenge an email detailing the payout. Please advise your client to make the payout as emailed and with that and the separation certificate I will allow Fairwork Australia and you to determine whatever is required by law.

Please note that until I receive the payout I am still "on the clock" and expect compensation accordingly."

[22] During the hearing, the Applicant explained that when he said he was still "*on the clock*", he meant that he considered himself to remain employed by the Respondent and that he "*was accruing wages and sick leave and leave pay as per the law*". On Monday, 29 August 2022, Mr Stratton sent a text message to the Applicant confirming that the redundancy payment had been made and apologised for the delay due to the previous Friday being a public holiday. The Applicant responded by stating "*I'd like to place on the record as at to date I have not received my redundancy offered the 15th August, again I am on the clock until payment is made.*" It is not in dispute that the Applicant was paid the redundancy payment on 29 August 2022. On 30 August 2022, Mr Procter of Aitken Legal wrote to the Applicant stating as follows:

Dear David,

RE: PAYMENT OF YOUR SEVERANCE PACKAGE AND OTHER MATTERS

We refer to the above matter and our previous correspondence.

Our client rejects your assertion, made to our client directly, and then us, that you remain 'on the clock'. Your employment terminated due to redundancy on 15 August 2022.

Our client's email to you on 15 August 2022 was clear in its communication to you that your position was made redundant at that time, and the only result of a plain reading of that email can be that your employment with our client was terminated on that date. Further, in the meeting between you and Stuart Stratton on 22 August 2022, you and he discussed the amount of your redundancy entitlements, not whether your position was made redundant and certainly not on the basis you were then in ongoing employment, as well as the resolution of all matters in contention between you both. This conversation undeniably proceeded on the premise that your employment had ended.

In any event, your vague reference to expecting 'compensation' is misguided, noting you have not been accessing any paid leave entitlement, and have not been working let alone making yourself available for work. As such, even if your employment continued beyond 15 August 2022, which it clearly did not, you would not be entitled to any additional "compensation".

Our client is disappointed you have refused its invitation to particularise any dispute you have to its calculation of your severance package in any meaningful way that would allow it to consider your position. We note our client's previous formulation of your severance package was calculated to 4 August 2022. Our client has now recalculated the severance package to which you are entitled, up to the actual date of termination of your employment, 15 August 2022. That severance package is made up as follows:

	Weeks	Hours	Amount
Redundancy	16	608	$20,003.20
Notice	5	190	$6,251.00
Long Service Leave		311.82	$10,258.88

	Total	$36,513.08

We are instructed that our client paid the amount of $36,513.08 less tax according to law, to you by electronic funds transfer to your nominated bank account on Monday 29 August 2022. Our client will provide you with a pay slip in due course.
…"

[23] In oral submissions, the Applicant contended that Mr Stratton did not stipulate in the email of 15 August 2022, or any subsequent communication, the exact date upon which the Applicant's dismissal or redundancy was to take effect. While this submission was made after I had put this proposition to Mr Stratton, the Applicant maintained that, in his mind, until he received the redundancy payment on 29 August 2022, he considered that he was still "*on the clock*", meaning that he remained employed by the Respondent and consequently, in his view, the dismissal or redundancy had not taken effect prior to 29 August 2022. In addition, the Applicant submitted that even if the dismissal was found to have taken effect on 22 August 2022, being the date of his meeting with Mr Stratton, his application would still have been made within the 21-day period.

[24] The Applicant further submitted that if he was wrong and the dismissal or redundancy in fact took effect on 15 August 2022, it would be relevant to a consideration of whether there were exceptional circumstances justifying the grant of a further period, that after receiving the letter from Aitken Legal on 25 August 2022, he had a "*relapse*" as he considered the letter "*intimidating and tantamount to bullying*". The Applicant said that he was bedridden from his relapse and was unable to "*do anything else*". Notwithstanding this, the Applicant said that because he considered that the 21-day period commenced from 29 August 2022, "*I forced myself to do what I needed to do to ensure that I have made that application within the 21 days from the 29th.*"

[25] In response to the proposition that he had provided no evidence, such as a medical certificate or report, to support his claim that he suffered from a medical condition in the relevant period which prevented him from making the application, the Applicant said that his treating psychologist was in the United States at the time, and he did not receive treatment from his psychologist in relation to the relapse. The only medical evidence provided by the Applicant was an undated medical certificate stating that the Applicant was unfit to attend work from 20 May 2022 to 10 June 2022.

