



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Peter Wetzler**

v

**Australian Taxation Office**  
(U2023/12120)

DEPUTY PRESIDENT ROBERTS

SYDNEY, 23 FEBRUARY 2024

*Application for an unfair dismissal remedy- extension of time*

[1] On 6 December 2023, Mr. Peter Wetzler (Applicant) filed an application for an unfair dismissal remedy under Part 3-2 of the *Fair Work Act 2009* (Cth) (Act) with the Fair Work Commission (Commission). The Applicant's former employer and respondent to the application was the Australian Taxation Office (Respondent).

[2] The Respondent raised two objections to the application. First, it was said that the Applicant was not dismissed by the Respondent but had voluntarily resigned his employment. Further and in the alternative, the Respondent said that if the Applicant had been dismissed, the application was made outside the 21-day time limit prescribed by s.394(2) of the Act. Section 394(2) of the Act provides that an application of this kind must be made within 21 days after the dismissal took effect or within such further period as the Commission allows under s.394(3).

[3] Contrary to the Respondent's submission that the Applicant had not been dismissed, the Applicant contended that the dismissal took effect on 19 September 2023. In that event, the deadline for the filing of the application would have expired on 10 October 2023 and the application would be 57 days outside the prescribed time limit. The Applicant accepted that his application is outside the time limit by that period.

[4] Before considering the merits of the application for an unfair dismissal remedy, the Commission must be satisfied that the application was not made out of time or alternatively, extend the 21-day time limit provided for in section 394(2)(a).<sup>1</sup> The Applicant has asked the Commission to exercise its discretion to extend the time limit under s.394(3) of the Act. That course was opposed by the Respondent.

[5] Directions were made that the parties file and serve evidence and submissions going to the issue of whether an extension of time should be granted. The matter was heard on 22 and 31 January 2024. This decision deals only with the question of whether or not the time for the making of the application should be extended.

**Background and Chronology**

[6] The Applicant was a long-term employee of the Respondent having commenced his employment with them in or about July 2004.

[7] In March 2023, the Applicant was advised by Victoria Police that they were re-opening an investigation into the disappearance in 2004 of the Applicant's former de facto partner. Shortly thereafter, the Applicant engaged a law firm, Conditis Lawyers, to act on his behalf in relation to the investigation.

[8] On 6 September 2023, the Applicant was arrested and charged with the murder of his former de facto partner. Bail was granted by the NSW Local Court and the grant of bail was subsequently stayed. The Applicant remained in custody and was later released on bail on 8 September 2023.

[9] By written notice dated 6 September 2023 the Applicant was advised by the Respondent that he had been suspended without pay with immediate effect on the basis of a possible breach of the APS Code of Conduct.

[10] On or about 11 September the Applicant spoke with a representative of the Respondent, Ms. Hamilton, and authorised the Respondent to contact his wife, Ms. Allen Wetzler, and his lawyer, Mr. Conditis, and speak with them. Ms. Allen Wetzler was given a power of attorney by the Applicant to act on his behalf.

[11] On 15 September 2023, the Applicant appeared in the Victorian Magistrates Court in relation to the charge and was remanded in custody. The Applicant remained in custody until a successful bail application was made to the Victorian Supreme Court.

[12] On 18 September 2023, while the Applicant was in custody in Victoria, Ms. Allen Wetzler spoke with Ms. Hamilton from the Respondent about the Applicant's circumstances. The following day, Ms. Allen Wetzler spoke with Ms. Hamilton again and then emailed her to say that the Applicant would like to hand in his resignation.

[13] The Applicant was released from custody in Victoria on 18 October 2023 as a result of a decision of the Victorian Supreme Court on that day.

[14] On 23 October 2023 Conditis Lawyers wrote to the Respondent on behalf of the Applicant referring to the "constructive dismissal" of the Applicant and seeking his reinstatement in employment without loss of entitlements. The Respondent replied by email on 6 November 2023 rejecting the claim that the Applicant had been constructively dismissed and refusing to reinstate him.

[15] On 6 December 2023 the Applicant's unfair dismissal application was filed with the Commission.

