DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Lina Cao
v
IMile Delivery & Logistic Pty Ltd
(U2025/4514)

COMMISSIONER MCKINNON SYDNEY, 20 JUNE 2025

Application for an unfair dismissal remedy – application out of time

[1] This decision is about whether Ms Lina (Amelia) Cao was dismissed by iMile Delivery & Logistics Pty Ltd (iMile Australia) and if so, when the dismissal took effect. The answer affects whether the application was filed in time. The decision also deals with whether additional time should be allowed for the application to be made.

[2] Ms Cao was originally employed in China by Hangzhou Aima Technology Co., Ltd. (iMile Hangzhou) on a 3-year fixed term contract from 13 January 2023 to 12 January 2026. Two months later, she was transferred to Dubai and worked for iMile Delivery Services LLC (iMile Dubai) from 15 March 2023 to 16 October 2023. On 17 October 2023, Ms Cao commenced work in Australia as a Supply and Distribution Manager for iMile Australia. iMile Australia is controlled by iMile Dubai (which holds 100% of its shares). iMile Dubai is described by the business as the owner and operator of the iMile Group.

[3] On 11 April 2025, Ms Cao applied for an unfair dismissal remedy in relation to her employment with iMile Australia. Applications of this type must be made within 21 days after the dismissal took effect, or if there are exceptional circumstances, such further period as the Commission allows.[1]

[4] I find that Ms Cao was dismissed by way of demotion in November 2024 and finally dismissed by iMile Australia on 31 January 2025. In the most favourable scenario for Ms Cao, the application is 49 days late. I have decided to allow additional time for the application to be made. These are my reasons.

Was Ms Cao dismissed?

[5] A remedy for unfair dismissal is only available if the Commission is satisfied that an employee has been dismissed.

[6] Section 386 of the *Fair Work Act 2009 (Cth)* (the Act) sets out the circumstances in which a person is taken to have been "dismissed" for the purposes of section 394. It provides as follows:

> "**Meaning of dismissed**
>
> (1) A person has been dismissed if:
>
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.
>
> (2) However, a person has not been *dismissed* if:
>
> (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
> (b) the person was an employee:
> (i) to whom a training arrangement applied; and
> (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;
> and the employment has terminated at the end of the training arrangement; or
> (c) the person was demoted in employment but:
> (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
> (ii) he or she remains employed with the employer that effected the demotion.
>
> (3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part."

[7] Ms Cao relies on s.386(1)(b) above. She says that she accepted iMile Australia's repudiation of contract on 9 April 2025 after it failed to reimburse her expenses by the April pay run. iMile Australia denies that it dismissed Ms Cao. It does not dispute that Ms Cao was dismissed. It says that in December 2024, Ms Cao agreed to a transfer of her employment from iMile Australia to iMile Hangzhou and this brought her employment with iMile Australia to an end. It is not in dispute that Ms Cao was issued with a letter of termination of her original fixed-term employment contract on 4 March 2025 by iMile Hangzhou.

[8] In *Bupa Aged Care Australia Pty Ltd v Tavassoli,*[2] a Full Bench of the Commission summarised the approach to dealing with alleged 'forced' resignations under section 386(1)(b) of the Act as follows:

> "(2) A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element."[3]

[9] A separate Full Bench in *Ayub v NSW Trains,*[4] discussed when a termination of employment at the employer's initiative can be said to have taken effect for the purpose of s.394(1)(a) in the following way:

> "[17] At common law, a contract of employment may unilaterally be terminated by the employer with notice or by way of a summary dismissal. The general principle is that to effect the termination of a contract of employment, an employer must, subject to any express provision in the contract, communicate to the employee by plain or unambiguous words or conduct that the contract is terminated. Where the communication is in writing, the communication must at least have been received by the employee in order for the termination to be effective."

[10] There is no written termination of the employment contract between Ms Cao and iMile Australia. The only written advice of termination provided to Ms Cao is dated 4 March 2025 and is from iMile Hangzhou. It refers to the termination of her 3-year fixed term contract with immediate effect. Despite the absence of any written notice of termination of the Australian employment contract, I agree with the parties that their employment relationship has come to an end.

