



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Anthony Peter Bond

v

Brian’s Auto Centre Pty Ltd
(U2025/15869)

COMMISSIONER HUNT

BRISBANE, 19 JANUARY 2026

Application for an unfair dismissal remedy – postal delay beyond the control of the Applicant.

[1] Mr Anthony Bond has made an application to the Fair Work Commission (the Commission) pursuant to s.394 of the *Fair Work Act 2009* (the Act) alleging that he had been dismissed from his employment with Brian’s Auto Centre Pty Ltd (the Respondent) and that his dismissal was harsh, unjust or unreasonable.

[2] Mr Bond was dismissed on Sunday, 7 September 2025. To be within the 21-day time limit to bring an unfair dismissal application,¹ the application needed to have been made by 29 September 2025.² Mr Bond’s application was received by Commission office in Brisbane on 30 September 2025. The application therefore appears to have been made one day out of time.

[3] This decision deals with whether Mr Bond’s application was made within the statutory 21-day time limit, and if not, whether an extension of time should be granted to Mr Bond for the making of his application.³

Legislative requirements

[4] Section 394 of the Act states:

“394 Application for unfair dismissal remedy

(1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.

Note 2: For application fees, see section 395.

Note 3: Part 6 1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.

- (2) The application must be made:
 - (a) within 21 days after the dismissal took effect; or
 - (b) within such further period as the FWC allows under subsection (3).
- (3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC 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.”

Background

[5] Mr Bond resides in the Gold Coast, Queensland. He was employed by the Respondent as a Console Operator and Driveway Attendant on a casual basis.

[6] Mr Bond was dismissed on 7 September 2025 following a meeting with the Respondent’s owner and two managers. The Respondent alleges that Mr Bond was belligerent and threatening during this meeting, leading the Respondent to form the view that dismissal was the only reasonable outcome. The Respondent states that the purpose of the meeting was to ascertain why property in the residence Mr Bond had been renting had been taken by him when he moved out. Mr Bond claims that these matters were not related to his employment and he was therefore unfairly dismissed.

[7] Mr Bond handwrote his unfair dismissal application and posted it to the Commission’s Brisbane office via express post. The application form is dated 23 September 2025. Postal tracking information included with the envelope indicates that the envelope was received by Australia Post in Mermaid Beach on 26 September 2025. The envelope then arrived at the Commission’s post office box in Brisbane at 4:45am on 29 September 2025. The envelope was not delivered by Australia Post to the Commission’s Brisbane office until 30 September 2025, despite the Commission paying for a daily delivery service.

[8] I have made enquiries as to why the envelope might not have been delivered on 29 September 2025. I have been reliably informed that Australia Post considers the following as

possible explanations for why the delivery was not made to the Commission offices on 29 September 2025:

- (a) The driver collected the mail, but the letter may have slipped behind other items and was overlooked on that day; or
- (b) A driver may not have been available that day to collect mail from the post office box; or
- (c) Staffing shortages at the facility during that period may have impacted mail processing.

[9] Upon the envelope being delivered to the Commission’s Brisbane office on 30 September 2025 it was processed by the Commission and entered into the Commission's file management system.

[10] In the application form, in response to a question asking whether the application is being made within 21 days of the dismissal taking effect, Mr Bond responded “yes” but noted that the application may be a “day late due to posting”.

[11] The Respondent filed a Form F3 response to the application on 9 January 2026. In it, the Respondent raised a jurisdictional objection to the application on the basis that the application was filed outside the 21-day time limit. The Respondent argued that that if the application was only received by the Mermaid Beach post office on Friday, 26 September, it is clear that it would be delivered late. The Respondent further noted that no reason has been given for the application not being received by Australia Post until 26 September 2025, particularly in circumstances where the application is dated 23 September 2025.

When was the application made?

