



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Liam Morgan**

v

**Kelly Partners Group Holdings Limited**

(U2025/14067)

COMMISSIONER CRAWFORD

SYDNEY, 8 OCTOBER 2025

*Unfair dismissal application – application filed one day out of time – representative error – exceptional circumstances – extension of time granted*

## Background

[1] Liam Morgan commenced employment with Kelly Partners Group Holdings Limited (**Kelly Partners**) as a Talent Resourcer on 8 October 2024. Kelly Partners is an accounting business. Mr Morgan was dismissed on the ground of redundancy on 30 July 2025. Mr Morgan filed an unfair dismissal application on 21 August 2025. The application was filed one day after the 21-day filing period ended on 20 August 2025. That means Mr Morgan needs an extension of time from the Commission to be able to proceed with his application.

[2] A hearing was conducted via video on 1 October 2025. Mr Morgan relied on a witness statement from his representative, Irving Warren, in support of his request for an extension of time. Mr Warren was cross-examined during the hearing on 1 October 2025. Mr Morgan also relied on his termination letter and a job advertisement placed by Kelly Partners after his dismissal for a Talent Acquisition Coordinator position. Kelly Partners relied on a solicitor affidavit from Brittan Morgan who is employed by Walter Baden. Ms Morgan was not required for cross-examination.

## Statutory provisions – extension of time

[3] Under s. 394(3) of the FW Act, the Commission may allow a further period for an unfair dismissal application to be made if the Commission is satisfied that there are exceptional circumstances, taking into account:

- (a) the reason for the delay; and
- (b) whether Mr Morgan first became aware of the dismissal after it had taken effect; and
- (c) any action taken by Mr Morgan 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 Mr Morgan and other persons in a similar position.

[4] Each of the above matters must be considered in assessing whether there are exceptional circumstances.<sup>1</sup>

### **Consideration – extension of time**

#### ***Reason for the delay***

[5] For the application to have been made within 21 days after the dismissal took effect, it needed to have been made by midnight on 20 August 2025. The delay is the period commencing immediately after that time until 21 August 2025, although circumstances arising prior to that period may be relevant to the reason for the delay.<sup>2</sup>

[6] The reason for the delay is not in itself required to be an exceptional circumstance. It is one of the factors that must be weighed in assessing whether, overall, there are exceptional circumstances.<sup>3</sup>

[7] Mr Morgan does not need to provide a reason for the entire period of the delay. Depending on all the circumstances, an extension of time may be granted where Mr Morgan has not provided any reason for any part of the delay.<sup>4</sup>

[8] Mr Morgan's explanation for the delay is representative error. Mr Warren has provided uncontested evidence that Mr Morgan contacted him by telephone on 13 August 2025. The outcome of that conversation, or potentially a further conversation on 13 August 2025 or on 14 August 2025,<sup>5</sup> included that Mr Warren would lodge an unfair dismissal application on behalf of Mr Morgan. Mr Warren did not finish preparing the application until 20 August 2025. Mr Morgan reviewed the application on 20 August 2025 and instructed Mr Warren to file the application. Mr Warren says he experienced internet outages and water leakage issues which prevented him from filing the application until 21 August 2025. Mr Warren gave evidence that he initially attempted to file the application using the Commission's online lodgment system on 20 August 2025 and did not become aware that this had been unsuccessful until 21 August 2025.

[9] It is well established that representative error, in circumstances where the applicant was blameless, weighs strongly in favour of a finding of exceptional circumstances. However, the other factors in s.394(3) of the FW Act must still be considered as part of the overall assessment.<sup>6</sup>

[10] I consider this is a reasonably clear case of representative error where Mr Morgan was essentially blameless for the delay. Mr Morgan contacted Mr Warren on 13 August 2025 which was well before the end of the 21-day filing period on 20 August 2025. Mr Morgan then waited until 20 August 2025 for Mr Warren to prepare the application and approved the filing of the draft application on that same day. Mr Warren then failed to file the application until 21 August 2025. I consider the delay from 20 August 2025 to 21 August 2025 is attributable to the actions of Mr Warren.

[11] I accept Mr Powles' submission that there is a lack of evidence to substantiate that Mr Morgan was not aware he may have an unfair dismissal case until Mr Warren and Mr Morgan

spoke on 13 August 2025. However, the “delay” is the period commencing from when the 21-day period ended on 20 August 2025 to when the application was filed on 21 August 2025. Circumstances arising prior to that period may be relevant, but the focus is on the reasons for the “delay.” I consider the fact that the application was filed on 21 August 2025 rather than within time on 20 August 2025 was due to representative error from Mr Warren.

[12] I also consider contacting a representative a week prior to the expiry of the 21-day filing period should generally leave ample time for the filing of an unfair dismissal application. Although it is obviously prudent and sensible to act more urgently given the strict statutory filing period.

[13] I find Mr Morgan has a satisfactory explanation for the delay. This factor weighs strongly in favour of finding that there are exceptional circumstances.