[16] The Applicant maintains that the termination of his employment with the Respondent took effect on 19 September 2023 when Ms. Allen Wetzler spoke with Ms. Hamilton from the Respondent. The Applicant said that the cessation of employment was on the employer's initiative because there was a resignation expressed in the heat of the moment and in

circumstances where Ms. Allen Wetzler was suffering significant emotional distress and/or mental confusion. Alternatively, the Applicant says that he was forced to resign because of the conduct of the Respondent.

[17] The Respondent says that there was no dismissal on that date or at all. They say the Applicant voluntarily resigned his employment with them through his wife who had a power of attorney to act for the Applicant. Further, the Respondent says that even if the Applicant were dismissed on 19 September, which the Respondent denies, the application is 57 days out of time and there are no exceptional circumstances justifying an extension in this case. For the purposes of the extension of time application I will assume, as the Applicant contends, that the Applicant was dismissed and that the dismissal took effect on 19 September 2023.

### **Legislation**

[18] Section 394 of the Act provides that the Commission may allow a further period for an application for an unfair dismissal remedy to be made if the Commission is satisfied that there are exceptional circumstances, taking into account the following matters:

- (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.*

[19] I deal with these criteria below.

### **Reason for the delay**

[20] The Applicant said that the delay was attributable to the charging and incarceration of the Applicant and representative error by the Applicant's solicitors, or a combination of both matters.

### **Representative Error**

[21] The Applicant said that the evidence showed that he had provided authorisation to Conditis Lawyers to liaise with the Respondent in relation to his employment and that this had been conveyed to the Respondent on 11 September 2023. This was recorded in a file note of the Respondent.<sup>2</sup>

[22] The evidence from Mr. Conditis was as follows:

*On or about 8 or 11 September 2023 Mrs. Allen Wetzler informed me of the Suspension Letter. After being advised of that letter I said to Mrs Allen Wetzler that I would deal with it at a later date.*

*At that time I did not have instructions to act on behalf of Mr. Wetzler in his employment matter. Mr. Wetzler did not request that I act on his behalf in the employment matter at*

*that time. I did not specifically seek instructions from Mr. Wetzler to act in his employment matter at that point in time and my focus was on the extremely serious murder charge he was facing.*<sup>3</sup>

[23] Mr. Conditis also gave evidence that Conditis Lawyers first became aware of the conversation between Ms. Allen Wetzler and Ms. Hamilton on 19 September 2023 on or about 8 October 2023 when Ms. Allen Wetzler advised that she had tendered a resignation for the Applicant on the former date.<sup>4</sup>

[24] The Applicant remained in custody in Victoria at the time Conditis Lawyers were made aware of the events of 19 September.

[25] It was submitted that the Applicant himself became aware of the fact that his wife had tendered his resignation on 19 September, on 8 October 2023. The Applicant did not give evidence about this or any other matter. Counsel for the Applicant said that the Applicant maintained his right to silence and did not want to abrogate that right in the criminal proceedings by exposing himself to cross-examination in the Commission proceedings.

[26] Mr. Conditis also gave evidence that at some time after he became aware of the 19 September conversation, he advised Ms. Allen Wetzler that the conduct of the Respondent “may amount to a constructive dismissal”. He said he could not recall whether he gave any advice about a limitation period for an unfair dismissal application. He said he was focused on the murder charge and bail application and regarded himself as “only retained for the criminal matter.”<sup>5</sup>

[27] Mr. Conditis said that on 16 October he participated in a conference with the Applicant and went through Ms. Allen Wetzler’s affidavit and advised that the resignation could be a constructive dismissal. He said:

*“The Applicant did not request that I act on his behalf in the employment matter at that time. I did not specifically seek instructions from Mr. Wetzler to act in his employment matter at that point in time.”*<sup>6</sup>

[28] The Applicant submitted that if his lawyers did not intend to act for him in employment matters then at the point at which the Applicant’s lawyers became aware that a resignation had been tendered, or even earlier on 11 September when the Applicant had advised the Respondent that they could liaise with Conditis Lawyers, that they should have referred the Applicant to another employment lawyer or at least told him that they could not represent him in the employment matter and suggested he seek alternate advice and representation. The Applicant submitted that at least as at 8 October 2023, it was clear that a solicitor-client relationship in respect of the employment situation existed between himself and Conditis Lawyers.<sup>7</sup> The Applicant said he was entirely reliant on Conditis Lawyers and that although he had been well-represented in relation to the criminal matter, his lawyers had “dropped the ball” in relation to the employment matter.

