



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

David Cooke

v

Insurance Australia Group Limited
(U2025/9275)

COMMISSIONER MCKINNON

SYDNEY, 8 AUGUST 2025

Application for an unfair dismissal remedy – application filed out of time – whether additional time can be allowed

[1] Mr David Cooke was employed as a Regional Sales Representative by Insurance Australia Group Limited (IAG) from 27 July 2015 until 8 May 2025. On 30 May 2025, Mr Cooke applied to the Commission for an unfair dismissal remedy from IAG. Under s.394 of the *Fair Work Act 2009* (the Act), an application for an unfair dismissal remedy must usually be made within 21 days after the dismissal took effect. Mr Cooke’s application was filed 2 minutes after midnight, with the result that the application is 1 day late.

[2] The question is whether to allow additional time for Mr Cooke to make the application to the Commission. For the reasons that follow, no additional time can be allowed.

Extension of time

[3] If an application for unfair dismissal remedy is not made within 21 days after the dismissal took effect, additional time may be allowed for the filing of the application under s.394(2) of the Act but only if the Commission is satisfied that there are exceptional circumstances and that an extension of time is appropriate.

[4] The meaning of “exceptional circumstances” was considered and summarised in *Nulty v Blue Star Group*¹:

“[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.”

[5] In reaching the state of satisfaction as to whether there are exceptional circumstances for the purpose of extending the time to apply for an unfair dismissal remedy, it is necessary to consider each of the matters listed in s.394(3) of the Act. These are:

- 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.

Consideration

[6] *Reason for delay:* Mr Cooke was told that he had to lodge a complaint within the required time and that the Commission would assist. He thought he did get the application in on time, but the ticking of the clock was against him. On the materials, Mr Cooke started his application with less than 2 hours to go on the last day of the filing period. He completed the application at 12.02am the following day. In the absence of any other evidence or explanation for the timing of these events, I find the circumstances both avoidable and unexceptional. The other reasons given for delay are about events preceding the date of dismissal and not relevant.

[7] *Whether the person first became aware of the dismissal after it had taken effect:* Mr Cooke knew on 3 April 2025 that his employment would end 5 weeks later. This was the day Mr Cooke agreed to his resignation as part of a Deed of Release settling all claims in relation to his employment (with limited exceptions). This is not an exceptional circumstance.

[8] *Any action taken by the person to dispute the dismissal:* Mr Cooke did not take any formal steps to dispute the dismissal until he filed this application. He tried to access legal advice through the Commission’s Workplace Advice Service but it did not have the capacity to see him. He also tried other services who either did not have capacity to assist or did not have relevant unfair dismissal experience. He has not seen a lawyer due to the cost involved. These are not exceptional circumstances.

[9] *Prejudice to the employer (including prejudice caused by the delay):* Prejudice to an employer includes, but is not limited to, prejudice caused by the delay in filing. There is no prejudice to IAG from the delay of less than 1 day. Some potential for prejudice arises if the application is allowed to proceed because of the existence of the Deed of Release which, on its terms, operates as a bar to the proceeding. An extension of time would put both parties to the further time and cost of a legal claim that has already been settled. Again, these circumstances are not exceptional.

[10] *Merits of the application:* As noted above, Mr Cooke and IAG entered into a Deed of Release on 3 April 2025. The Deed released IAG from all claims by Mr Cooke in relation to his employment (with limited exceptions). The settlement agreement provided for Mr Cooke to be paid an ex-gratia amount over and above his employment entitlements and for the cessation of his employment to be treated as a resignation.

[11] Both the existence of the Deed, and the related resignation, indicate that the merits of the case are not strong. To proceed with the application, Mr Cooke would need first to seek to have the Deed set aside in the courts. If successful, he would face a further jurisdictional hurdle about whether, in the circumstances, Mr Cooke was dismissed. Only a person who has been dismissed is entitled to apply for a remedy for unfair dismissal. The substantive claim of unfair dismissal involves questions of performance in the context of health issues faced by Mr Cooke in recent years after a long and largely successful period of service. Those matters could only be properly assessed on a hearing of the case. On balance, the merits weigh against a finding of exceptional circumstances.

[12] *Fairness as between the person and other persons in a similar position* does not appear to be relevant in the circumstances of the case. An IAG submission about the entitlement to certainty for employers appears misplaced because on my reading of s.394(3) of the Act, the question of fairness is about the person applying to the Commission for an unfair dismissal remedy (in this case, Mr Cooke).

Conclusion

[13] For the reasons above, I am not satisfied that there are exceptional circumstances in connection with the late filing of the application such that additional time to apply for unfair dismissal remedy might be allowed to Mr Cooke. The application was not made in accordance with the Act.

Order

[14] The application is dismissed.



COMMISSIONER

Hearing details:

2025.

Sydney (via Microsoft Teams):

July 31.

No appearance for the Applicant.

B Shelton of Lander & Rogers for the Respondent.

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¹ [2011] 203 IR 1 at [13].