



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Belinda Robson

v

Randstad Pty Limited
(U2023/1877)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 6 APRIL 2023

Application for an unfair dismissal remedy – extension of time – attempted lodgement in time – computer malware – lodgement occurred once computer repaired – exceptional circumstances – time for late lodgement extended

[1] Belinda Robson (Ms Robson or the applicant) has applied to the Commission under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) for an unfair dismissal remedy in relation to an alleged dismissal by Randstad Pty Limited (Randstad, the respondent or the employer) which is said to have taken effect on 9 February 2023.

[2] Ms Robson’s application was received by the Commission on 8 March 2023.

[3] The application is six days outside the statutory 21-day period for making unfair dismissal claims. Ms Robson seeks an extension of time. Randstad oppose an extension being granted. Randstad also raise a jurisdictional issue; that Mr Robson was not dismissed.

[4] It is appropriate to determine whether time for late lodgement should be extended before the Commission deals with other issues.¹

[5] This decision only determines whether an extension of time should be granted.

[6] I issued directions on 30 March 2023.

[7] I heard the extension of time issue by video conference on 4 April 2023.

[8] Ms Robson and Randstad were self-represented; the employer by officers of its human resource department.

[9] Ms Robson gave evidence. Ms Robson’s recall was hazy and she was confused and somewhat confusing in setting out the sequence of events leading to her application being made.

[10] However, the facts, drawn from both oral and documentary evidence, are generally not in dispute.

Facts

[11] I make the following findings.

[12] Randstad is a labour hire agency.

[13] Ms Robson is a resident of suburban Brisbane, Queensland. She commenced employment with Randstad on 14 March 2022.

[14] At the time of her alleged dismissal, Ms Robson was working in a placement with the National Disability Insurance Agency (NDIA).

[15] Ms Robson alleges in her unfair dismissal application that she was removed from her placement at the NDIA effective 9 February 2023 for reasons that were fabricated by the NDIA after she had made a bullying complaint.

[16] In its response to the unfair dismissal application, Randstad do not contest that Ms Robson was removed from the NDIA placement effective 9 February 2023 but contend that, as her employer, it did not dismiss Ms Robson and that she remained on its books as an employee for other placement purposes.

[17] At the time of being removed from the placement and following, Ms Robson considered her removal unfair.

[18] After speaking to a friend, about a week after her alleged dismissal Ms Robson researched her rights. She examined the Commission website. She discovered that an unfair dismissal claim could be made by a dismissed employee, which she considered herself to be. She had been told by her friend and then read online that a claim needed to be made within twenty-one days of dismissal. She counted out that twenty-one days from 9 February meant that her claim needed to be made by 2 March 2023. She researched these issues both from a computer at her friend's house, as well as in evenings on her daughter's laptop.

[19] Ms Robson waited until three days before the 21-day deadline to progress her rights. In this period she had other commitments including searching for a new job. She also wanted to reconcile in her mind managing those commitments with time spent in pursuing a claim.

[20] On or about 27 February 2023 Ms Robson decided to proceed to make a claim. That morning from her friend's house and computer she drafted the text of an email to accompany her intended application. She did not populate an application form that day, preferring to do so the following day with the assistance of her partner.

[21] On 28 February 2023, the nineteenth day of this period, Ms Robson accessed online the unfair dismissal form (F2) and populated and signed it electronically. Ms Robson used her thirteen year old daughter's laptop computer for that purpose. Ms Robson's evidence was that she then prepared a covering email by cutting and pasting the text she had drafted the previous day.

[22] Ms Robson's evidence was that in the late afternoon, using her daughter's email account and via the online portal, she then electronically sent to the Commission her application (F2), a fee waiver request (F80) and a covering email.

[23] Ms Robson's evidence was that she believed from that time onwards that her application had been sent and received.

[24] Ms Robson did not look in the 'sent items' box in her daughter's email account to check that her email had been sent.