[26] The Respondent submitted that the Applicant's apologies for his "*tardiness re the 21 days*" in his email to the Vice President's Chambers could only be interpreted as an acknowledgment or admission by the Applicant that his application was filed out of time. Further, Mr Stratton's email to the Applicant on 15 August 2022 was said to be unambiguously clear in communicating to the Applicant that his employment was terminated because of the redundancy of his position and the only reasonable conclusion that could be drawn from reading that email is that the Applicant must have understood his employment to be at an end on that day.

[27] The Respondent submitted that the Applicant had an opportunity between 15 August 2022 and 22 August 2022 to dispute the termination by filing an unfair dismissal application and yet failed to do so. The Applicant had another opportunity in the 22 August meeting to raise an objection to the termination of his employment, or at the very least, seek clarification as to

the character of the 15 August 2022 email if he was under any sort of false impression but the Applicant did not do so. At that point in time, the Respondent stated that the Applicant had 14 days remaining (from 15 August 2022) to make his application, and still did not make the application within time. At the end of the meeting on 22 August 2022, the Respondent stated that the Applicant returned the company vehicle to Mr Stratton which is a clear indication that the Applicant must have known his employment relationship had ended.

[28] Further, the Respondent submitted that in the Applicant's text message of 23 August 2022, the Applicant not only acknowledged the redundancy notice of 15 August 2022, but in fact requested that the Respondent continue with the redundancy of his position and thanked Mr Stratton. In the letter of 30 August 2022, Aitken Legal acting on behalf of the Respondent refuted any inference that the Applicant remained employed on 30 August 2022 and unequivocally confirmed that the Respondent considered that the Applicant's employment with the Respondent came to an end on 15 August 2022. At the time of receiving that correspondence on 30 August 2022, the Respondent stated that the Applicant still had 6 days remaining (from 15 August 2022) to file his application, but the Applicant did not do so.

[29] In relation to the Applicant's submission that the final date of his employment was 29 August 2022 as that was the date his final payment was received, the Respondent submitted that this submission must be rejected because there is no premise in law that supports such a submission, and it is commonplace (and in fact many industrial instruments acknowledge) that entitlements due on termination of employment will be paid after the final day of employment. Even if it is accepted that the Applicant was suffering from a medical condition (which the Respondent submitted that the Commission should not accept, due to a lack of evidence) there was insufficient detail as to why that alleged medical condition rendered the Applicant unable to prepare and file the application during that period.[4]

Approach to determining whether a further period should be granted

The date the dismissal took effect

[30] The FW Act does not define when a dismissal takes effect. Some guidance, however, may be found in s. 117(1) of the FW Act, which provides as follows:

> "**117 Requirement for notice of termination or payment in lieu**
>
> Notice specifying day of termination
>
> (1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).
>
> Note 1: Section 123 describes situations in which this section does not apply.
>
> Note 2: Sections 28A and 29 of the Acts Interpretation Act 1901 provide how a notice may be given. In particular, the notice may be given to an employee by:
>
> (a) delivering it personally; or
>
> (b) leaving it at the employee's last known address; or
>
> (c) sending it by pre-paid post to the employee's last known address."

[31] In *Ayub v NSW Trains*[5] a Full Bench of the Commission considered the proper meaning and application of the expression "*within 21 days after the dismissal took effect*" in s.394(2)(a) of the FW Act. In particular, the Full Bench considered whether in any circumstances a dismissal could be said to have taken effect before it was communicated to the relevant employee observing that:

> "[17] At common law, a contract of employment may unilaterally be terminated by the employer with notice or by way of a summary dismissal. The general principle is that to effect the termination of a contract of employment, an employer must, subject to any express provision in the contract, communicate to the employee by plain or unambiguous words or conduct that the contract is terminated. Where the communication is in writing, the communication must at least have been received by the employee in order for the termination to be effective. Where notice is given of the termination of the employment contract, then the contract will terminate at the end of the period of notice specified in the communication to the employee. The principles in this respect were summarised by the Supreme Court of NSW (White J) in *Fardell v Coates Hire Operations Pty Ltd* as follows:
>
>> '[82] To be effective, a notice of termination of a contract of employment must specify a time when termination is to take effect, or that time must be ascertainable (G J McCarry, Termination of Employment Contracts by Notice (1986) 60 ALJ 78 at 79; *Burton Group Ltd v Smith* [1977] IRLR 351 at 354). The notice is to be construed according to how it would be understood by a reasonable person in the position of the recipient who had knowledge of the background of the dealings between the parties (*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19; [1997] AC 749 at 767-768; *Carter v Hyde* [1923] HCA 36; (1923) 33 CLR 115 at 126; *Prudential Assurance Co Ltd v Health Minders Pty Ltd* (1987) 9 NSWLR 673 at 677; *Fightvision Pty Ltd v Onisforou* [1999] NSWCA 323; (1999) 47 NSWLR 473 at [99]).'
>
> [18] A notice of termination may validly operate notwithstanding that it is stated to take effect subject to a condition, provided that the notice is expressed with sufficient certainty so that conditional date of termination is ascertainable, the condition upon which the termination becomes operative has been fulfilled and the employee is in a position to know that the condition has been satisfied.
>
> [19] When the termination occurs without notice on the basis that a sum of money is paid in lieu of the notice that would otherwise be required, then the termination would take effect when communicated to the employee subject perhaps to the additional requirement that the amount in lieu of notice has actually been paid to the employee."