[29] The Respondent submitted that the Applicant had become personally aware of the events of 19 September by 8 October 2023, which was within the 21-day period. They said the Applicant could have instructed his lawyers to file an application at that point but did not. They

said the Applicant's incarceration did not explain the entirety of the delay and that the Applicant had provided inadequate or no explanation at all for extensive periods of the delay. In particular, the Respondent said that the Applicant and his lawyers did nothing after the letter of 23 September was sent. They simply waited for the reply from the Respondent on 6 November. The Respondent said there was no evidence explaining why there was a delay from 6 November until 14 November when counsel was briefed to advise on the unfair dismissal matter or the further delay from then until the application was ultimately filed on 6 December. They said there was no evidence that the Applicant had asked his lawyers for advice or to file an application and that they failed to do so. They pointed to the evidence that the Applicant was advised on 16 October that the resignation could have been a constructive dismissal but that he did not give instructions to challenge the termination and nor did his lawyers seek any such instructions to act in relation to the matter.

**[30]** In considering the reason for the delay, the relevant period of the delay is from the date of the expiration of the 21-day time period until the date of the lodgement of the application. In this case that period is from 10 October 2023 until 6 December 2023.

**[31]** It was accepted that both the Applicant and his lawyers in the criminal matter were aware of the circumstances relating to the cessation of the Applicant's employment at least two days before the expiration of the time period. At that point a solicitor-client relationship existed between the Applicant and Conditis Lawyers. It is also not in dispute that at the time the Applicant became aware of those circumstances, he was incarcerated and remained incarcerated until 18 October 2023. By 23 October 2023 Conditis Lawyers clearly had instructions to act on behalf of the Applicant in relation to the termination of his employment and were actively challenging that termination based on those instructions. What is less clear is the status and role of Conditis Lawyers in the employment matter between 8 October and prior to the letter of 23 October, and whether the Applicant had given them clear instructions to pursue the matter in a way that would protect his interests.

**[32]** The Applicant asserted that the evidence supported a conclusion that by 9 October 2023 at the latest, Conditis Lawyers had been retained to act in the employment matter. They relied on the file note of the Respondent of 11 September 2023 and the affidavit of Ms. Allen Wetzler which referred to the receipt of advice about constructive dismissal from Conditis Lawyers. In my view the evidence of the authorisation given by the Applicant for the Respondent to speak to Conditis Lawyers on 11 September 2023 supports the view that the Applicant was at that point reliant on the Conditis Lawyers to advise and represent him in employment-related matters as well as representing his interests in the criminal proceedings. The fact that Mr. Conditis subsequently gave advice to both the Applicant and his wife by at least 16 October 2023 that there may have been a "constructive dismissal" reinforces the view that the firm was at least providing some general advice about the Applicant's employment situation for him to consider.

**[33]** Mr. Conditis' evidence was that his view was that he did not have formal instructions to act in the matter on 16 October 2023. There was undoubtedly a solicitor-client relationship. However, Mr. Conditis needed clear instructions to take the matter up. In my view the explicit instructions from the Applicant to do that must have come at some time after 16 October. Conditis Lawyers could not have challenged the termination in the absence of explicit instructions to do so and in that respect, I do not consider that the blameworthiness for the delay

in taking steps prior to the letter of 23 October rests entirely with them. Some of the responsibility must lie with the Applicant. However, the Applicant's circumstances were unusual. He was in custody until 18 October. He had been in custody for some weeks. His focus would have been on the bail hearing in the Victorian Supreme Court on 18 October which was to determine whether he was to be released or had to spend a significant further period in prison. In those circumstances I accept that to the extent to which the Applicant contributed to the delay in the period prior to 23 October there is a reasonable explanation for that part of the delay attributable to him.