[11] I also agree that Ms Cao was not dismissed by iMile Australia on 4 March 2025. I accept Ms Cao's evidence that she did not agree to transfer her employment from iMile Australia to iMile Hangzhou in December 2024. An employee cannot be transferred from one employer to another without their express or implied consent.[5] There is no documentary evidence of an agreement to transfer from one employer to another. Ms Cao's evidence is that on 26 November 2024, she was told to return to China to assist the iMile Group with an audit issue and to undertake a procurement role on a temporary basis. She asked for, and was granted, leave from her employment with iMile Australia. She resumed work in China on 30 December 2024. On 17 February 2025, she was detained by local police in response to allegations of criminal activity in Australia made by the iMile Group against her. The police issued her with a 12-month overseas travel ban which prevented her from returning to Australia.

[12] To the extent that this evidence conflicts with the evidence of witnesses for iMile Australia, I prefer it. For the most part, the witnesses for iMile Australia did not have direct knowledge of the facts relating to Ms Cao's contractual arrangements with the iMile group of companies, or their evidence did not withstand scrutiny. They asserted, but could not describe, any factual scenario that could be characterised as an agreement for Ms Cao to transfer her employment from iMile Australia to iMile Hangzhou (whether express or implied). On the evidence, Ms Cao was directed to return to China on 26 November 2024. She was not given a choice. She followed the direction. I do not consider that by this action she agreed to transfer

her employment from one entity to another. There is no evidence that the issue was ever discussed with her directly.

[13] The WeChat message exchange between Ms Cao and Ms Remi Chen (Human Resources Administrator) is not evidence of an agreement to transfer employment between entities. It shows that on 27 December 2024 (one month after she had been directed to return to China), Ms Cao remained employed on a basic salary, supplemented by an overseas subsidy (which applied because she was posted to work in Australia). A separate message said the overseas subsidy would be cancelled "if being stationed in Shenzhen later", and that "if being stationed overseas in the future, it will pay it again". These messages tend to support, rather than contradict, Ms Cao's evidence that her return to China was put to her on the basis that it was temporary. Ms Chen also gave evidence that Ms Cao ceased being paid by iMile Australia, at least initially, because the Australia entity's accounts had been frozen in connection with the audit. That is, payment by iMile Australia did not cease because Ms Cao had ceased to be employed by it, or because there was a transfer of employment, but because an investigation was being carried out into its affairs.

[14] On 4 March 2025, Ms Cao was dismissed by iMile Hangzhou. The letter of termination advised of the termination of her contract of employment with iMile Hangzhou. This contract pre-dated her employment with iMile Australia, and the evidence is to the effect that the contract continued to operate alongside her separate contracts of employment for work with iMile Dubai and iMile Australia. That is, it provided the primary basis for her employment by the iMile group of companies while the overseas contracts were supplementary; specific to work in those places and likely necessary for the grant of temporary visa work rights. iMile Hangzhou continued to pay Ms Cao a portion of her salary in Chinese Yuan. That is not to say the contract in Australia was a sham. It was entered into for legitimate purposes, operated of its own force and applied to the relationship of employment between Ms Cao and iMile Australia. But the argument that Ms Cao's employment was transferred in December 2024 from iMile Australia to iMile Hangzhou is a fiction. There was no need for any transfer of employment because in December 2024, Ms Cao was already employed by iMile Hangzhou.

[15] That leaves the question of how the employment relationship with iMile Australia came to an end. I do not agree with Ms Cao that she was dismissed on 9 April 2025 when she purported to accept its repudiation of her contract. In my view, there are two events of relevance to the Act's unfair dismissal scheme. The first is a unilateral demotion of Ms Cao from NSW Regional Operations Manager to warehouse operator in November 2024. Although Ms Cao did not challenge this event as a 'dismissal' for the purposes of s.386(2)(b) of the Act, it appears capable of meeting that description.

