



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Erinn McGowan

v

Jelmac Australia Pty Ltd

(U2024/14937)

COMMISSIONER MIRABELLA

MELBOURNE, 7 APRIL 2025

Application for an unfair dismissal remedy – application made under s.399A of the Fair Work Act – no response from the Applicant – application dismissed

[1] On 12 December 2024, Ms Erinn McGowan (the Applicant) made an application to the Fair Work Commission (the Commission) for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (the Act). The Applicant alleges she was unfairly dismissed from her employment with Jelmac Australia Pty Ltd (the Respondent) on 27 November 2024.

[2] Both parties attended the mention/conference on 29 January 2025. The Applicant failed to attend the hearing on 4 March 2025, which was ultimately vacated, and did not attend the relisted hearing (31 March 2025), or the non-compliance hearing (2 April 2025). The following background and submissions detail the sequence of proceedings, correspondence and submissions by the parties to date.

Background and submissions

[3] On 29 January 2025, amended directions were sent to parties, and the email noted:

... Please note that these Directions do not vary the dates when the Applicant and Respondent's initial materials are due, as per the Directions issued on 24 January 2025.

An additional date has been added to these Directions to allow the Applicant to submit materials in reply.

[4] Direction 3 directed:

3. The Applicant *must* send to the Commission and to the Respondent any submissions and witness statements in reply by 4:00pm on Friday, 28 February 2025. (emphasis added)

[5] ‘*Important Information*’ on the directions noted:

Non-compliance: The Commissioner will **not** accept material that is filed late unless an extension has been granted by the Commissioner before it was due. Requests for an extension of time must be made in writing in a timely manner and specify substantial grounds. Parties must not assume an extension will be granted.

[6] On 27 February 2025, the Applicant emailed Chambers:

Just one quick question regarding the respondent having legal representation as I can see all the emails that there [sic] lawyer has sent through, I was just wondering if they still had to ask for permission to represent the respondent? Or has that been granted already? I ask this as in there [sic] response it states they are asking me to pay there [sic] fees if I loose [sic], but obviously it’s there [sic] own choice to hire a lawyer, not to mention have so many witnesses that were not present when I was terminated...

... My final response will be sent through tomorrow as per due date.

[7] On 28 February 2025, no submissions in reply were filed by the Applicant. On 3 March 2025, four business days after the Applicant’s submissions in reply were due, and the day before the hearing, the Applicant called Chambers and left a voicemail message. Chambers returned the call, and the Applicant said that she was concerned about the Respondent’s submissions. Even though the directions included a date for the Applicant to respond to the Respondent’s submissions, the Applicant said she was unaware of a permission to respond. The Applicant requested an extension to allow her time to reply to the Respondent’s submissions, and that she would send them shortly. The Applicant was advised to send the request and submissions in writing if she wished. The submissions were due at 16:00PM on 28 February 2025. To date, the Applicant has not filed any submissions in reply.

Failure to attend the hearing dated 4 March 2025

[8] On 24 January 2025, Chambers sent an email to the parties providing a notice of listing for the mention/conference, and directions. ‘*Important Information*’ in the notice included the following:

- A. This notice of listing is definite. A request for an **adjournment** will only be considered if it:
 - a) is in writing;
 - b) has been provided to Commissioner Mirabella and to the other party;
 - c) provides a substantial reason as to why the date should be changed; and
 - d) has been made in a timely manner.

[9] On 19 February 2025, a notice of listing was sent to the parties for a hearing on 4 March 2025.

[10] On 4 March 2025 at 08:54AM, the Applicant emailed the Commission:

Good morning, I have just been in a car accident whilst on my way to the hearing this morning. My car is not drivable and waiting on a tow truck right now. I don't know if I will be able to make it by 10am by the time I get home and grab my other car. Please advise on what I should do?

[11] On 4 March 2025 at 09:34AM, Chambers emailed the parties '*Dear Parties, Thank you Ms McGowan for letting us know. Please can the parties urgently advise availability to attend the Hearing at 1pm AEDT today?*'.

[12] On 4 March 2025 at 09:38AM, the Applicant responded '*thank you, 1pm will be fine. Erinn McGowan*'.