[32] The Full Bench also considered cases where a notice of termination of employment had been purported to operate retrospectively and stated that there is no proper exception to the general proposition established by the authorities under the former *Workplace Relations Act* and the FW Act, that a dismissal cannot take effect before it is communicated to the employee. The Full Bench went on to conclude that:

> "[36] Having regard to the language, purpose and context of s.394(2)(a), we do not consider in relation to either question that the provision should be interpreted or applied so that the 21-day period to lodge an application for an unfair dismissal remedy could begin to run before an employee who has been dismissed at the initiative of the employer became aware that he or she had been dismissed, or at least had a reasonable opportunity to become aware of this. The combination of the very restricted time period to lodge an application under s.394(2)(a), together with the very high bar of "*exceptional circumstances*" required to be surmounted in order to obtain an extension of time to lodge an application, clearly demonstrates that it was intended that the timeframe to agitate such an application was to be strictly limited. Indeed s.394(2)(a) of the FW Act as originally enacted provided for a 14-day period only; this was extended to 21 days by the *Fair Work Amendment Act 2012*. On any view, the period allowed by s.394(2)(a) is extremely short having regard for the need for a dismissed person to take stock of his or her situation, seek advice or information about his or her rights, make a decision to seek a remedy, and complete and lodge an application. In that context it would require express language to justify an

> interpretation of the provision under which the 21-day time period allowed is further shortened because a dismissal is taken to have had effect before the employee has become aware that it has occurred. Were it otherwise, it would be possible for a dismissal with retrospective effect to be constructed which significantly diminished or even entirely eliminated the time allowed for an employee to lodge an unfair dismissal remedy application."

[33] After considering the objects of the FW Act, the Full Bench also observed that it would not be consistent with a system that addresses the needs of employees as well as employers and is intended to ensure that a "*fair go all round*" is accorded to employees as well as employers, that the practical opportunity to lodge an application is diminished or eliminated, by treating any dismissal as having retrospective effect. Support for this construction was also found in s.117 of the FW Act which provides that an employer shall not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination, which cannot be before the day the notice is given.

[34] Subject to some exceptions which are not presently relevant, the principles from cases concerning when a dismissal takes effect, are:

- A failure on the part of an employer to provide written notice of termination of employment as required by s. 117 of the FW Act will not necessarily result in a finding that a dismissal has not taken effect;
- To effect a termination of employment requires plain and unambiguous communication by words or conduct;
- A dismissal does not take effect until it is communicated to the employee and cannot take effect retrospectively; and
- The 21-day period for an employee to lodge an unfair dismissal application does not commence to run before an employee, who has been dismissed at the initiative of the employer, becomes aware that he or she had been dismissed, or at least has a reasonable opportunity to become aware of it.

[35] It is axiomatic that a plain and unambiguous communication of dismissal includes the date on which the dismissal is to take effect.

A further period under s. 394(3)

[36] The FW Act allows the Commission to grant a further period within which to make an unfair dismissal application only if it is satisfied that there are "*exceptional circumstances*" taking into account matters set out in s. 394(3) of the FW Act. Briefly, exceptional circumstances are circumstances that are out of the ordinary course, unusual, special or uncommon but the circumstances themselves need not be unique or unprecedented, or even very rare.[6] Exceptional circumstances may include a single exceptional factor, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together can be considered exceptional.[7]

[37] The requirement that there be exceptional circumstances before a further period can be granted under s. 394(3) contrasts with the broad discretion conferred on the Commission under s 185(3) to extend the 14 – day period within which an application for approval of an enterprise agreement must be made, which is exercisable simply if in all the circumstances the Commission considers that it is "*fair*" to do so.

[38] Section 394(3) requires that, in considering whether to grant a further period for an application to be made, the Commission must take into account the following:

(a) the reason for the delay;

(b) whether the person first became aware of the dismissal after it had taken effect;

(c) any action taken by the person to dispute the dismissal;

(d) prejudice to the employer (including prejudice caused by the delay);

(e) the merits of the application; and

(f) fairness as between the person and other persons in a similar position.