[16] The second event, and the one which brought the employment relationship to an end, occurred on 31 January 2025 when iMile Australia unilaterally paid out her accrued leave entitlements. This conduct, plain and unambiguous, signalled to Ms Cao that the relationship with iMile Australia had now been severed. The date coincided with the cessation of payment of salary to Ms Cao by iMile Australia (although it is said by iMile Australia that its payment of Ms Cao's salary for the month of January was a mistake). From February 2025, Ms Cao was paid only by iMile Hangzhou and did not expect to receive any further payment of salary from iMile Australia. She was waiting only for reimbursement of business expenses incurred before her return to China.

[17] The result of this finding is that the application was not made within 21 days of the dismissal taking effect. Instead, on the most favourable scenario for Ms Cao, it was made 7 weeks, or 49 days, late.

Should additional time be allowed for Ms Cao to apply for an unfair dismissal remedy?

[18] Section 394(2) of the Act empowers the Commission to allow an extension of time to apply for an unfair dismissal remedy that has not been made within the statutory 21-day filing period. The power is discretionary and can only be exercised if I am satisfied there are exceptional circumstances, taking into account:

a) the reason for the delay
b) whether the person first became aware of the dismissal after it had taken effect
c) any action taken by the person to dispute the dismissal
d) prejudice to the employer (including prejudice caused by the delay)
e) the merits of the application; and
f) fairness as between the person and other persons in a similar position.

[19] The meaning of "exceptional circumstances" was considered and summarised in *Nulty v Blue Star Group:*[6]

> "[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."[7]

[20] *Reason for delay:* The requirement to return to China in November 2024 happened quickly and meant that Ms Cao did not have time to settle her dormitory lease or pack her personal belongings. After leaving Australia on 27 November 2024, Ms Cao took approved leave and then commenced work in iMile Group's Shenzen office on 30 December 2024. These matters are relevant to the initial period of delay in filing if the dismissal is taken to have occurred in November 2024. In the circumstances, I would find exceptional circumstances in the hurried relocation to China, and none in connection with the period of approved leave (although for at least part of that period, it appears that the reason for leave was sick leave). On balance, these matters weigh in favour of additional time after the dismissal in November 2024 but are not relevant to any delay after the dismissal on 31 January 2025.

[21] A further reason for the delay is that Ms Cao was waiting for reimbursement of expenses to the value of approximately $35,000 (AUD) that she had incurred while employed by iMile Australia. She was hoping for payment to be made in the pay run following her dismissal by iMile Hangzhou, which was due to occur on 2 April 2025. When no payment was received, Ms Cao notified iMile Australia of her intention to terminate the employment contract for breach. She acted on this intention on 9 April 2025 and filed the application two days later. Waiting for payment of entitlements would not usually indicate exceptional circumstances, even if the amount sought was a significant sum in the context of Ms Cao's salary, including as adjusted on her return to China, and her lack of any income after 4 March 2025. On balance, the delay attributable to waiting for payment of expenses does not weigh in favour of additional time.

[22] Ms Cao submits that she experienced significant distress and depression after being deceived into returning to China, being reported to local police for what she says are fabricated criminal allegations relating to her employment in Australia and being detained by local police on 17 February 2025 for approximately 30 hours in relation to those charges. She did not return to work after this time. Ms Cao was subsequently interrogated at least four more times by Chinese authorities about the allegations. She experienced high levels of anxiety and a sense of powerlessness in response to the criminal process and related one-year overseas travel ban. For an employee in Australia, these are very much exceptional circumstances. They weigh in favour of additional time being allowed.

[23] Finally, Ms Cao submits that a lack of legal representation by Australian lawyers, due to an inactive phone number and her residency in China, hindered the timely filing of her application. This is not an exceptional circumstance and does not weigh in favour of additional time.

