



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Matilda Heard

v

BHP Olympic Dam Corporation Pty Ltd

(U2023/10281)

COMMISSIONER THORNTON

ADELAIDE, 30 JANUARY 2024

Application for an unfair dismissal remedy – extension of time required for lodgement – whether exceptional circumstances exist justifying an extension of time

[1] This decision concerns an application by Ms Matilda Heard (Ms Heard or the Applicant) for an unfair dismissal remedy pursuant to s.394 of the *Fair Work Act 2009* (Act).

[2] The Applicant’s employment with BHP Olympic Dam Corporation Pty Ltd (the Respondent) concluded on account of the Applicant’s dismissal on 31 August 2023. The Applicant was notified of her dismissal in writing on 31 August 2023 and the dismissal took effect on the same day. The reason provided for the Applicant’s termination was that an investigation had substantiated a breach of the Respondent’s code of conduct by the Applicant on 6 August 2023.

[3] The application in this matter was lodged with the Fair Work Commission (the Commission) on 19 October 2023.

[4] Section 394(2) of the Act states 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 allowed by the Commission pursuant to s.394(3). In this instance, the period of 21 days concluded on 21 September 2023. The application was not filed until 49 days from the date of dismissal, making the application 28 days out of time. It is therefore necessary that the Applicant be granted an extension of time for her application to proceed.

[5] The Applicant requests the Commission grant an extension of time for her application under s.394(3) of the Act. The Respondent initially objected to the application on the basis that it was filed out of time, however, its objection was later withdrawn.

[6] The Commission conducted a Hearing by video via MS Teams to facilitate the determination of the extension of time application. The Applicant was self-represented and participated in the hearing, giving sworn evidence. Ms Laird and Mr Ryals appeared on behalf of the Respondent and elected not to make any submissions or ask any questions in cross examination.

[7] I have determined that there are exceptional circumstances in this matter, and in the circumstances, my discretion to extend the time for the Applicant to file her unfair dismissal application should be exercised pursuant to s.394(3) the Act. I set out my reasons below.

Observations on the evidence

[8] Ms Heard provided a witness statement and gave sworn evidence in support of her application.

[9] I found Ms Heard's evidence relating to the explanation for the delay in filing the application to be given open and honestly. Ms Heard gave forthright evidence in circumstances that were particularly difficult and distressing for her. She referred on multiple occasions during her evidence to the embarrassment she felt surrounding the reasons she advanced for filing her application after the statutory time frame. At times Ms Heard was visibly distressed and teary when giving her evidence, which is not surprising given the subject matter of that evidence.

[10] The Respondent raised an objection to the extension of time in its form F3 – employer response to unfair dismissal application. However, the Respondent did not lead any evidence nor cross-examine Ms Heard in the hearing of this matter. I draw no negative inference from this, given the nature of the evidence given with respect to the reason for the delay. Consequently, Ms Heard's evidence was not challenged.

Background facts

[11] The Applicant was engaged by BHP Olympic Dam Corporation Pty Ltd as a Miner - Diesel Trucking from 6 July 2021. The Applicant resided in company housing based in Roxby Downs.

[12] The Respondent alleges that on 6 August 2023 the Applicant behaved inappropriately, in an unprofessional, offensive, insulting and malicious manner towards her supervisor when she was advised she would be moved to work in a different crew.

[13] Ms Heard was stood down from her employment from 7 August 2023, and her employment was ultimately terminated on 31 August 2023 following a show cause process.

[14] Ms Heard claims there were mitigating circumstances that influenced her behaviour at work on 6 August 2023 that are also relevant to the reason she asserts for the delay in filing her unfair dismissal application. In particular, the Applicant asserts that she was in an abusive relationship with her former partner and that relationship had affected her mental health. Ms Heard claims that on 6 August 2023 she advised her manager of her poor mental health, was fatigued on day six of a nightshift roster and had asked her supervisor for permission to leave the site on account of her mental health concerns. She asserts this request was denied. Ms Heard submitted to her employer that the language she used when speaking with her manager was out of character, having had no previous behavioural issues raised with her at work.

[15] Ms Heard gave evidence that following her dismissal on 31 August 2023, she became mentally unwell and could not function, spending a number of days in bed. She said she was embarrassed at losing her job and in a state of shock.