[13] On 4 March 2025 at 10:30AM, Chambers emailed the Applicant and requested '*evidence supporting the car accident. Please forward evidence to this email address*'. Later that morning, the Applicant emailed Chambers photos of a blue motor vehicle that was badly damaged:

I have just got *my mechanic* to send these so please see attached photos of *my car* that has just been towed to my mechanics [sic] shop. I have just spoken to my insurance [sic] and they are recommending I go to the hospital or GP before getting behind the wheel of another car to drive back to the city. What will you need me to supply for this to be granted?

(emphasis added)

[14] On 4 March 2025, Chambers attempted to call the Applicant approximately seven times but without success, the calls were diverted to voicemail. At 12:03PM, after multiple attempts to contact the Applicant, Chambers emailed the Applicant to confirm she would be attending the Commission by another mode of transport. At 12:29PM, after not receiving a response from the Applicant, the hearing was vacated.

[15] On 4 March 2025 at 16:41PM, Chambers emailed the Applicant to request a copy of the police report and other documents relevant to her motor vehicle accident, and to confirm she wished to proceed with her application.

[16] On 5 March 2025 at 11:20AM, the Applicant emailed the Commission and apologised for the lack of contact, advising that she had fainted after sending the photos of the motor vehicle accident. The Applicant advised that she had a concussion and spent the rest of the day in bed. She advised that she could not provide a police report because they did not attend the accident. She apologised that the event was completely out her control. The Applicant advised that she wanted to proceed with her application, and she felt '*extremely attacked*' even though she did everything she could to '*limit any disruption to all involved*'.

[17] On 5 March 2025 at 11:42AM, Chambers emailed the Applicant to request evidence regarding her capacity not to attend the hearing, and in the absence of a police report, any other

evidence, such as insurance correspondence, or the details of other vehicles involved in the accident.

[18] On 5 March 2025 at 13:55PM, the Applicant emailed a photo of the Driver Licence of the *'other driver'* and advised that she would *'get the insurance documents for you shortly'*.

[19] On 10 March 2025 at 11:04AM, the Respondent emailed Chambers expressing concerns regarding the reliability of the Applicant's evidence, including contradicting date and time stamps on the *'other driver's'* Driver Licence photos provided by the Applicant. The Respondent also noted that the Applicant failed to provide any documentation to support her version of events. No insurance documents were provided as was promised by the Applicant, and no evidence regarding the make, colour, or registration of the other vehicle involved in the accident, or the towing company, or the mechanic, and how the accident occurred, or why the police were apparently not notified. The Respondent provided screenshots of the photo's data information which indicate that they were taken on 31 January 2025 at 14:46PM, over a month before the alleged motor vehicle accident.

[20] The Respondent expressed serious doubts as the Applicant's version of events, and provided submissions in the above email that, as the Applicant has been unable to provide proper evidence as directed by the Commission, the Commission should order:

1. the Applicant be given until 16:00pm Wednesday, 12 March 2025 to provide proper evidence, as requested by the Commission on 4 and 5 March 2025; and
2. in the absence of any satisfactory evidence, or if the Applicant is unable to comply with Order 1, the Application be dismissed pursuant to section 399A(1)(a) and (b) of the Act

[21] The Respondent also advised they had incurred significant costs in defending the application, including with respect to the hearing which had *'been thrown away by reason of the adjournment'*. The Respondent maintained that the application was baseless and had no prospects of success. The Respondent advised that if the Commission was minded to issue the orders, and if the application was dismissed by reason of non-compliance, the Respondent intended to make an application as to the issue of costs pursuant to s.400A of the Act.

[22] On 10 March 2025 at 11:53AM, the Applicant responded to the Respondent's allegations, claiming they were false, and stated that *'I didn't have the photos until I crashed the car'*, and that the Respondent had previously changed the date of another proceeding due to a holiday. She stated that she was waiting on the insurance paperwork from the other driver, and that *'I was in fact not driving the car at all at the time of the accident'*. The Applicant argued that it was not up to the Respondent to state that she had no case for an unfair dismissal, denied responsibility for costs, and accused the Respondent of insulting the Commissioner for *'allowing me to move to this stage in the first place by stating there is absolutely no basis for a claim'*. The Applicant confirmed that she wanted to move forward with the application.