[34] In relation to the remainder of the period of the delay I regard this as being largely attributable to representative error on the part of Conditis Lawyers. They had, by 23 October 2023, instructions to pursue the matter including, according to the letter, by commencing proceedings in the Commission. It was reasonable to expect that they would be conscious of time limitations. There was no urgency to the steps they took. There were extended periods which were unaccounted for following their correspondence of 23 October. I am conscious that the conduct of an applicant remains a central consideration in determining whether representative error provides an acceptable explanation for the delay.<sup>8</sup> However, I also note and accept the evidence of Ms. Bromfield from Conditis Lawyers to the effect that there was no delay on the Applicant's part in providing instructions or making himself available for conferences with his legal team at least in the period after 16 November 2023. I do not think that this is a case where, given the surrounding circumstances, there was a responsibility upon the Applicant to do anything more than he did after 23 October 2023. He had instructed his lawyers to pursue all avenues for his reinstatement including the commencement of proceedings. He was dependent on them to take diligent steps. The failure to do that in a timely way was the responsibility of Conditis Lawyers.

[35] In my view representative error accounts for the overwhelming period of the delay. As the Full Bench said in *Qantas Ground Services Pty Ltd t/a QGS v. Rogers*,<sup>9</sup> the lack of an acceptable explanation for a solicitor's own inaction supports rather than negates the existence of exceptional circumstances.

#### **Whether the Applicant first became aware of the dismissal after it had taken effect**

[36] The Applicant said that he only became aware on 8 October 2023 that a resignation had been tendered on his behalf in the preceding month. He became aware of this while he was in prison awaiting his bail application. The Applicant said such circumstances were extraordinary and weighed in the Applicant's favour.

[37] The Respondent said that the Applicant was aware of the cessation of his employment on and from 19 September 2023 since he authorised his wife to resign on his behalf on that date. Alternatively, the Respondent said that the evidence shows that the Applicant's wife was in regular contact with him and is reasonable to assume she would have made the resignation known to him shortly thereafter.

[38] I do not accept that the Applicant was aware of the cessation of his employment for the purposes of s.394(b) merely because his wife who had been appointed to act on his behalf pursuant to a power of attorney had tendered the resignation and was aware of it. I accept the submission of the Applicant that there is a difference between empowering a person to act on

another's behalf and the knowledge that a person has of particular events. Section 394(b) requires actual awareness on the part of the Applicant and I am unable to conclude on the evidence that the Applicant had any such awareness prior to 8 October 2023. Given that the deadline for filing an application expired on 10 October, the Applicant had limited time in which to file an application within time. This weighs in favour of a conclusion that there are exceptional circumstances justifying an extension of time.

### **Any action taken by the Applicant to dispute the dismissal**

[39] Where an applicant disputes a termination and puts an employer on notice that the decision may be contested, this can weigh in favour of granting an extension of time.<sup>10</sup> Here the Applicant did not take any steps to dispute the termination of employment prior to the expiry of the 21-day time limit. The first and only time the Respondent became aware of the dispute was on 23 October 2023 when the letter was sent from Conditis Lawyers. After the Respondent provided a response, nothing further was heard from the Applicant until the application was filed on 6 December 2023. However, the fact that the Applicant took steps to dispute the termination through a detailed letter from his solicitor, albeit after the expiration of the time period, weighs in the Applicant's favour.

### **Prejudice to the employer**

[40] The Respondent contended that it had suffered prejudice in having to allocate resources to deal with the extension of time application and that there would be further prejudice in the event that an extension was granted. The Applicant said there was no relevant prejudice and that the Respondent was a large and well-resourced organisation and there was nothing to suggest that any delay has compromised their ability to respond to the application. I am unable to identify any relevant prejudice to the Respondent that would not have been suffered had the proceedings been commenced in time. I regard prejudice as a neutral consideration here.

### **Fairness as between the Applicant and other persons in a similar position**

[41] The Applicant did not point to other persons in a similar position. I regard this as a neutral consideration.

### **Merits of the Application**

[42] I am not required to embark on a detailed consideration of the substantive case<sup>11</sup> or to resolve all contested facts going to the merits for the purpose of dealing with this application. That would be a matter for a full hearing.

[43] The Applicant contended that he was dismissed in circumstances where his wife who had a power of attorney to act for the Applicant tendered what appeared on the face of it to be a voluntary written notice of resignation. The Applicant contended that both limbs of s.386 could apply and relied on the evidence of Ms. Allen Wetzler as to what was said by the Respondent's representative at the time of the resignation. Ms. Allen Wetzler was not cross-examined on that evidence. The evidence was that the Respondent's representative made certain representations to Ms. Allen Wetzler which had the effect of inducing the Applicant's resignation through his wife, or alternatively, forced the Applicant to resign.

