



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Jonathan Stay

v

R. & K.M. Jordin Pty. Ltd.
(U2024/4112)

COMMISSIONER CRAWFORD

SYDNEY, 11 JULY 2024

Unfair dismissal application potentially filed out of time – dispute regarding resignation date – employee cannot resign with retrospective effect – no extension of time required – jurisdictional objection dismissed.

Background

[1] Jonathan Stay (**Mr Stay**) has made an application to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for an order granting a remedy, alleging that he was unfairly dismissed by R. & K.M. Jordin Pty. Ltd (**R & KM Jordin**).

[2] Mr Stay commenced full-time employment with R & KM Jordin on around 25 July 2022 as a Level 3 Floor Painter.

[3] On 22 March 2024, Mr Stay sent an email to Ross Jordin (Owner), Jayne Bates (Business Manager) and Brent Stowers (Lawyer – Workhorse Advisory). Mr Stay’s email had a resignation letter attached. The resignation letter stated Mr Stay’s resignation was “not voluntary but is due to the ongoing conduct of the Company”. The letter goes on to provide details about the conduct Mr Stay claims forced him to resign. In relation to the effective date of the resignation, the letter states:

“Following an email from Jayne to my legal representative on 18 March 2024, I understand now that a resolution is not possible. Subsequently, I feel that my position is untenable, and I am forced to resign effective from that date.”

[4] Mr Stay’s Form F2 unfair dismissal application was filed on 11 April 2024. The applicant alleges Mr Stay was “dismissed” within the meaning of s.386(1)(b) of the FW because he was forced to resign because of R & KM Jordin’s conduct. The application identifies a dismissal date of 22 March 2024 and indicates the application was lodged within 21 days of the dismissal taking effect.

[5] On 7 May 2024, R & KM Jordin filed a Form F3 employer response to the unfair dismissal application. The Form F3 raised a jurisdictional objection on the basis that Mr Stay's application was not filed within 21 days of the dismissal taking effect on 18 March 2024 and argued that an extension of time should not be granted. R & KM Jordin also argued Mr Stay was not forced to resign because of its conduct and was not "dismissed" within the meaning of s.386(1)(b) of the FW Act.

[6] During a Mention/Directions proceeding on 31 May 2024, I granted both parties permission to be represented in relation to the application on the basis this would enable the matter to be dealt with more efficiently. I also determined that I would conduct a hearing to determine whether Mr Stay needs an extension of time for the filing of his application and, if so, whether an extension should be granted. This was not opposed by the parties. Directions were issued for the filing of material and the matter was listed for hearing via video on 3 July 2024.

[7] Mr Stowers represented Mr Stay at the hearing on 3 July 2024. Mohammad Kadir from Employsure Law Pty Ltd represented R & KM Jordin.

[8] During the hearing, Mr Stowers stated that Mr Stay was only arguing that he did not require an extension of time for the filing of his application and that Mr Stay accepted there were not otherwise "exceptional circumstances" to justify the granting of an extension of time, if an extension is required.

Material filed

Mr Stay

[9] Mr Stay relied on the following evidence in support of his argument that he does not require an extension of time:

- A statutory declaration from Mr Stay dated 17 June 2024. The declaration had a copy of Mr Stay's employment contract with R & KM Jordin attached along with a copy of the email with an attached resignation letter that he sent to R & KM Jordin on 22 March 2024. I marked Mr Stay's declaration **Exhibit A1**. Mr Stay was cross-examined by Mr Kadir during the hearing.
- A statutory declaration from Mr Stowers dated 17 June 2024. The declaration had a copy of an email from Ms Bates to Mr Stowers dated 18 March 2024 attached. Ms Bates' email proposes that Mr Stay and R & KM Jordin sever ties immediately. I marked Mr Stowers' declaration **Exhibit A2**. Mr Stowers was cross-examined by Mr Kadir during the hearing.

[10] Mr Stay also relied on his unfair dismissal application and an outline of submissions dated 17 June 2024. Mr Stowers also made oral closing submissions at the end of the hearing.

R & KM Jordin

[11] R & KM Jordin relied on the following evidence in support of its argument that Mr Stay needs an extension of time and in opposition to an extension being granted:

- A copy of a letter from Ms Bates to Mr Stay dated 19 December 2023. The letter invites Mr Stay to a disciplinary meeting and sets out eight allegations regarding his conduct and performance. Ms Bates confirmed the accuracy of the letter under an affirmation. I marked the letter **Exhibit R1**.
- A copy of an email from Mr Stay to Ms Bates dated 21 December 2023. Mr Stay's email responds to the eight allegations raised against him and refers to the proposed meeting not proceeding after Mr Stay sought permission to record the meeting. Ms Bates confirmed the accuracy of the email under an affirmation. I marked the email **Exhibit R2**.
- A witness statement from Ms Bates dated 1 July 2024. The statement had a copy of Mr Stay's email dated 22 March 2024 attached. The email has Mr Stay's resignation letter as an attachment. I marked Ms Bates' statement **Exhibit R3**.

[12] Ms Bates was cross-examined by Mr Stowers during the hearing.

[13] R & KM Jordin also relied on its Form F3 employer response and an outline of submissions dated 1 July 2024. Mr Kadir made oral closing submissions at the end of the hearing.

Extension of time

[14] Section 394(2) of the FW Act provides that an unfair dismissal application must be made:

- (a) within 21 days after the dismissal took effect; or
- (b) within such further period as the Commission allows.

Was the Application made within 21 days after the dismissal took effect?