[23] On 11 March 2025, Chambers requested that the Applicant advise whether the photos were taken on 31 January 2025, as the Respondent's screenshots suggested. The Applicant was also asked to provide any other evidence, *'including, but not limited to, relevant insurance documents, by 4.00pm on 12 March 2025'*.

[24] On 12 March 2025, the Applicant emailed Chambers and refused to provide further details ‘*no that’s not possible I said the pics were sent to me that day after the it [sic] got to the mechanics*’. The Applicant advised that she was unsure what else she could provide to ‘*satisfy the court*’, and a statutory declaration was attached declaring that she was involved in an accident on 4 March 2025. It stated that she was a passenger in transit to the Commission for the hearing. She declared that the police did not attend, and that she asked the driver of the vehicle (it was not specified which vehicle) for copies of the insurance paperwork, but with no reply. She declared that the photos sent to the Commissioner on 4 March 2025 were from the accident, and ‘*not the 31st January as stated and accused by the Respondent*’.

[25] On 17 March 2025, the Respondent emailed the Commission and noted inconsistencies in the Applicant’s version of events, including legal ownership of the motor vehicle and the applicable insurance policy. The Respondent advised that they had not received any evidence establishing the time and date that the Applicant received the photos from the mechanic. The Respondent submitted that on balance, the application should be dismissed.

Failure to attend the hearing dated 31 March 2025

[26] On 19 March 2025, a notice of listing was sent to the parties for the hearing on 31 March 2025. The notice of listing included the following:

Parties are to provide appearances by sending a list of attendees to ...

... by no later than **4:00pm on Friday, 28 March 2025**, including the following information for each attendee...

[27] The notice of listing also noted:

IMPORTANT INFORMATION

- A. This notice of listing is definite. A request for an **adjournment** will only be considered if it:
- (a) is in writing;
 - (b) has been provided to Commissioner Mirabella and to the other party;
 - (c) provides a substantial reason as to why the date should be changed; and
 - (d) has been made in a timely manner.

[28] On 26 March 2025, The Respondent emailed the Commission concerning allegations of fraud by the Applicant. The Respondent expressed concerns that due to these allegations, and previous non-attendance by the Applicant, that she may not attend the hearing. The Respondent requested that the Commission consider the cost implications for the Respondent in the event that the Applicant did not attend. The Respondent requested that, in the absence of the applicant’s confirmation that she would attend, the hearing be vacated and the application dismissed.

[29] On 27 March 2025 at 14:10PM, the Applicant emailed Chambers denying the allegations. She advised of anxiety and distress, the irrelevance of the allegations, concerns for procedural fairness and well-being, requests for relief, and that the hearing be vacated with a decision issued on the papers. She also advised that she sought compensation for detriment suffered as a result of her dismissal.

[30] On 27 March 2025 at 15:42PM, the Respondent emailed the Commission and advised that no defamatory or unsubstantiated allegations were made by them. They emphatically rejected any suggestion by the Applicant that they were trying to influence the outcome of the proceedings or introduce further evidence to prejudice the Commission. The Respondent pointed out that the investigation was a factual development which had implications for the hearing. They stated:

The Respondent is similarly not agreeable to any further opportunity for the Applicant to put on further submissions and notes the Applicant has provided no valid reason why she was unable to previously comply with the timetable in this regard.

[31] The Respondent also stated that the orders sought by the Applicant would cause substantial prejudice to be suffered to the Respondent, and due to the Applicant's request to vacate the hearing, sought orders for the application to be dismissed.

[32] On 27 March 2025 at 17:33PM, Chambers emailed the Applicant and advised that it was not appropriate in all the circumstances to proceed on the papers. Chambers advised that procedural fairness includes witnesses being available for cross examination, and that the Applicant was required to attend the hearing on 31 March 2025. The email stated that the Applicant was given the opportunity to file additional documents, but none had been forthcoming. The correspondence stated that the Commission is not involved in any proceedings or investigations outside of its jurisdiction. The email also noted that the Applicant had stated that her mental health was affected, and that she could not attend the hearing, however no supporting documentation had been provided, and without medical evidence it was open to the Commissioner to make adverse inferences. The correspondence also noted:

Failure to comply with directions, or to attend the hearing in person, may result in the Commission proceeding to determine the matter in your absence and based on the material before the Commission.