[16] Ms Heard was given 28 days to leave her BHP company property and she had to make arrangements following her termination to vacate the property. She ultimately left the property on 28 September 2023.

[17] Ms Heard recounted that her gym membership expired during the period she was stood down from work, and she did not renew it, in case she was terminated and would have to vacate her accommodation and leave Roxby Downs. She described being without any emotional support and unable to manage her mental health with gym exercise in the period of her stand down and following her termination.

[18] Following what Ms Heard said was approximately one week of being so unwell that she found it hard to get out of bed, in the second week following her dismissal Ms Heard helpfully attended some community courses arranged by BHP focused on improving mental health in order to recover and regain functioning. She gave evidence that she did these courses during the second week following her termination.

[19] Ms Heard also described being in the controlling relationship with a man, her now former partner, from approximately June 2023 which was continuing at the time of her dismissal. Her former partner worked for a contractor on the BHP Olympic Dam site. Ms Heard recounted his demands early in the relationship to meet him after nightshift when he kept her awake, for reasons Ms Heard said in her evidence that she now thought was to fatigue her and wear her down. Ms Heard gave evidence that her former partner's controlling and aggressive behaviours escalated from this conduct early in the relationship.

[20] Ms Heard explained that her former partner engaged in other controlling behaviours such as stealing her belongings, denying the theft and then accusing her of being crazy when she asked him about it, to the point that she questioned her sanity. He often ignored her requests to be alone and would attend her apartment uninvited and loudly bang on the door, which concerned Ms Heard that it would disturb her neighbours. On an occasion she refused to see him, she gave evidence that he had done a 'burn-out' in his car, further creating a disturbance in her neighbourhood.

[21] Ms Heard recounted further emotional abuse from her former partner that involved starting arguments with her, refusing to let her leave, calling her abusive names, and if she did leave, following her. Her evidence was that he criticised her so much that she continually tried to 'fix herself' to meet his increasing demands.

[22] Ms Heard recounted that post her dismissal her partner's conduct escalated significantly. For the first week, she says she spent a number of days in bed at her partner's house, and his behaviour improved because she was not leaving the house and was quite dependent on him.

[23] However, Ms Heard recounted that her former partner became enraged once she started attending the mental health courses offered by BHP. In that week he more frequently shouted at her, locked her in and out of the house, and at times refused to let her get out of his car. His

behaviour fluctuated from excessive and over the top expressions of emotion that Ms Heard described as ‘love-bombing’ to abusively shouting at her and restricting her movement.

[24] Ms Heard gave evidence that in this period of time, she could not think straight. She was also trying to move house and sell her personal items. Ms Heard gave evidence that she could not operate as the organised, decisive person she usually is and was unable to make decisions for herself and felt “frozen in fear.” She found herself needing to rest a lot, which she describes as a situation still affecting her. Ms Heard also gave evidence about her difficulties in managing various demands at the time with losing her employment, moving house and trying to leave her partner. She ultimately decided to relocate to Queensland where her family is located.

[25] Ms Heard gave evidence that on 16 September 2023, she drove to Adelaide to see a close friend, to seek some support and to advise her friend that she was moving to Queensland. She was in Adelaide for 5 days. She describes this week as the one in which everything “exploded”.

[26] On 20 or 21 September 2023 (21 September 2023 being the day on which the 21 day time limit expired), Ms Heard’s former partner arrived in Adelaide. She was aware he was travelling to Adelaide, and at the time she had intentions of returning with him to Roxby Downs to vacate her unit before she made her permanent move to Queensland.

[27] From the time of his arrival, Ms Heard recounted that her partner was argumentative and reluctant to see Ms Heard with her friends. He attempted to get Ms Heard to cancel a social plan she had made with friends and when she refused, he would not get out of the car to attend the event, later causing a disturbance and embarrassing her in front of her friends. Following the event, he refused to allow her to get out of his car for over three hours whilst he drove around, trying to start an argument.