[39] The requirement that these matters be taken into account means that each matter must be considered and given appropriate weight in assessing whether there are exceptional circumstances. I now consider these matters in the context of the application.

Consideration

Reason for the delay

[40] The reason for the delay provided by the Applicant is that he believed he remained in employment until 29 August 2022, when he was paid redundancy payments by the Respondent. The Applicant also asserts that he was suffering from a medical condition, described by him as a "*relapse*", following receipt by him of a letter from the Respondent's legal representative on 25 August 2022 in relation to his redundancy.

[41] For a dismissal to be effective, plain and unambiguous communication of the dismissal is required. I am not satisfied that the Applicant's dismissal was communicated to him in a plain and unambiguous manner. The email of 15 August 2022, sent to the Applicant by Mr Stratton, does not state that the Applicant's employment has been terminated with effect from that date. This lack of clarity is compounded by the fact that the payments said to be due to the Applicant on the termination of his employment, are calculated as at 4 August 2022 and are subject to further adjustments "*when finalised*". Further, these amounts were not actually paid until 29 August 2022. That date coincides with the end of a period of sick leave the Applicant states that he had taken. The fact that the Applicant's paid sick leave accruals had been exhausted does not mean that he ceased to be employed.

[42] I do not accept the Respondent's submission that on any reasonable reading of the email of 15 June 2022, the Applicant should have understood that his employment was at an end, effective from that date. A submission that I should make such a finding, based on a reasonable reading of the email, indicates that it did not plainly and unambiguously communicate that the Applicant's employment had been terminated. If the email was clear, it would not be necessary to consider what a reasonable person would have understood. In the circumstances existing at

the time the email was sent it was not reasonable for the Applicant to have concluded that he had been notified of his dismissal effective 15 August 2022.

[43] The next discussion between the Applicant and Mr Stratton was at a meeting on 22 August 2022. Mr Stratton does not state that he informed the Applicant that he had been dismissed on 15 August 2022. Rather, Mr Stratton said that he repeated the contents of the email of 15 August 2022. Given my finding that the email was unclear, I do not accept that this was sufficient to constitute a plain and unambiguous communication of the dismissal. Mr Stratton also said that the Applicant continued to dispute his redundancy payment. Given that the correspondence of 15 August stated that the figure for redundancy payments would be adjusted when finalised, and the Applicant and Mr Stratton were still debating the subject of redundancy paymente on 22 August, I do not accept that the Applicant should have understood that he had been dismissed on that date or an earlier date.

[44] While the Applicant returning his Company vehicle on 22 August is consistent with his employment ending on that date, it is also consistent with the Applicant accepting that his employment would end when negotiations about his redundancy payments concluded and the Applicant simply taking the opportunity to return the vehicle while attending the Respondent's premises. The text message sent by the Applicant to Mr Stratton on 23 August 2022, does not indicate an understanding that his employment had ended and, to the contrary, invites Mr Stratton to proceed with the redundancy and to provide a separation certificate.

[45] I am also of the view that the emails exchanged between the Applicant and the Respondent prior to 15 August 2022, do not establish that the Applicant understood the Respondent's position that his employment ended on 15 August 2022. The emails establish nothing more than the fact that, prior to 15 June 2022, the parties were negotiating about matters including a redundancy payment, in the context of the Respondent having informed the Applicant that his position was redundant. The Applicant's correspondence indicates that while he understood that his position was redundant, he wanted either an alternative position or a redundancy payment and believed he was still employed. The fact that a person's position is redundant at a particular point, does not necessarily mean that the person's employment has been terminated.

[46] In this regard, emails from the Applicant to the Respondent dated 2 and 11 August[8] indicate that redundancy was being discussed prior to 15 August 2022. An email on 15 August in which the Applicant forwarded the email from Mr Stratton to Ms Peterson, the Respondent's payroll person, states that the Applicant intended to "*contest this*". Given that the forwarded email contains a table setting out payrates, the Applicant had been engaged in a discussion about his entitlements to redundancy pay, and the email was forwarded to Ms Petersen rather than Mr Stratton, the email indicates the Applicant was disputing redundancy payments consistent with his view that his dismissal would not take effect until he had received those payments.

[47] I do not accept that the Applicant has provided evidence sufficient to establish that his health issues are an acceptable explanation for the delay in filing his application. However, based on the matters set out above, even if the dismissal did take effect on 15 August 2022, I am satisfied that the reason for any delay in filing the application is lack of clarity in the communication of the Applicant's dismissal. This weighs in favour of a further period being granted for the application to be filed.