[25] At around the same time Ms Robson also sent the attachments to her application to her union, advising her union that she had made an unfair dismissal claim. She had not sought or received advice from the union on her unfair dismissal rights but had, at an earlier time, received advice on her bullying complaint.

[26] At around the same time that late afternoon or evening Ms Robson came to the view that the battery on her daughter's laptop was not holding charge for long enough. The laptop had been recently purchased from a local computer repair shop (4 Award Computer Services). Ms Robson decided that evening (28 February 2023) to take the laptop back to the shop. She took it to the repair shop which was closed. However a repairer was present and told Ms Robson to leave the laptop under the door which she did. Ms Robson followed up with the repairer the next day asking for the laptop to be assessed.

[27] Over an eight day period 28 February 2023 to 8 March 2023 the laptop was assessed and repaired. The repairer had discovered malware that had infected it with a virus. It was cleansed and rendered operable.

[28] For the purposes of these proceedings and at Ms Robson's request, an officer of 4 Award Computer Services prepared a report dated 31 March 2023, that was admitted by consent.² The report read:

"This is to confirm that on the 28/2/2023 Georgia Robson dropped in her laptop to this workshop after clicking on a link to a malware site and was instantly infected by a crypto virus on her HP Elite. It was confirmed that it had been compromised by malware and scam FBI crypto virus. The drive was cleaned and windows was reinstalled and picked up on the 8/3/2023"

[29] Ms Robson and her daughter collected the computer from the computer repairer on 8 March 2023 and took it home.

[30] Ms Robson's evidence was that she did not re-send to the Commission her unfair dismissal application or the fee waiver request or the covering email on 8 March 2023. She did nothing electronically that day with respect to her application.

[31] However, by covering email dated 8 March 2023 the Commission that day received an email from Ms Robson via her daughter's email account. It read:³

"**From:** ROBSON, Georgia [REDACTED]"

Sent: Wednesday, 8 March 2023 at 9:43 AM
To: Melbourne Registry[Melbourne@fwc.gov.au]
Subject: Qld Unfair Dismissal - Belinda Robson
Attachments: form_f2.docx; Attachment 1 28.2.msg; Attachment 2 28.2.docx; Attachment 3 28.2.msg; Attachment 4 28.2.msg; Attachment 5 28.2.msg; Attachment 6 28.2.msg; Complaint.docx
Categories: F2 (Unfair Dismissal)

Good morning,

Whilst I was employed by Ranstad I was contracted to NDIA and I was subject to bullying which ended with my dismissal.

Please find the attached Complaint. My employer didn't support me at all in relation to my workplace bullying situation. My employer was only out to please NDIA to keep future opportunities open through maintaining a submissive approach whilst ignoring the toxic environment they put me and other employees in.

I have attached my formal Complaint, Attachments, Form F2 and Form F80. I have sent this from my daughter's computer as I am in the process of trying to acquire a new laptop.

Kind regards
Belinda Robson

[REDACTED]

Sent from Mail for Windows 10"

[32] The unfair dismissal application as received by the Commission on 8 March 2023 is dated 28 February 2023. In answer to question 1.6, Ms Robson states that the application is made within 21 calendar days of her dismissal taking effect. This was the case on 28 February 2023, but not the case when the application was made.

[33] Ms Robson took no steps to follow-up the progress of her application.

[34] On 9 March 2023 the Commission wrote to Ms Robson advising that her application had been received. The letter neither stated when it had been received or that it had been received late.⁴

[35] On 10 March 2023 the Commission wrote to Ms Robson advising that her request for a fee waiver had been granted.⁵

[36] On 9 March 2023 the Commission also wrote to Randstad advising that an application had been received from Ms Robson.⁶ Unlike the letter to Ms Robson of same date, it stated that the application had been received on 8 March 2023. However, it did not state that the application

had been received late. This was the first Randstad was aware of the unfair dismissal proceedings.

[37] On 10 March 2023 and as requested, Randstad advised the Commission of the contact details of the officer who would handle the proceedings.