[24] *Whether the person first became aware of the dismissal after it had taken effect:* Although the evidence is unclear on the point, it appears that Ms Cao knew both of her demotion in November 2024, and the payment of her final pay on or about 31 January 2025, straight away. It is clear from the evidence that Ms Cao did not appreciate the legal significance of either of these events on her employment relationship with iMile Australia at the relevant time. Adding to the uncertainty, iMile Australia did not issue any notice of termination of employment to Ms Cao. Because ignorance of the law is not an exceptional circumstance and Ms Cao appears to have been aware of the events as they happened, this is a neutral consideration.

[25] *Any action taken by the person to dispute the dismissal*: Ms Cao did not take any action to dispute the dismissal in either November 2024 or in the three weeks after 31 January 2025. From the third of those weeks, she was facing serious criminal allegations and was dealing with that matter as a priority. On 2 April 2025, Ms Cao wrote to iMile Australia about payment of her salary for the month of March and expressed the view that her contract of employment had not been terminated. She asked for a response by 9 April 2025. On 9 April 2025, Ms Cao applied to a labour arbitration commission in Hangzhou for resolution of a dispute about her dismissal by iMile Hangzhou on 4 March 2025. Two days later, on 11 April 2025, Ms Cao filed this application. There is also a submission that Ms Cao initiated civil proceedings against the founder of the iMile group of companies seeking repayment of funds invested in shares in the iMile Group, but no further information about the nature of the claim or its progress.

[26] The lack of action prior to 2 April 2025 is partly explained by the reasons above and in particular, the experience of being detained by the police, dealing with the serious criminal allegations made against her including petitioning Chinese authorities to lift the overseas travel ban, and the related mental distress this caused. Although no medical evidence is submitted in connection with the submission about Ms Cao's mental health, I accept it without reservation. Any reasonable person faced with the same or similar circumstances would likely experience symptoms of the kind described. At hearing, it was apparent that Ms Cao remains troubled by these events. In the circumstances, the lack of action to dispute the dismissal does not weigh against additional time.

[27] *Prejudice to the employer (including prejudice caused by the delay)*: There is no evidence of prejudice to iMile Australia if additional time is allowed for the application to be made. This is a neutral consideration.

[28] *Merits of the application:* It is not possible to assess the merits of the application on the materials before me. Although it is agreed that serious allegations have been made against Ms Cao in connection with her employment in Australia, there is insufficient information about the content of those allegations, which are hotly disputed, and I do not know whether there is any substance to them. There appear to be questions of procedural fairness and good faith dealings that could affect whether the dismissal was harsh, unjust or unreasonable. The best that can be said is that Ms Cao has an arguable case. The merits are a neutral consideration in the circumstances.

[29] *Fairness as between the person and other persons in a similar position:* Another employee of the iMile Group who worked with Ms Cao in Australia, Mr Thomas Cai, appears to have been dismissed in similar circumstances to Ms Cao. He has also applied for an unfair dismissal remedy and that matter is set down before a separate member of the Commission for jurisdictional hearing later this month. In the circumstances, it is a neutral consideration.

Conclusion

[30] I am satisfied that there are exceptional circumstances in this case for the reasons described above. On balance, I consider it appropriate to allow additional time for the application to be made.

Order

[31] The date for filing of the application is extended to 11 April 2025.

[32] Directions will now be listed for the further programming of the matter.

COMMISSIONER

Appearances:

Ms L Cao on her own behalf.
Ms G Chard of Hamilton Locke on behalf of iMile Australia.

Hearing details:
2025.
Sydney via Microsoft Teams:
June 11.
June 19.

Printed by authority of the Commonwealth Government Printer
<PR788422>

---

[1] *Fair Work Act 2009* (Cth), s 394(2).

[2] [2017] FWCFB 3941

[3] Ibid, [47]

[4] [2016] FWCFB 5500

[5] *Roberg v FGP Company Pty Ltd & Steelworks Australia Pty Ltd* [2013] FWC 4947 (20 August 2013); *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803 (19 July 2011); *McCluskey v Karagiozis* [2002] FCA 1137 (12 September 2002); *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014

[6] [2011] 203 IR 1.

[7] Ibid [13].