Whether the person first became aware of the dismissal after it took effect

[48] If the dismissal took effect on 15 August 2022, I am satisfied that the Applicant became aware of the dismissal on 29 August when he was unequivocally notified by the Respondent's lawyer that the Respondent had purported to dismiss him on 15 August. Even if I am wrong on this point, given the lack of clarity in the 15 August letter, the earliest date upon which the Applicant could have been notified of his dismissal was on 22 August when he met with Mr Stratton. If the dismissal took effect on that date, the application was not made outside the required time. The fact that the Applicant first became aware of the dismissal after it purportedly took effect, is a matter that weighs in favour of the grant of a further period to make the application.

Whether the person took action to dispute the dismissal

[49] While the action taken by the Applicant disputed his redundancy payment, I accept that the Respondent was informed that the Applicant did not accept the circumstances in which his employment ended and that he was in dispute about the ending of his employment. This is not a case where the Applicant emerged from left field after an extensive period, and filed an unfair dismissal application with no indication that the dismissal was disputed. This is also a matter that weighs in favour of a further period being granted, albeit only slightly.

Prejudice to the employer (including prejudice caused by the delay)

[50] I do not accept that the Respondent will suffer any prejudice if a further period is granted, other than that the Respondent will be required to defend the application. That prejudice does not relate to the delay in filing the application. However, the mere absence of prejudice is, considered in isolation, an insufficient basis to grant an extension of time. This is a neutral consideration.

The merits of the application

[51] In the matter of *Kornicki v Telstra-Network Technology Group*[9] the Commission considered the principles applicable to the exercise of the discretion to extend time under s.170CE(8) of the *Workplace Relations Act 1996* (Cth). In that case the Commission said:

> "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."

[52] The matters the Commission is required to consider in deciding whether a dismissal is unfair, include the reason for the dismissal, the way it was carried out, the effect on the person who was dismissed and other relevant matters. A dismissal may be unfair because of any one or more of these considerations.

[53] In the present case, the Respondent objects to the application on the ground that it asserts the dismissal was a case of genuine redundancy. For the Applicant's claim to succeed, he must rebut this objection. Mr Stratton states that the business was adversely affected by the COVID-

19 Pandemic the role of General Manager previously performed by the Applicant is no longer required and that he and his brother, as Directors of the Respondent, have absorbed the duties performed by the Applicant. The Applicant appears to assert that he should have been redeployed into another position.

[54] The outcome of this case will depend on the evidence that is accepted at a hearing, and at this stage, it is not possible to reach any view other than that the application is not without merit. Accordingly, merit is a neutral consideration.

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

[55] As a Full Bench of the Commission has noted, "*this consideration is concerned with the importance of the application of consistent principles in cases of this kind, thus ensuring fairness as between the* [applicant] *and other persons in a similar position. This consideration may relate to matters currently before the Commission or others previously decided by the Commission.*"[10] It is consistent with other cases that a further period can be granted in circumstances where a dismissal has not been plainly and unambiguously communicated so that this is an acceptable explanation for delay. This factor is neutral in the present case.

Conclusion

[56] Having regard to the matters in s. 394(3) of the FW Act, I am satisfied that there are exceptional circumstances in this case. The substantive reason for the delay is that the dismissal was not communicated in a plain and unambiguous manner and the Applicant was not aware that he had been dismissed until some weeks after the Respondent purported to dismiss him. This is an exceptional circumstance in the sense it is out of the ordinary or unusual, that a dismissal is not communicated in plain and unambiguous terms. These matters weigh in favour of the grant of a further period and are not outweighed by other matters I am required to consider.

[57] Because I am satisfied that there are exceptional circumstances, I have determined to exercise the discretion to extend the time for making the application to 12 September 2022. An Order to that effect will issue with this decision. The matter will be listed for Case Management and a Notice of Listing will also be issued.

DEPUTY PRESIDENT

Appearances:

D Goodenough, the Applicant.
C Campbell of Aitken Legal for the Respondent.

Hearing details:

2022.
Brisbane (By Telephone):
16 December.

Printed by authority of the Commonwealth Government Printer

<PR760582>

---

[1] Exhibit R1.

[2] Exhibit R1 at [29].

[3] Ibid at [32].

[4] *Rose v BMD Constructions Pty Ltd* [2011] FWA 673.

[5] [2016] FWCFB 5500.

[6] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [13].

[7] Ibid.

[8] Annexure SS-1 to Mr Stretton's statement of evidence.

[9] Print P3168, 22 July 1997 per Ross VP, Watson SDP and Gay C.

[10] *Perry v Rio Tinto Shipping Pty Ltd* [2016] FWCFB 6963, [41].