[44] The Applicant said that as to the merits of the termination, the only reason that the Respondent could advance for the Applicant's termination would be that by reason of what was advanced against the Applicant in the criminal proceedings, the Applicant had breached the Australian Public Service Code of Conduct. He said his history of service with the Respondent was impeccable and the criminal case against him "so weak as to be almost baseless." In that case it was put that the asserted dismissal was likely to be successfully challenged by the Applicant.

[45] The Respondent said there was a voluntary resignation given by the Applicant's wife whom it was accepted had the authority under a power of attorney to tender that resignation. They said that the resignation was plainly not made in the "heat of the moment" and that the conduct of parties after the resignation, in particular email exchanges between Ms Allen Wetzler and Ms. Hamilton, was consistent with a voluntary and considered position. The Respondent said that there were numerous opportunities for Ms Allen Wetzler to retract the resignation but this did not happen. The Respondent said that the Commission should conclude that the Applicant's case that there had been a dismissal within the meaning of s.386, lacked merit.

[46] The case for the Applicant on the question of whether there was a dismissal at all is certainly not without its difficulties. The determination of that question will often turn on findings of fact that can only be made after a full hearing. For the purposes of this matter, I have available to me the evidence of Ms. Allen Wetzler as to the conversation that occurred between her and Ms. Hamilton on 19 September 2023. Ms. Hamilton did not give her version of the conversation but contemporaneous file notes of it were in evidence. Taking the most generous view of the Applicant's evidence I am of the view that the Applicant's case on the question of dismissal is, at best, arguable.

[47] As to the merits of the unfair dismissal application more broadly having regard to the matters referred to in s.387 of the Act, given that the outcome may, in large measure, turn on whether there was a valid reason related to the Applicant's conduct, which might in turn depend on the ultimate outcome of the criminal proceeding, it is neither possible nor desirable to express even a preliminary view on that matter based on the material before me.

[48] In my view the merits of the application are, at the very highest for the Applicant, arguable. This factor weighs slightly in favour of a conclusion that there are exceptional circumstances warranting an extension of time.

***Is the Commission satisfied that there are exceptional circumstances, taking into account the matters above?***

[49] Exceptional circumstances are circumstances that are out of the ordinary course, unusual, special or uncommon but the circumstances themselves do not need to be unique nor unprecedented, nor even very rare.<sup>12</sup> Exceptional circumstances may 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 can be considered exceptional.<sup>13</sup>



[50] Having regard to all of the circumstances of this case and the matters in s.394(3), and my conclusions in relation to those matters set out above, I am satisfied that there are exceptional circumstances to warrant an extension of time.

### *Conclusion*

[51] The Applicant's application for an extension of time pursuant to s.394(2)(b) is granted. An order giving effect to these reasons will be issued separately.



DEPUTY PRESIDENT

### *Appearances:*

Mr A. Wilson, Counsel for the Applicant.  
Ms R. Marando, Solicitor for the Respondent.

### *Hearing details:*

By Video using Microsoft Teams on 12:00pm AEDT on Monday, 22 January 2024 and 9:00am AEDT on Wednesday, 31 January 2024.

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<sup>1</sup> Section 396(a).

<sup>2</sup> Exhibit R1 Annexure RM 1.

<sup>3</sup> Exhibit A1 paragraphs 11 and 12.

<sup>4</sup> Ibid paragraph 16.

<sup>5</sup> Ibid paragraph 18.

<sup>6</sup> Ibid paragraph 19.

<sup>7</sup> Transcript PN 317.

<sup>8</sup> *Davidson v Aboriginal & Islander Child Care Agency* [2001] 105 IR 1.

<sup>9</sup> [\[2019\] FWCFB 2759](#) at [16].

<sup>10</sup> *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298.

<sup>11</sup> *Kyvelos v Champion Socks Pty Ltd* Print T2421.

<sup>12</sup> *Nulty v Blue Star Group Pty Ltd* [\[2011\] FWAFB 975](#), [13].

<sup>13</sup> *Nulty v Blue Star Group Pty Ltd* [\[2011\] FWAFB 975](#), [13]. See also *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmond Oysters* [\[2018\] FWCFB 901](#).