[28] On 22 September 2023, Ms Heard gave evidence that her former partner attended her friend’s house where she was staying and was yelling at her from the front yard. Ms Heard went to the front yard to de-escalate the situation and recounted in her evidence how her former partner was verbally abusive to a greater extent than he had ever been before, swearing and yelling at her. She said that he is significantly larger and taller than her and he was standing over her, yelling at her to get in the car. She didn’t want to get in, but felt like she had no choice in order to get him to stop yelling at her. Ms Heard gave evidence that her former partner then kept her in the car for more than 3 hours. She was not wearing any shoes, did not have her phone and had no water. Her former partner continued to abuse her and when she failed to engage with him, he became more enraged. He eventually let her out of his car.

[29] Ms Heard gave evidence that her friend with whom she was staying called the police about the incident. Ms Heard provided a photograph of a police report and whilst it did not identify the nature of the complaint, her evidence was that it was provided to Ms Heard’s friend upon her report to police. Ms Heard confirms that she did not have any direct contact with the police herself about the incident. Ms Heard gave evidence that she made enquiries with South Australian Police about obtaining a more detailed police report, but was advised that she had to either attend in person to a police station, which she could not do once she had relocated to

Queensland, or submit a freedom of information request which would take 28 days to be processed.

[30] Following the incident on 22 September 2023, Ms Heard returned to Roxby Downs without her former partner to clear out her apartment. Ms Heard gave evidence that on her return to Roxby Downs her partner stalked her by sitting outside her apartment for lengthy periods of time. Her evidence was that she became increasingly scared of him. She told him she no longer wanted to be with him and ultimately left Roxby Downs for Queensland on 27 September 2023.

[31] Once Ms Heard returned to Queensland, she gave evidence she was still not thinking straight and that her former partner and his conduct towards her was “still in her head”. She described how the effects of what she called domestic violence, did not leave her easily. She reported continuing to feel terrified that every time she left her accommodation her former partner would be there, because he was unhappy that she had left him.

[32] After her relocation to Queensland, she reported difficulty sleeping and experiencing nightmares about her former partner, which continue to afflict her. Ms Heard gave evidence that her former partner also followed her and relocated to Queensland on 1 November 2023. He continues to try to contact her and Ms Heard stated she was still “living in fear”.

[33] Ms Heard reports that she filed her unfair dismissal on 19 October 2023 after she had first seen her family. She reports at that time she was starting to slightly improve and seeing her sister, who visited her in Brisbane, gave her the support she needed to file her claim. She was unable to see her family before then because her car was still in transit from South Australia and her family lived an hour away from where she was staying.

Consideration

[34] Section 394(3) requires that when considering whether to grant an extension of time, the Commission must take 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.

[35] 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. These considerations will now be weighed in the context of this application.

Reason for the delay

[36] The Act allows the Commission to extend the time period within which an unfair dismissal application can be made where it is satisfied that there are exceptional circumstances.¹

[37] The reason for the delay in itself is not required to be exceptional. Rather, the reason for the delay is one of the factors that must be weighed in assessing whether, overall, there are exceptional circumstances.² Exceptional circumstances may include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually are of no particular significance, when taken together can be considered exceptional.³

[38] The delay required to be considered under section 394(3)(a) is the period after the prescribed 21 day period for the lodgement of an application. This period does not include the time from the date the dismissal took effect to the end of the 21 day period. However, the circumstances from the time of the dismissal must be considered when assessing whether there is an acceptable reason for the delay, or any part of the delay, beyond the 21 day period.⁴

[39] 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 for the delay. 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, and a credible explanation for the entirety of the delay will usually weigh in an applicant's favour; however, all of the circumstances must be considered on their own merits.⁵

[40] It is also the case that a credible explanation for the whole of the delay is not required to make a finding of exceptional circumstances. That is, it is relevant to have regard to whether the Applicant has provided an explanation for the entirety or any part of the delay.⁶

[41] There were a number of reasons advanced by the Applicant as to the reason for the delay in filing her application, being poor mental health, the stress associated with relocating from a regional area interstate within a 28 day time period, and the lack of support from family and friends in Roxby Downs. But the most significant reason advanced by the Applicant as a reason for the delay in filing her unfair dismissal application was the ongoing abuse she was subjected to by her partner and the resulting effects it had on her mental health and functioning.

