



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Adnan Ali

v

Lindsay Australia Pty Limited
(U2025/17662)

DEPUTY PRESIDENT WRIGHT

SYDNEY, 17 DECEMBER 2025

Application for an unfair dismissal remedy

Introduction and outcome

[1] On 6 November 2025, Mr Adnan Ali made an application to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for an order granting a remedy, alleging that he had been unfairly dismissed from his employment with Lindsay Australia Pty Limited (Lindsay).

[2] Section 394(2) of the FW Act requires that the application be made within 21 days after the dismissal took effect, or within such further period as the Commission allows.

[3] In his application, Mr Ali stated that the dismissal took effect on 14 October 2025. Therefore, the application has been made outside of the 21-day period prescribed by s.394(2) of the FW Act.

[4] Before considering the merits of the application or other jurisdictional objections, the Commission must consider whether exceptional circumstances warrant granting an extension of time to file the application. To determine whether there are exceptional circumstances, the factors in subsections 394(3)(a)-(f) of the FW Act are considered.

[5] In summary, I have found that the application should have been made on 4 November 2025 to comply with s.394(2)(a) of the FW Act. The application was therefore made two days outside of the 21-day limit.

[6] I have found that the circumstances in which the application was made are exceptional, according to the factors in s.394(3) of the FW Act, and so I have granted an extension of time to file the application.

Should the Commission allow a further period for the application to be made?

[7] 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 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.

[8] Each of the above matters must be considered in assessing whether there are exceptional circumstances.¹

[9] I set out my consideration of each matter below.

Reason for the delay

[10] There is no dispute between the parties that Mr Ali's dismissal took effect on 14 October 2025. For the application to have been made within 21 days after the dismissal took effect, it should have been made by midnight on 4 November 2025. The delay is the period commencing immediately after that time until 6 November 2025, although circumstances arising prior to that delay may be relevant to the reason for the delay.²

[11] 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.³

[12] An applicant 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 an applicant has not provided any reason for any part of the delay.⁴

Evidence and submissions

[13] Mr Ali gave evidence that on 10 October 2025, he was stood down without pay and investigated for allegations of serious misconduct. Mr Ali said that he sought assistance from his union, the Transport Workers' Union of Australia (TWU) and met with representative Mr Fadie Odeh who helped him draft a response to the allegations through a show cause process. Mr Ali said that he was stood down without pay for four days before he was terminated for serious misconduct and that he met with Mr Odeh again shortly after being terminated. Mr Ali said that Mr Odeh took down his details and said that the TWU

would help him with an unfair dismissal application. Mr Ali said that he trusted that this would happen and had some further contact with Mr Odeh after meeting with him.

[14] Mr Odeh explained that he has been employed by the TWU since 1 September 2025 and currently works in the member service centre (MSC) of the TWU as a MSC official. In this role, Mr Odeh is responsible for handling individual workplace grievances through contact with TWU members by telephone, email and in person. He assists in resolving issues for TWU members including the preparation and conciliation of unfair dismissal applications. Mr Odeh estimated that he has prepared less than ten unfair dismissal applications and said that he has attended some conciliations on his own. Mr Odeh explained that he is still learning in his role and is becoming more competent and confident in his role as an MSC official. During cross-examination, Mr Odeh explained that he had been employed as a truck driver before he commenced employment with the TWU and that he had been a TWU member, but not a workplace delegate.

[15] Mr Odeh said that Mr Ali first came to the TWU when he was subject to allegations of serious misconduct on or around 7 October 2025. Mr Odeh said that Mr Ali was concerned about losing his job, so Mr Odeh helped Mr Ali provide a written response to the allegations on 10 October 2025 as part of a show cause process. Mr Odeh said that Mr Ali was terminated on 14 October 2025 and met with Mr Odeh at the TWU's Minchinbury office that same day. Mr Odeh said that Mr Ali wanted to dispute the termination and Mr Odeh said that the TWU would file an unfair dismissal application for him with the Commission. Mr Odeh said that he prepared an unfair dismissal application that he intended to file with the Commission. Mr Odeh said that he gave assurances to Mr Ali that he would file the application and that he would be in touch about its progress. Mr Odeh said that he lost track of the process as he was fairly new to the job and did not have a lot of experience in preparing unfair dismissal applications. Mr Odeh identified that he had not filed the application on 6 November 2025, when he was asked about any outstanding matters that he had on at that time. Upon becoming aware that he had not filed the application, Mr Odeh filed it immediately the same day.