[38] By email on 14 March 2023 an officer of the Commission advised both Ms Robson and Randstad that the application had been filed late and sought a written explanation by 17 March 2023 for late lodgement.⁷ This was the first Ms Robson was aware that her application had been filed late.

[39] Ms Robson's evidence was that she tried unsuccessfully to telephone the officer on three subsequent occasions.

[40] On 20 March 2023 Ms Robson emailed the Commission with her explanation for late lodgement. It read:⁸

"I was using my daughter's computer at the time due to my employer retrieving the laptop I was using.

I prepared and sent my original email on 28th February the day after my birthday and 2 days before the cutoff. My daughter's computer was recently purchased from a local IT company and had been refurbished. There was a problem with the laptop and we had to take it back for them to service. On restart of the laptop that must have been when the email went through. The repairer is more than happy to write a confirmation letter that he had the laptop for repair."

[41] By response (F3) dated 20 March 2023 the employer opposed the application on jurisdictional grounds and opposed an extension of time.

Consideration

[42] 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.”

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

[44] An applicant for an extension of time has an onus to adduce evidence in support of matters which that applicant asserts constitute exceptional circumstances.⁹

[45] The test of “exceptional circumstances” establishes a “high hurdle” for an applicant.¹⁰ A decision whether to extend time under s 394(3) involves the exercise of a discretion.¹¹

[46] 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.”¹²

[47] The principles of *Nulty* have been cited with approval by subsequent full benches of the Commission.¹³

[48] In this matter and for the purposes of considering the extension of time issue, it is appropriate to assume (without determining) that a dismissal occurred, as it is not contested that the date of the alleged dismissal (if one occurred) was 9 February 2023.

[49] It is not in dispute that the application is six days out of time.

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

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

[51] 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.¹⁴ 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.¹⁵

[52] 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.¹⁶

[53] 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.¹⁷

[54] The reason for the delay advanced by Ms Robson is that she was precluded from making her application within time by a malfunction on her daughter's computer that was unknown to her at the time. Based on the repairer's report Ms Robson now believes the malfunction was malware.

[55] Although not tech-savvy and firm in her evidence that neither did she or anyone on her behalf send the email of 8 March 2023 on that day, Ms Robson hypothesises that the email of 8 March 2023 attaching the application and fee waiver was automatically generated by technology using the email she drafted and believed to have been sent on 28 February:¹⁸

“On restart of the laptop that must have been when the email went through.”

[56] Ms Robson submits that the whole period of delay is explained by the computer being with the repairer. Ms Robson submits that no relevant mistake was made on her part; an application was prepared within time and she believed in good faith it had been sent within time. She says in submissions that she was the victim of “a run of bad luck”.

[57] This was the explanation provided by Ms Robson in her email to the Commission of 20 March 2023.

[58] Is this an acceptable reason for the delay pointing to an exceptional circumstance?

[59] Ms Robson's submission that no mistake was made on her part requires me to be satisfied of two primary matters:

- That she is telling the truth that she sent her application by email on 28 February 2023 despite there being no evidence of that fact other than the application being dated that day; and
- That it is plausible, from a technological point of view, that technology could generate an email dated 8 March 2023 even though nothing was sent that day and had in fact sought to be sent eight days earlier, and apparently remained in an outbox on her daughter's email account whilst the drive was being cleaned and software reinstalled.

[60] On the first matter, whilst Ms Robson was confused and confusing in her evidence, I accept her evidence that she did populate her application on 28 February 2023 and did press “send” on her daughter’s computer that afternoon in a genuine attempt at lodgement. I make this finding because the application is dated that day, because I do not believe that Ms Robson backdated her application and because the computer she used was in the repair shop for the eight days from the evening of 28 February to 8 March 2023.

[61] On the second matter, Ms Robson did not call the repair engineer to address this issue. It would have been helpful if she had done so. However, given that the laptop was collected on 8 March 2023 it is plausible that the repair was completed that day. Further, 8 March is the date of the email as received by the Commission. Further, I accept Ms Robson’s evidence that the text of the email as received by the Commission on 8 March was the very text she had drafted on 27 February and used in her 28 February covering email. In these circumstances I find it more likely than not that her email attaching her unfair dismissal application of 28 February was unsent, sat in an outbox for eight days and its sending was generated on 8 March 2023 as and when the computer was rendered operable by the repairer.