[42] Around the time the 21 day time limit expired, Ms Heard gave compelling and distressing evidence about the serious abuse she was experiencing, including being held captive in a car for three hours, a matter which I accept was reported to the Police. Following that date, and at least until 27 September 2023, Ms Heard was being stalked by her partner. Ms Heard appeared very scared and distressed when she described her former partner's attempts to contact her after his relocation to Queensland and her recent efforts to prevent any contact from him by blocking him on her phone.

[43] The Applicant was in a relationship characterised by family violence prior to her dismissal and immediately after her dismissal. I accept Ms Heard's evidence that the abusive behaviour of her former partner escalated after her dismissal. This behaviour had a significant

effect on her mental health and functioning and she was consequently overwhelmed with fear and focused on escaping the abuse.

[44] In *Campagnolo v My Skin Admin (Vic) Pty Ltd*⁷ (Campagnolo), the Commission found:

*“It is also well established that the impact and ramifications of domestic violence on the mental and physical health of victims is significant, incapacitating and long lasting and in these circumstance[s], could most certainly have impacted on Ms Campagnolo’s capacity to complete and lodge her application within the required period.”*⁸

[45] I accept Ms Heard’s evidence that her mental health and the effects of the trauma of the abuse continued until at least the time she filed her unfair dismissal application and in fact continued as at the time of hearing the matter. The effect on her functioning, including her sleep, ability to make decisions and even leave her house, provide a credible reason for the entirety of the delay in filing her application.

[46] The reasons for delay advanced by Ms Heard with respect to the embarrassment and shock at losing her job, stress associated with her relocation from a regional area and the absence of family support are not out of the ordinary or unusual. However, the abuse experienced by Ms Heard and the psychological effect of the associated trauma on her, for a prolonged period of time are exceptional and weigh in favour of granting the extension of time to file the application.

When the applicant first became aware of the dismissal

[47] There is no dispute that the Ms Heard became aware of her dismissal on the day it took effect being 31 August 2023.

[48] This consideration does not support a finding of exceptional circumstances.

Any action taken by the applicant to dispute the dismissal

[49] Ms Heard submitted that she disputed the decision as part of the show cause process.

[50] However, there is no evidence that Ms Heard took any steps to dispute her dismissal after the dismissal took effect. Her evidence concerned her poor mental health, focus on relocation from Roxby Downs and efforts to leave her relationship.

[51] Given Ms Heard’s circumstances, I consider this a neutral factor in determining whether there are exceptional circumstances.

Prejudice to the employer, including prejudice caused by the delay

[52] The Respondent made no argument that an extension of time would cause them any prejudice. In fact, prior to the hearing, the Respondent communicated with the Commission and sought to withdraw their jurisdictional objection on the basis that the application was filed outside the statutory time limit.

[53] I cannot identify any prejudice to the Respondent if the time limit was extended. The Respondent has not set out any prejudice, and the absence of prejudice is a relevant consideration.⁹ I have considered it in assessing whether exceptional circumstances exist. The absence of prejudice is not a significantly weighty factor, but a factor that nonetheless weighs in favour of the Applicant.¹⁰

Merits of the application

[54] The merits of the application are relevant; however, the assessment of the merits for present purposes is limited to, in effect, a preliminary consideration.¹¹ Further, the primary consideration is whether the Applicant has an arguable case.¹²

[55] In the Respondent's Form F3, it was submitted that the Applicant was terminated for serious breaches of the Respondent's Code of Conduct.

[56] The Applicant submitted that her behaviour was out of character and was as a result of the significant stress she was under at the time. The Applicant's remorse for her actions was noted by the Respondent in the Applicant's letter of termination.

[57] The Applicant has raised a number of issues which has led me to conclude that her case is at least arguable. The Applicant addressed in her witness statement mitigating factors with respect to the alleged misconduct, including asserting that she advised her supervisor of her issues at the time with poor mental health and fatigue, and if her evidence is accepted at any substantive hearing, she asked to leave the site on account of her ill-health on 6 August 2023. The Applicant asserts in her witness statement that she told her supervisor "*at least 3 times prior to raising my voice or swearing that I was having an emotional breakdown, that I was unfit to be at work and that it was unsafe to me to be operating a 110 ton vehicle in my emotional state.*" She then asserts that she was told that if she left the work site, she would be subjected to disciplinary action.