[33] The Applicant did not attend the 31 March 2025 hearing at 10:00AM. The Applicant did not contact the Commission in advance, regarding her non-attendance, until 1 April 2025 at 14:11PM, in an email detailed below at [36]. At the hearing, I advised the Respondent that I would consider their request under s.399A of the Act to dismiss the application and waived the requirement for a formal filing of the request.¹ The Respondent made oral submissions, and the matter was to be listed for a non-compliance hearing.

Failure to attend the non-compliance hearing dated 2 April 2025

[34] On 31 March 2025 at 14:43PM, Chambers emailed the Applicant noting that she did not attend the hearing dated 31 March 2025, and that this followed a prior non-attendance at the hearing dated 4 March 2025, after which she was requested to provide reasons for her non-

attendance. The correspondence stated that the Respondent applied under s.399A of the Act for the matter to be dismissed. A notice of listing was attached to the email, including the Microsoft Teams details for an online video non-compliance hearing:

Listing Details:

The above matter is listed for Non-Compliance Hearing, by Video using Microsoft Teams, before Commissioner Mirabella at:

6:30 PM AEDT

Wednesday, 2 April 2025

Video using Microsoft Teams

Join the meeting now

Meeting ID: ...

... PARTIES PLEASE NOTE:

This matter is listed by Video on Microsoft Teams. Parties are not required to attend the Fair Work Commission. Parties are to provide the names and appropriate contact telephone numbers of those appearing to...

... by no later than 4:00PM on Tuesday, 1 April 2025. Where possible, please provide a direct line and not the telephone number for reception or switchboard.

[35] The correspondence also included the following:

Commissioner Mirabella has determined to list this matter for a Non-Compliance Hearing on **Wednesday 2 April 2025 at 6.30pm AEDT**, to be conducted by video on Microsoft Teams.

At the Non-Compliance Hearing, **you will need to explain why you have failed to attend both hearings and did not comply with Directions**. Please find the Notice of Listing attached confirming the details of the Non-Compliance Hearing.

[36] On 1 April 2025 at 14:11PM, the Applicant emailed the Commission and requested a virtual hearing due to '*Harassment, Procedural Concerns, and Outstanding Entitlements*'. The notice of listing had already advised that the hearing was to be conducted by Microsoft Teams. The Applicant also stated that her absence at the hearing on 31 March 2025 was a direct result of severe distress caused by harassment and '*defamatory correspondence by the Respondent's legal representatives*'. She advised of significant harm to her psychological health due to the fraud allegations. She addressed issues regarding her termination of employment, the allegations against her, and outstanding wages. The Applicant alleged defamation, workplace harassment, psychological safety violations, she also mentioned '*unfair dismissal protections*', and argued '*financial entitlements*'. The Applicant requested a Zoom or virtual platform hearing, to ensure safety and impartiality. She expressed concerns about intimidation, and she requested that the future proceedings were '*conducted with transparency and free from intimidation*'.

[37] On 1 April 2025 at 17:33PM, Chambers emailed the parties to advise that their submissions would be addressed at the non-compliance virtual hearing (Microsoft Teams) scheduled for 2 April 2025 at 18:30PM, and Chambers resent the notice of listing which detailed the online hearing. The Applicant did not respond to this email, and did not provide appearances as required by the notice of listing, by 16:00PM on 1 April 2025.

[38] On 2 April 2025, the Applicant did not attend the non-compliance hearing. At the non-compliance hearing, the Respondent augmented their previous submissions for dismissal of the application, pursuant to s.399A of the Act.

[39] The Applicant has not filed any formal submissions regarding her non-attendance at the vacated hearing (4 March 2025) and the hearing (31 March 2025). In particular, the Applicant has not filed the supporting material requested by the Commission on 4, 5, 11, and 19 March 2025, relating to the motor vehicle accident. Additionally, to date, the Applicant has not contacted the Commission since her non-attendance at the non-compliance hearing on 2 April 2025.