[62] This then leaves the question whether Ms Robson was sufficiently attentive to her interests over this period to make her explanation an acceptable reason for delay.

[63] Ms Robson took no steps to follow up on her application in the fourteen day period between 28 February 2023 and 14 March 2023. However, only six of those days were a delay period (2 March to 8 March). Further, unlike matters where an applicant has been advised during the delay period (either by a bounce-back message or by the Commission) that their lodgement email has not been sent or received,¹⁹ Ms Robson received no such notification. I accept that Ms Robson was, during this period, under the genuine belief that her application had been sent and received. I consider that belief to have been reasonably held, in objective terms. That being so, there was no reason for Ms Robson to take immediate follow-up steps.

[64] Randstad submit that Ms Robson could have done more during this period. I agree that there is a continuing responsibility on an applicant to be attentive to the status of their application. The two steps that Ms Robson could have taken were (1) to check the sent items in the email account after sending the attempted lodgement email on 28 February 2023 to make sure it had been sent; and (2) to call the Commission directly in the days following to follow-up and find out what was happening with her application.

[65] Ms Robson has reasonable explanations for doing neither. Firstly, whilst it is prudent for a person sending important communication electronically to check that their device records the communication as a ‘sent’ item, Ms Robson had no reason to believe the lodgement email had not been sent and received. Secondly, by dint of circumstance, within hours of believing she had sent the lodgement email on 28 February, the laptop she had used was in the repairers. Though Ms Robson could have used her friend’s computer to search the ‘sent items’ or ‘outbox’ in her daughter’s email account had she thought of doing so, the laptop being in the repairers meant that this device could not be used to access the sent items or outbox. Thirdly, an applicant not following up their application for a week after what they believed was electronic lodgement is not, of itself, an undue period of inactivity.

[66] Having accepted the evidence that the laptop was in the repairer for the whole of the delay period and that Ms Robson had believed her application had been sent on 28 February, I do not conclude that Ms Robson was unduly inattentive to her interests such that her explanation for the delay is not merited.

[67] For these reasons, I find that the delay was caused by a personal computer malfunction of which Ms Robson was not advised and could not at the time or during the delay period have been reasonably aware. I also conclude that she was not relevantly inattentive to her interests.

[68] It is certainly an unusual circumstance that an email sent on a particular day is not received by the Commission until eight days later and then received under cover of an email dated the day it was received and not the day it was sent. Yet that is what occurred in this matter and this occurred without relevant error or failure on the applicant's part.

[69] The reason for delay weighs in favour of a finding of exceptional circumstances.

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

[70] Ms Robson was aware that she was removed from the placement at NDIA from 9 February 2023.

[71] Ms Robson was also aware of the reason.

[72] In the circumstances, this factor does not weigh in favour of a finding of exceptional circumstances.

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

[73] Ms Robson genuinely felt wronged by her removal from work at the NDIA.

[74] She did not however put Randstad on notice that she was contemplating taking legal action. Randstad was unaware of these proceedings until advised by the Commission on 9 March 2023.

[75] This is a neutral consideration.

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

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

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

[78] However, the absence of prejudice would not itself be a reason to grant an extension.²⁰

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

Merits (s 394(3)(e))

[80] The merits of Ms Robson's unfair dismissal application appears to concern an allegation of fabricated reasons following a bullying complaint.

[81] Not having heard evidence on these issues, it is not safe to express even a provisional view on that question.

[82] However, before that question could be considered, the Commission would need to determine the employer's jurisdictional challenge. The application is only within jurisdiction and able to be dealt with on merit if Ms Robson was dismissed by Randstad. It is apparent from the application itself that Randstad was a labour hire employer, and that the NDIA was simply a host business from where Ms Robson was working.