***Did Mr Morgan first become aware of the dismissal after it had taken effect?***

[14] Mr Morgan became aware of the dismissal on 30 July 2025, which was the date the dismissal took effect.

[15] I find this is a neutral factor.

***What action was taken by Mr Morgan to dispute the dismissal?***

[16] Mr Morgan contacted Mr Warren in relation to his redundancy after he noticed an advertisement for a Talent Acquisition Coordinator was posted by Kelly Partners around the time of his dismissal. Mr Morgan instructed Mr Warren to file an unfair dismissal application on 13 or 14 August 2025. This was action taken to dispute the dismissal. However, this conduct has already been taken into account in relation to the reason for the delay.

[17] I find the actions Mr Morgan took prior to speaking with Mr Warren on 13 August 2025 were actions to dispute Mr Morgan’s termination payment entitlements, rather than actions taken to dispute the dismissal.

[18] I find this is a neutral factor.

***What is the prejudice to the employer (including prejudice caused by the delay)?***

[19] The delay was a period of one day. I am not satisfied Kelly Partners will suffer any significant prejudice from the delay.

[20] I consider this is a neutral factor.

***What are the merits of the application?***

[21] It is well established that “it will not be appropriate for the Tribunal to resolve contested issues of fact going to the ultimate merits for the purposes of taking account of the matter in s.366(2)(d)”, or in this case, s.394(3)(e).<sup>7</sup>

[22] Detailed evidence about the operations of Kelly Partners will be required to assess whether Mr Morgan’s dismissal was a case of genuine redundancy. An assessment of award coverage may also be required to determine if consultation obligations applied to Kelly Partners. I do not have sufficient evidence to make even a preliminary assessment about these matters.

[23] I find the merits to be a neutral factor.

***Fairness as between Mr Morgan and other persons in a similar position***

[24] As a Full Bench has noted, “this consideration is concerned with the importance of the application of consistent principles in cases of this kind, thus ensuring fairness as between the [applicant] and other persons in a similar position. This consideration may relate to matters currently before the Commission or others previously decided by the Commission.”<sup>8</sup> In particular, the history of this provision indicates that it refers to “other employees of the employer agitating the same or similar substantive issues”.<sup>9</sup>

[25] Neither party advanced a submission in relation to this factor.

[26] I find fairness between Mr Morgan and other people in a similar position to be a neutral factor.

**Conclusion – exceptional circumstances**

[27] I must now consider whether I am satisfied that there are exceptional circumstances, taking into account my findings above.

[28] Briefly, 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>10</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>11</sup> The test of “exceptional circumstances” establishes a “high hurdle” for an applicant for an extension.<sup>12</sup>

[29] Having regard to all the matters identified in s.394(3) of the FW Act, I am satisfied that there are exceptional circumstances. Mr Morgan has a satisfactory explanation for the very brief delay in the filing of his unfair dismissal application because the delay was caused by representative error. I have not found that any of the other statutory factors weigh against the finding of exceptional circumstances.

**Conclusion**

[30] Being satisfied that there are exceptional circumstances, the Commission may consider whether to allow a further period for the application to be made.

[31] Having regard to those exceptional circumstances and the requirement for the Commission to exercise its powers in a manner that is fair and just,<sup>13</sup> I am satisfied that it is appropriate to extend the period for the application to be made to 21 August 2025.

[32] The application will proceed to be dealt with in accordance with the Commission's normal processes.



## COMMISSIONER

### *Appearances*

*Mr I Warren* from The People Management Company #1 representing Mr Morgan.  
*Mr B Powles* from Walter Baden for Kelly Partners.

### *Hearing:*

*1 October 2025.*

*Via video.*

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<PR792454>

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<sup>1</sup> *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFCB 901, [39].

<sup>2</sup> *Shaw v Australia and New Zealand Banking Group Ltd* [2015] FWCFCB 287, [12] (Watson VP and Smith DP).

<sup>3</sup> *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFCB 901, [39].

<sup>4</sup> *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFCB 901, [40].

<sup>5</sup> Mr Warren's evidence in cross-examination was that he received final instructions to proceed with preparing an unfair dismissal application on either 13 or 14 August 2025.

<sup>6</sup> *Robinson v Interstate Transport Pty Ltd* (2011) 211 IR 347; [2011] FWAFB 2728 at [24].

<sup>7</sup> *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [36].

<sup>8</sup> *Perry v Rio Tinto Shipping Pty Ltd* [2016] FWCFCB 6963, [41].

<sup>9</sup> See *Elrifai v Demons Formwork & Construction Pty Ltd* [2011] FWA 5090, [19].

<sup>10</sup> *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [13].

<sup>11</sup> *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [13].

<sup>12</sup> *Lombardo v Commonwealth of Australia represented by the Department of Education, Employment and Workplace Relations* [2014] FWCFCB 2288 at [21].

<sup>13</sup> *Fair Work Act 2009* (Cth) s 577.