[40] The Respondent's submissions in support of the s.399A application include the following:

- A request to strike out the matter pursuant to s.399A of the Act
- The Applicant's non-attendance at a hearing, twice in March 2025, while the Respondent has attended both hearings, with four witnesses from the Respondent's executive team, and thus preventing the executives from conducting and managing their business during this time
- In addition, the Applicant failed to comply with the directions dated 29 January 2025, specifically direction 3
- Numerous emails were sent from the Commission to the parties, since 4 March 2025, in which directions were provided or given by the Commission, and have not been complied with by the Applicant, specifically the emails on 11 and 19 March 2025
- The Respondent seeks to have the application dismissed and further seeks to make an application for costs

[41] The Respondent also submits:

- that it cannot have faith in the information provided by Applicant concerning the accident on 4 March 2025, with no evidence provided by the Applicant to substantiate this, without providing even the details of the registration of the motor vehicle involved, which is omitted in the material and not visible in the photos;
- there has been no material or information provided as to the mechanic or the towing company, or any particulars of the accident;
- a police report was not provided;
- the insurance report was referred to by the Applicant, but they were yet to provide further information, and not even a reference number was provided;
- due to the combination of the above, the Respondent has no faith that the events even occurred;

- a courtesy was provided to the Applicant to provide submissions, which was beyond amicable, and multiple dates were offered to provide any information, none of which was provided;
- on 11, 12, 19 and 24 March 2025 there were opportunities to provide information;
- on 4 March 2025 at 08:54AM, Applicant said she had been in an accident stating ‘my car is not driveable’, and that she would go and get her other motor vehicle, and then at 11:41AM the Applicant attached photos, indicating no forwarding address, of ‘my car’ stated again, this was expressly stated in two emails;
- no material was provided, even though on 5 March 2025 the Applicant stated that she would provide insurance material shortly;
- the damage to the motor vehicle in the photo was extensive, and therefore one might expect the police to be there; and
- on 11 March 2025, the Applicant advised the Commission that it was not her motor vehicle involved in the accident.

Dismissing an application where the applicant has acted unreasonably

[42] Section 399A of the Act provides as follows:

399A Dismissing applications

- (1) The FWC may, subject to subsection (2), dismiss an application for an order under Division 4 if the FWC is satisfied that the applicant has unreasonably:
 - (a) failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or
 - (b) failed to comply with a direction or order of the FWC relating to the application; or
 - (c) failed to discontinue the application after a settlement agreement has been concluded....
- (2) The FWC may exercise its power under subsection (1) on application by the employer.
- (3) This section does not limit when the FWC may dismiss an application.

[43] Section 593 of the Act provides that the Commission is not required to hold a hearing except as provided by the Act. The Respondent provided oral submissions at the hearing on 31 March 2025. I have waived compliance with the *Fair Work Commission Rules 2024* (Cth) and accepted the Respondent’s written and oral submissions.² As the Applicant did not file any material in opposition to the application to dismiss pursuant to s.399A of the Act, I will determine the application on the papers.

[44] On balance, assessing the Applicant’s submissions and interactions with the Commission, it is difficult to decide what can be believed about the Applicant’s submissions

and matters alleged in correspondence, regarding her non-attendance at the vacated hearing on 4 March 2025 and the hearing on 31 March 2025. On 4 March 2025, the Applicant expressly stated that *'I have just been in a car accident whilst on my way to the hearing this morning. My car is not drivable'*, and again she specified the motor vehicle as *'my car'*, in a later email, as being towed to *'my mechanics shop [sic]'*. The Commission relisted the hearing for 13:00pm that day, which was accepted by both parties, including the Applicant. Later that day, the Applicant emailed photos of a damaged motor vehicle to the Commission, and then stated that *'her insurance'* advised her to go to the hospital or a GP *'before getting behind the wheel of another car'*, and thus she could not make the 13:00PM hearing. These statements by the Applicant clearly indicate that she was driving at the time of the accident. On 5 March 2025, the Applicant emailed the Commission a photo of the *'other driver'* and advised that she would *'get the insurance documents for you shortly'*. Up until this point, one may have been ready to accept these submissions, that the Applicant was driving when an accident occurred, once the promised evidence was submitted to support these claims.