[83] Whilst I have not heard evidence and submissions on this matter, my provisional view is that if the facts are as apparent on the face of the application and response, a serious jurisdictional impediment may exist to the pursuit of this application. Ms Robson would do well to obtain legal advice on whether her claim is able to proceed given the jurisdictional issue.

[84] This consideration weighs somewhat against granting an extension of time.

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

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

Conclusion

[86] The period of delay of six days, in the context of a twenty-one day statutory time period, is not insignificant.

[87] The reason for delay weighs in favour of a conclusion of exceptional circumstances. The undetermined jurisdictional issue weighs somewhat against. Other considerations are neutral or not relevant.

[88] Considered overall, I am satisfied that the circumstances are exceptional. Ms Robson made a genuine attempt to file electronically within time, had no reason to believe that she had not done so and was not notified otherwise. The cause of her lodgement email not being received within time rests neither with Ms Robson nor the Commission. It was the product of an unusual set of circumstances whereby the device she was using was, unknown to her, infected by malware, taken into a repairer that evening for what was thought to be a different problem, and the lodgement email with the application attached was eight days later sent and received by dint of technology and not human interaction when operability of the laptop was restored by the repairer.

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

Disposition

[90] There being exceptional circumstances and it being appropriate to do so, the time for lodgement of application U2023/1977 is extended so as to enable further proceedings to be conducted.

[91] The application is returned to the regional co-ordinator for further allocation, including conciliation.

[92] An order²¹ giving effect to this decision is issued in conjunction with its publication.



DEPUTY PRESIDENT

Appearances:

Ms B Robson, on her own behalf

Ms M Sullivan with Ms T Horne, of and on behalf of Randstad Pty Limited

Hearing details:

2023

Adelaide (by video)

4 April

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¹ *Herc v Hays Specialist Recruitment (Australia) Pty Limited* [2022] FWCFB 234, [17]

² A3

³ A1 (email addresses and private phone numbers have been redacted in the published decision but are contained in the copy of this exhibit as filed)

⁴ A4

⁵ Ibid

⁶ R1

⁷ A2 email chain ‘Chambers – Catanzariti VP’ 14 March 2023 3.09pm

⁸ A2

⁹ *Smith v Canning Division of General Practice* [2009] AIRC 959

¹⁰ *Lombardo v Commonwealth of Australia as represented by the Department of Education, Employment and Workplace Relations* [2014] FWCFCB 2288 at [21]

¹¹ *Halls v AR & MA McCardle & Sons Pty Ltd and Ors* [2014] FCCA 316

¹² [2011] FWAFB 975 at [13]. See also *Cheval Properties Pty Ltd t/as Penrith Hotel Motel v Smithers* [2010] FWAFB 7251 at [5]

¹³ *John Mamur v Coles Group Supply Chain Pty Ltd* [2020] FWCFCB 4954 at [7] and [19]; *Dennis Obel v Central Desert Regional Council* [2021] FWCFCB 167 at [6]

¹⁴ *Manoj Ellikuttige v Moonee Valley Racing Club Inc* [2018] FWCFCB 4988 at [30] and [36]

¹⁵ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* [2018] FWCFCB 901, [39] – [40]

¹⁶ *Stogiannidis* (Ibid); *Elliott v LEAP Legal Software Pty Ltd t/a LEAP Legal Software* [2018] FWCFCB 3288

¹⁷ *Shaw v Australia and New Zealand Banking Group Limited* [2015] FWCFCB 287 at [12]; *Ozsoy v Monstamac Industries Pty Ltd* [2014] FWCFCB 2149 at [31] – [33]; *Perry v Rio Tinto Shipping Pty Ltd T/A Rio Tinto Marine* [2016] FWCFCB 6963; *Czoy v Monstamac Industries Pty Ltd* [2014] FWCFCB 2149

¹⁸ A2 paragraph 3 of email of 20 March 2023

¹⁹ See for example *Deacon v Pets Health Pty Ltd* [2023] FWC 665

²⁰ *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 at 299-300

²¹ [PR760910](#)