[15] As the Full Bench has stated in relation to a general protections application but equally applicable here, "[t]he 21 day period prescribed... does not include the day on which the dismissal took effect."¹

[16] Whether Mr Stay needs an extension of time turns on the discrete legal issue of whether Mr Stay's resignation took effect on the date it was communicated to R & KM Jordin. There was no dispute the resignation was communicated on 22 March 2024 and that an extension of time would not be required if that is the effective date, because the application was filed on 11 April 2024 prior to the end of the 21-day filing period on 12 April 2024. Alternatively, if the resignation took effect on 18 March 2024, which is clearly the effective date Mr Stay identified in his resignation letter, an extension of time would be required because the 21-day filing period ended on 8 April 2024, three days before Mr Stay's application was filed. Given Mr Stay did

not argue there were any “exceptional circumstances” to justify the granting of an extension of time, the application would then be dismissed.

[17] In *Mohammed Ayub v NSW Trains* [2016] FWC 5500 (*Ayub v NSW Trains*) the Full Bench conducted a comprehensive assessment of authorities regarding whether a dismissal can take effect before it is communicated to an employee. The Full Bench stated at [21] and [22]:

“In *Stevanovski v Linfox Transport*² the Australian Industrial Relations Commission (Lacy SDP) rejected the proposition that at common law an employment contract could be terminated with effect from a date prior to that upon which the termination was communicated to the employee:

“The notion of the termination of an employment contract retrospectively, as seems to be the purport of the letter of 9 October 2000, is inconsistent with the rule of law to the effect that the giving of a notice terminating a contractual employment, whether by employee or employer, is the exercise of the right under the contract of employment to bring the contract to an end, either *immediately or in the future*: *Riordan v War Office* (1959) 1 WLR 1046 per Diplock J. When the respondent called the applicant to come to work on 9 October 2000, and decided to terminate his employment, it was entitled to terminate his employment either upon notice or with immediate effect. It did neither of those things. It terminated his employment with effect from a prior date. It would appear that the applicant might have been deprived of one day’s pay as a result of the respondent’s retrospective termination of his employment.”

It is conceivable that a contract of employment might expressly provide for its termination by the employer immediately without the termination first being communicated to the employee. However, other than in that circumstance, it is difficult to contemplate that an employment contract could ever terminate retrospectively even by agreement between the employer and the employee.³”

[18] While the decision in *Ayub v NSW Trains* concerned whether a dismissal can take effect before it is communicated to an employee, I see no reason why the reasoning in *Ayub v NSW Trains* would not apply equally to the effective date of a resignation. I accept that there is a difference in that a retrospective dismissal date deprives an employee of time to file an application contesting their dismissal, and that may result in them missing the filing deadline. That is not necessarily the case in terms of a retrospective resignation date because the employee is the one selecting the retrospective date. However, I do not consider that difference is sufficient to justify a departure from the reasoning in *Ayub v NSW Trains* for cases concerning the operative date of a resignation.

[19] Mr Kadir referred during the hearing to it being common in settlements related to dismissal applications for parties to agree that an employee will be taken to have resigned on an earlier date. That normally arises where an employer agrees to record the end of the employment as a resignation rather than a dismissal, to assist the employee in finding other work. However, I do not consider that circumstance is the same as the point R & KM Jordin is arguing in this case. Those settlements generally proceed on the basis that the employer’s records will effectively be amended to indicate the employee resigned and for this to be

confirmed if any external enquiries are made of the employer. That is an agreement to alter the employer's records regarding *how* the employment relationship ended. That is different to retrospectively altering the *date* that the employment relationship ended. As a result, I do not consider this argument can be relied upon to determine a resignation can operate retrospectively.

[20] I also consider there are practical problems with the proposition that a resignation can operate retrospectively. The employee will inevitably be bound to comply with the employment contract and implied duties until the employer becomes aware of the resignation. Likewise, the employer will be bound to comply with obligations to an employee until they are aware of the resignation. That may include having workers' compensation insurance to cover the employee. I consider it is problematic for these various duties and obligations if an employee can resign with retrospective effect. It would be odd, for example, if an employee is able to potentially circumvent actions for breaching the employment contract or implied duties during a period of employment by retrospectively resigning, effective from a date that preceded the relevant breach.

[21] I find that Mr Stay's resignation took effect when it was communicated to R & KM Jordin on 22 March 2024.

[22] Given I have found Mr Stay's resignation took effect on 22 March 2024, Mr Stay does not require an extension of time pursuant to s.366(2) of the FW Act.

Conclusion

[23] R & KM Jordin's jurisdictional objection concerning whether an extension of time should be granted to Mr Stay for the filing of his unfair dismissal application is dismissed.

[24] I direct R & KM Jordin to notify my chambers within seven days of the date of this decision whether it wishes to have Mr Stay's application listed for Conciliation or alternatively listed for Mention/Directions so that its other jurisdictional objection concerning whether Mr Stay was "dismissed" can be programmed for hearing.



COMMISSIONER

Appearances:

Mr Stowers from Workhorse Advisory representing Mr Stay.

Mr Kadir from Employsure Law Pty Ltd for R & KM Jordin.

Hearing Details:

3 July.
Via video.
2024.

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¹ *Singh v Trimatic Management Services Pty Ltd* [\[2020\] FWCFB 553](#), [10]. See also *Acts Interpretation Act 1901* (Cth) s 36(1) as in force on 25 June 2009; *Fair Work Act 2009* (Cth) s 40A.

² [2001] AIRC 388, [PR903594](#) (23 April 2001)

³ See GJ McCarry, *Termination of Employment Contracts by Notice*, (1986) 60 ALJR 78 at 83-4; *Transport Workers' Union of Australia v National Dairies Limited* (1994) 57 IR 183 at 184-5; *New South Wales v Paige* (2002) 60 NSWLR 371, 115 IR 283