[16] Lindsay submitted that representative error requires clear evidence of instructions and diligence and that the discretion to extend time should not be exercised in the absence of proof of precise instructions to file, when and how those instructions were given, and diligent follow-up before the time expired. Lindsay also submitted that an applicant must demonstrate that they were blameless and took reasonable steps to ensure filing occurred and explain why those steps still could not achieve filing. Lindsay further submitted that where an application is delayed because the employee has left the matter entirely in the hands of their representative and has not followed up, the extension may be refused and that reliance on assurances alone does not elevate the situation to exceptional circumstances. A number of these submissions are not supported by Full Bench authority such as a requirement for an applicant to establish 'diligent follow-up before the time expired' and explain why the reasonable steps taken to ensure filing still could not achieve filing.

Consideration

[17] In considering this matter, I have had regard to the recent Full Bench decision of *John Jordan and Neil MacLeod v Multiplex Australasia Pty Ltd*.⁵ In this case, the applicants had been dismissed and were members of their union, the Construction, Forestry and Maritime

Employees' Union (CFMEU). The CFMEU employee responsible for filing the applicants' unfair dismissal claims made an error in calculating the 21-day time period for lodging the applications with the result that the applications were filed three days late. At first instance, the Commission found that the reason for the delay was firstly, representative error on the part the CFMEU, and secondly, a failure on the part of the applicants to take steps to enquire about the status of their application after 26 July 2024 which was two weeks after they were dismissed. The Commission held that the second reason weighed against a finding of exceptional circumstances and after considering the matters in s.394(3) of the FW Act, dismissed the applications.⁶

[18] On appeal, the Full Bench said that the finding that the applicants were partly responsible for the delay in filing their applications was not open on the evidence because:

- (a) the applicants acted in a timely manner by seeking advice from the CFMEU on the day before their dismissals took effect;
- (b) the applicants requested and gave instructions to the CFMEU to provide them with representation and assistance in filing unfair dismissal applications;
- (c) the applicants spoke with the CFMEU representative on a number of occasions between 15 and 26 July 2024 (inclusive of both dates) and met with the CFMEU representative in person on 22 July 2024;
- (d) the applicants were at all times responsive and forthcoming with information for the CFMEU representative; and
- (e) the CFMEU representative represented to the applicants that the CFMEU would handle the filing of their applications.⁷

[19] The Full Bench referred⁸ to the decision of a Full Bench of the Australian Industrial Relations Commission in *Clark v Ringwood Private Hospital*⁹ which indicates that late lodgement of an application due to representative error may be grounds for an extension of time, however, there is a distinction between the delay caused by the representative where the employee is blameless and other circumstances where there may have been representative error but in fact the employee has contributed to the delay. The actions of the employee are the central consideration in deciding whether or not the explanation of representative error is acceptable. For example, it would generally not be unfair to refuse to accept an application which is some months out of time in circumstances where an applicant left the matters in the hands of their representative and took no steps to inquire as to the status of the claim. However, where an employee has given clear instructions to lodge an application and the representative has failed to do so then an extension may be granted.¹⁰

[20] The Full Bench also referred¹¹ to the decision of a different Full Bench in *Robinson v Interstate Transport Pty Ltd (Robinson)*¹² which concluded [emphasis added]:

[30] Mr Robinson arranged legal advice three days after the termination of his employment. At that time Mr Robinson requested that Mr Tayler prepare a client agreement for his consideration and upon receiving the agreement, he executed the agreement on 13 May 2010, within a week of its receipt. On the day he executed the agreement, Mr Robinson instructed Mr Tayler to file a general protections application on his behalf. It is unsurprising that Mr Robinson, having instructed his representative to lodge his application, relied upon the representative to give effect to his instructions. To suggest the failure of Mr Robinson to take any action in relation to the lodgement of his application, after instructing his legal representative to do so and having

complied with all of the representative's requirements for accepting instructions, represents inaction on his part, unreasonably imposes a further responsibility upon him beyond his action of providing clear instructions to Mr Tayler to lodge his application.

[31] As noted by a Full Bench in *La Rosa v Motor One Group Pty Ltd*, in the context of s 170CE of the WR Act:

As is evident from Clarke, little might be required to satisfy the Commission that the applicant was blameless in the delay. In the context of a relatively short delay, it may simply be a matter of establishing that the applicant gave instructions to lodge [in this case] a Notice of Election and thereafter left matters in the hands of his or her representative.

...