[45] However, on 10 March 2025, the Applicant emailed the Commission in response to allegations from the Respondent which identified gaps in her story and inconsistent photo data in the images provided by the Applicant (the photo of the other driver's Driver Licence). In this email, the Applicant stated, *'I didn't have the photos until I crashed the car'* (emphasis added), and then contradicted this statement by saying, in the same email, *'I was in fact not driving the car at all at the time of the accident'*. On 12 March 2025, the Applicant again argued that she was not driving the motor vehicle, and she refused to provide further evidence because of this. At the date of this decision, the Applicant has still not provided any further evidence as requested by the Commission; such as the insurance details (which was promised by the Applicant via email on 4, 5 and 10 March 2025), a police report, a time and location of the accident, and the mechanic's or the towing company's details. Requests for further evidence were made by the Commission on 4, 5, 11, and 19 March 2025.

[46] On 5 March 2025, the Applicant claimed that the police did not attend the motor vehicle accident scene. However, as the photos of the motor vehicle provided by the Applicant suggest, a serious accident such as this would likely have resulted in the police attending. Further, the Applicant has not provided any insurance claims or relevant correspondence to support her claims. On balance, due to a lack of credible supporting evidence and contradictory evidence from the Applicant, I cannot accept the Applicant's claims that a motor vehicle accident occurred on 4 March 2025 which prevented the Applicant from attending the Commission for the hearing.

[47] As the 4 March 2025 hearing was vacated, a hearing was relisted for 31 March 2025. Again, the Applicant did not attend, and she failed to communicate this beforehand or on the day of the hearing. The Applicant contacted the Commission on 1 April 2025, in response to the listing of a non-compliance hearing for 2 April 2025. The Applicant sent a lengthy email describing her issues during her employment, as well as stating that the reason for her non-attendance at the 31 March 2025 hearing was due to severe distress from *'defamatory correspondence by the Respondent's legal representatives'*, with damage to her psychological health. No evidence was provided to support the claim that psychological distress prevented her from attending the 31 March 2025 hearing.

[48] Further, the Applicant did not attend the non-compliance hearing on 2 April 2025. The Commission confirmed that the hearing was online and then resent the notice of listing to the parties. The Applicant did not contact the Commission to confirm appearances by the due date, to advise in advance of her non-attendance, or to provide any explanation why she kept the Commission and the Respondent waiting in a non-compliance hearing that she would never attend.

[49] The Applicant did not contact the Commission to request an extension, of the due date of 28 February 2025, for her submissions in reply, after promising on 27 February 2025 that her response would be sent '*as per due date*', and only contacted the Commission on 3 March 2025, on the day before the hearing, to request an extension.

[50] The power to dismiss an application if the non-compliance was unreasonable is discretionary. The Applicant has failed to provide a plausible explanation to the Commission for her repeated non-attendance at hearings. The Applicant failed to attend these hearings, and did not provide any reliable evidence to support her submissions for her reason for non-attendance, despite being given many opportunities to do so. The Applicant has shown very little regard for the tireless efforts of various members of the Commission's staff, who conscientiously and repeatedly attempted to make contact with her, to give her the opportunity to engage with the Commission's processes to prosecute her case.

Conclusion

[51] Section 399A of the Act states that the Commission may dismiss an application if it is satisfied that the Applicant in an unfair dismissal matter has unreasonably failed to attend a conference or hearing held by the Commission, or has failed to comply with directions of the Commission.³ In the circumstances of this matter, I am satisfied that the Applicant has acted unreasonably in failing to attend three hearings and to comply with directions, and that I should exercise my discretion under s.399A and dismiss her unfair dismissal application. The Applicant's application for remedy from unfair dismissal is therefore dismissed.

[52] An Order to this effect will be issued concurrently with this decision. This ends the Applicant's unfair dismissal application.



COMMISSIONER

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¹ *Fair Work Commission Rules 2024* (Cth) r.7.

² *Ibid.*

³ *Fair Work Act 2009* (Cth) s.399A(1)(a),(b).