[58] Ms Heard further asserts in her witness statement that she was given 10 minutes in her show cause meeting to respond to the allegations and that the decision to terminate was made in approximately the same amount of time before being communicated to her in writing. This appears to be evidence submitted by Ms Heard that she was not afforded adequate procedural fairness during the disciplinary process.

[59] In her oral evidence, Ms Heard also asserted that she expressed her deep remorse during the show cause process and implied that her termination was harsh, weighed against the nature of the conduct, the mitigating circumstances and her level of remorse.

[60] I consider the application to be arguable and not without merit. In the circumstances, this also weighs in the Applicant's favour with respect to exercising discretion to extend the time limit in which to file the Applicant's unfair dismissal claim.

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

[61] Neither party raised any relevant matter concerning this consideration.

[62] The Full Bench in *Perry v Rio Tinto Shipping Pty Ltd*¹³ considered this criterion and said:

*“Cases of this kind will generally turn on their own facts. However, this consideration is concerned with the importance of the application of consistent principles in cases of this kind, thus ensuring fairness as between the Appellant and other persons in a similar position. This consideration may relate to matters currently before the Commission or matters previously decided by the Commission.”*¹⁴

[63] Fairness as between the person and another person in a similar position may involve a comparison of cases involving similar facts.¹⁵ In the matter of *Campagnolo*¹⁶, the Commission extended the time for filing of an unfair dismissal claim by 15 weeks and 4 days in circumstances where the Applicant had been a victim of family violence, which had particularly serious effects on the Applicant.

[64] However, as neither party raised arguments with respect to fairness, and the facts of the recent matter of *Campagnolo* are similar but slightly different, I find this consideration be neutral in my consideration.

Conclusion

[65] Considering each of the factors in s.394(3) of the Act, I am particularly persuaded that one of the reasons for the delay, being the family violence and its associated effects on Ms Heard, are exceptional and credible and in combination with the arguable merits of the Applicant’s claim and the absence of prejudice to the Respondent, it is appropriate that I exercise my discretion in favour of the Applicant to extend the time for the filing of her unfair dismissal application.

[66] An order to this effect will be issued with this decision.



COMMISSIONER

Appearances:

M Heard, Applicant on her own behalf.

B Laird and L Ryals for BHP Olympic Dam Corporation Pty Ltd.

Hearing details:

Adelaide (Video via MS Teams)
2023
17 November.

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¹ Section 394(3) of the Act.

² *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd T/A Richmond Oysters* [\[2018\] FWCFCB 901](#) at [39].

³ *Nulty v Blue Star Group Pty Ltd* [\[2011\] FWAFB 975](#) at [13].

⁴ *Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank* [\[2015\] FWCFCB 287](#) at [12]; *Ozsoy v Monstamac Industries Pty Ltd* [\[2014\] FWCFCB 2149](#) at [31]; *Diotti v Lenswood Cold Stores Co-op Society t/a Lenswood Organic* [\[2016\] FWCFCB 349](#) at [29]-[31].

⁵ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd T/A Richmond Oysters* [\[2018\] FWCFCB 901](#) at [39].

⁶ *Ibid.*

⁷ [\[2023\] FWC 2893](#).

⁸ *Ibid* at paragraph [27].

⁹ *Brisbane South Regional Authority v Taylor* (1996) 186 CLR 541 as considered in *Jervis v Coffey Engineering Group Pty Ltd* AIRCFB [PR927201](#), 3 February 2003 at [16].

¹⁰ *Clarke v Uniti Group Ltd* [\[2023\] FWCFCB 133](#) at [44].

¹¹ *Kyvelos v Champion Socks Pty Ltd*, AIRCFB Print T2421, 10 November 2000 at paragraph [14].

¹² *Craig Thomson v Linx Cargo Care Pty Ltd T/A Linx Port Services* [2022] FWCFCB 40 at [32] to [34].

¹³ [\[2016\] FWCFCB 6963](#).

¹⁴ *Ibid* at paragraph [14]. See also *Higgins v FQM Australia Nickel Pty Ltd* [2023] 750.

¹⁵ *Croker v Erndit Logistics Pty Ltd* [\[2023\] FWCFCB 224](#) at [49].

¹⁶ [\[2023\] FWC 2893](#).