[36] We find that there was an acceptable explanation of the reason for the delay in lodgement of the application - representative error resulting from the oversight of Mr Robinson's original representative of the electronic reminder whilst the filing of the application was within his care and responsibility. In circumstances where Mr Robinson had promptly sought legal advice following his termination, promptly executed a client agreement prepared on his instructions and, upon doing so, immediately instructed his original representative to lodge a general protections application, we find that he was entitled to rely upon his representative to act on his clear instructions to file an application and was blameless for the delay in lodgement of the application.¹³

[21] In determining whether Mr Ali was 'blameless' for the delay in filing the application, I make the following findings based upon the uncontested evidence before me:

- The TWU was assisting Mr Ali with the show cause process from 10 October 2025;
- Mr Ali was dismissed on 14 October 2025;
- Mr Ali attended the TWU's office in person on the day he was dismissed and informed Mr Odeh that he wanted to dispute the termination;
- Mr Odeh told Mr Ali that the TWU would file an unfair dismissal application for him with the Commission;
- Mr Ali said that he trusted that this would happen;
- Mr Odeh lost track of the application as he was fairly new to the job did not have a lot of experience in preparing unfair dismissal applications;
- Mr Odeh identified that he had not filed the application on 6 November 2025; and
- Upon becoming aware that he had not filed the application, Mr Odeh filed it immediately the same day.

[22] I note that there is no evidence to suggest that Mr Odeh did not have all of the information required from Mr Ali on 14 October 2025 to lodge the application.

[23] Although Mr Ali gave evidence that he had 'some further contact with Mr Odeh after meeting with him' on the day of the dismissal, I understand from the evidence given during the hearing that this contact occurred when Mr Odeh contacted Mr Ali on 6 November 2025 to advise that the application had not been filed and that it would be filed late. Consequently, there was no contact between Mr Ali and Mr Odeh from 14 October 2025 to the date that the application was filed.

[24] In my view, it was not necessary for Mr Ali to contact Mr Odeh after 14 October 2025 as the evidence establishes that he gave clear instructions to Mr Odeh that he wanted to dispute the termination and that Mr Odeh committed to file the application. Mr Ali was employed as a truck driver and at times struggled to understand and speak English during the hearing. Given the TWU's role as a registered organisation with a lengthy history of representing members in the transport industry, I believe that it was reasonable for Mr Ali to defer to the TWU's expertise, leave the matter in the hands of the TWU and trust that the TWU would file his application on time. Consistent with the observations of the Full Bench in *La Rosa v Motor One Group Pty Ltd*¹⁴ extracted above, I do not believe that it was necessary for Mr Ali to check whether the application had in fact been lodged, particularly in the context of a relatively short delay. Further, to paraphrase the Full Bench in *Robinson*, any suggestion that failure of Mr Ali to take action in relation to the lodgement of his application, after instructing the TWU to do so and having complied with all of the representative's requirements for accepting instructions, represents inaction on his part, unreasonably imposes a further responsibility upon him beyond his action of providing clear instructions to the TWU to lodge his application.

[25] Based upon the material before me, I conclude that that the only reason for delay was representative error by the TWU and that Mr Ali was blameless for the delay in filing the application and did not contribute to the delay through his conduct. It follows that the reason for the delay weighs in favour of a finding of exceptional circumstances.

[26] Although I have found that there was representative error, it is important to note that I believe that responsibility for the error lies with those employees and/or officials of the TWU who supervise Mr Odeh's work and who are charged with ensuring that there are appropriate systems in place to ensure that statutory time limits are complied with. It is very concerning and unsatisfactory that a large and sophisticated organisation like the TWU with significant resources would require an employee as inexperienced as Mr Odeh to be solely responsible for a task as important as filing an unfair dismissal application.

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

[27] There is no dispute that Mr Ali became aware of his dismissal when it occurred on the 14 October 2025. I regard this as a neutral factor.

What action was taken by the Applicant to dispute the dismissal?

[28] Mr Ali submitted that he took action to dispute his dismissal even before such time that he was effectively terminated by way of providing a response during the show cause process and taking part in the investigation and subsequent termination process.

[29] Lindsay submitted that Mr Ali took some steps to dispute his dismissal, including contacting the TWU on the day of termination but that his failure to act beyond initially contacting his union does not weigh strongly in favour of a finding of exceptional circumstances.

[30] I have considered the submissions of the parties and find that this is a neutral factor.

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

[31] Mr Ali submitted that Lindsay will suffer negligible prejudice if the Commission exercises its discretion to allow a greater period of time for the application to be made and that there would be no greater prejudice to Lindsay caused by Mr Ali's application being accepted out of time than there would have been had it of been lodged on time.

[32] Lindsay submitted that it is incorrect that it will suffer negligible prejudice and that it has already borne additional costs and will bear further costs if the application is granted. Lindsay has not provided any evidence which establishes that it has incurred costs as a result of the delay or that it will experience prejudice. I therefore regard this as a neutral factor.

What are the merits of the application?

[33] Mr Ali submitted that there is a strong prima facie case for his dismissal to be found as unfair, that the application has merit and there is in all reasonable circumstances clearly a case to answer by Lindsay.

[34] Lindsay submitted that on the shift on 7 October 2025, Mr Ali failed to operate the dock in accordance with the required safety procedures, causing a sudden movement of the dock. Lindsay submitted that this was a significant event that could have resulted in serious injury to Mr Ali and other workers at the depot. Following the incident, Lindsay conducted an investigation. Lindsay submitted that the investigation concluded that Mr Ali had failed to follow the safe operating procedures for the dock. Lindsay terminated Mr Ali's employment on 14 October 2025, after considering all matters including the Mr Ali's response and previous disciplinary record.

[35] Mr Ali and Lindsay did not file any evidence in support of their submissions about the merits of the application. As it is not possible for me to make any firm or detailed assessment of the merits of the application in the absence of such evidence, I find that this is a neutral consideration.

Fairness as between Mr Ali and other persons in a similar position

[36] Mr Ali submitted that fairness between himself and other persons in a similar situation would require the extension of time to be granted because other persons who are forced to leave their employment in similar circumstances should not be prevented from seeking a remedy for unfair dismissal.

[37] Lindsay submitted that it would be unfair to other applicants if Mr Ali's circumstances were treated as 'exceptional' resulting in a significant departure from the strict 21-day time limit imposed by the FW Act. Lindsay submitted that the statutory timeframe exists to promote certainty and finality in employment disputes and that allowing an extension in routine circumstances would undermine that principle and create inconsistency in the application of the Act.

[38] The requirement to take into account fairness as between Mr Ali and other persons in a similar position involves considering Mr Ali in relation to other applicants employed by the

same employer, and affected by the same issue, who filed applications in time.¹⁵ Neither party provided any evidence in relation to this matter so I regard it as a neutral consideration.

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

[39] I must now consider whether I am satisfied that there are exceptional circumstances, taking into account my findings regarding:

- (a) the reasons for the delay, being representative error;
- (b) Mr Ali becoming aware of the dismissal when it took effect;
- (c) the absence of any action being taken by Mr Ali to dispute the dismissal prior to making the application;
- (d) there is no evidence of prejudice to the employer;
- (e) the merits of the application being unable to be determined ahead of a hearing of the evidence; and
- (f) no issue of fairness arising as between Mr Ali and other persons in a similar position.

[40] 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.¹⁶ 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.¹⁷

[41] The reason for the delay weighs in favour of a finding of exceptional circumstances. The matters in subsections 394(3)(b)-(f) are neutral considerations.

[42] Having regard to all of the matters listed at s.394(3) of the FW Act, I am satisfied that there are exceptional circumstances. In my view, the failure of the TWU to lodge the application on time in circumstances where Mr Ali is blameless for the delay constitutes an exceptional circumstance in which the application should be accepted. This conclusion is consistent with the approach taken by Full Benches of this Commission when considering similar factual scenarios.¹⁸

Conclusion

[43] Having regard to all of the matters at s.394(3) of the FW Act, I am satisfied that there are exceptional circumstances. On the basis of those exceptional circumstances and the object stated at s.381(2) of the FW Act to ensure that a “fair go all round” is accorded, I am satisfied that it is appropriate to extend the period for the application to be made to 6 November 2025.

[44] The matter will be shortly listed for Directions and Conciliation.



DEPUTY PRESIDENT

Appearances:

Mr A. *Grumley*, Legal Officer – TWU for the Applicant
Mr M. *Coonan*, Solicitor for the Respondent

Hearing details:

2025
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Online

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¹ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFCB 901, [39]

² *Shaw v Australia and New Zealand Banking Group Ltd* [2015] FWCFCB 287, [12]

³ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFCB 901, [39]

⁴ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFCB 901, [40]

⁵ [2024] FWCFCB 440

⁶ *Ibid*, [28]

⁷ *Ibid*, [30]

⁸ *Ibid*, [33]

⁹ (1997) 74 IR 413

¹⁰ *Ibid*, 419-420

¹¹ [2024] FWCFCB 440, [37]

¹² [2011] FWAFFB 2728

¹³ *Ibid*, [30]-[31], [36]

¹⁴ Unreported AIRC (FB) PR924583, 12 November 2002, [24]

¹⁵ *Ivan Whittle v Redi Milk Australia Pty Ltd* [2016] FWC 3773, [38]

¹⁶ *Nulty v Blue Star Group Pty Ltd* [2011] FWAFFB 975, [13]

¹⁷ *Ibid*

¹⁸ See for example *Robinson* [2011] FWAFFB 2728, [41]; *John Jordan and Neil MacLeod v Multiplex Australasia Pty Ltd* [2024] FWCFCB 440, [49]