[12] Section 394(2) of the Act refers to the requirement of an application needing to have been “made”. Rule 15(2)(b) of the *Fair Work Commission Rules 2024* (the Rules) allows a document, including an application, to be “lodged” with the Commission by post to an office of the Commission. Therefore, as observed by Deputy President Anderson in *Gore v Coles Supermarkets Australia Pty Ltd (Gore)*,⁴ a posted application is not “made” within the meaning of s.394(2) of the Act until it is received by an office of the Commission. An application is not “made” when drafted, dated or posted.⁵

[13] In *Gore*, Ms Gore made an unfair dismissal application to the Commission by express post. The application was delivered to the Commission’s post office box on 5 August 2022 but was not retrieved by an administrative officer of the Commission until 11 August 2022.⁶ Deputy President Anderson found that the application was not “made” until it was removed from the post office box by the Commission’s administrative officer on 11 August 2022.

[14] Adopting the reasoning of Deputy President Anderson in *Gore*, I find that that Mr Bond’s application was “made”, in the sense contemplated by s.394(2) of the Act, on 30 September 2025. Although delivered to the Commission’s post office box on 29 September 2025, the application was not received by an office of the Commission until the following day. Having regard to the language of s.394(2) of the Act and r.13(2)(b) of the Rules, it is at this time that lodgement occurred and the application was “made”.

[15] As I have determined that the application was made one day outside the statutory timeframe prescribed by s.394 of the Act, Mr Bond requires an extension of time in order for his application to proceed.

[16] I now turn to consider the factors set out in s.394(3) of the Act to determine whether Mr Bond should be granted an extension of time.

Should an extension of time be granted?

Applicable case law

[17] The meaning of “exceptional circumstances” was considered in *Nulty v Blue Star Group Pty Ltd*,⁷ where the Full Bench said:

“[10] It is convenient to deal first with the meaning of the expression ‘exceptional circumstances’ in s.366(2). In *Cheval Properties Pty Ltd v Smithers* a Full Bench of FWA considered the meaning of the expression ‘exceptional circumstances’ in s.394(3) and held:

‘[5] The word ‘exceptional’ is relevantly defined in The Macquarie Dictionary as “formatting an exception or unusual instance; unusual; extraordinary.” We can apprehend no reason for giving the word a meaning other than its ordinary meaning for the purposes of s.394(3) of the FW Act.’

[11] Given that s.366(2) is in relevantly identical terms to s.394(3), this statement of principle is equally applicable to s.366(2).

[12] The ordinary meaning of the expression ‘exceptional circumstances’ was considered by Rares J in *Ho v Professional Services Review Committee No 295* a case involving in s.106KA of the *Health Insurance Act 1973* (Cth). His Honour observed:

‘23. I am of opinion that the expression “exceptional circumstances” requires consideration of all the circumstances. In *Griffiths v The Queen* (1989) 167 CLR 372 at 379 Brennan and Dawson JJ considered a statutory provision which entitled either a parole board or a court to specify a shorter non-parole period than that required under another section only if it determined that the circumstances justified that course. They said of the appellant’s circumstances:

“Although no one of these factors was exceptional, in combination they may reasonably be regarded as amounting to exceptional circumstances.”

24. Brennan and Dawson JJ held that the failure in that case to evaluate the relevant circumstances in combination was a failure to consider matters which were relevant to the exercise of the discretion under the section (167 CL at 379). Deane J, (with whom Gaudron and McHugh JJ expressed their concurrence on this point, albeit that they were dissenting) explained that the power under

consideration allowed departure from the norm only in the exceptional or special case where the circumstances justified it (167 CLR at 383, 397).

25 And, in *Baker v The Queen* (2004) 223 CLR 513 at 573 [173] Callinan J referred with approval to what Lord Bingham of Cornhill CJ had said in *R v Kelly (Edward)* [2000] QB 198 at 208, namely:

“We must construe ‘exceptional’ as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.”

26. Exceptional circumstances within the meaning of s 106KA(2) 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. Thus, the sun and moon appear in the sky everyday and there is nothing exceptional about seeing them both simultaneously during day time. But an eclipse, whether lunar or solar, is exceptional, even though it can be predicted, because it is outside the usual course of events.

27. 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” in s 106KA(2) 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. And, the section is directed to the circumstances of the actual practitioner, not a hypothetical being, when he or she initiates or renders the services.’

[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.” [footnotes omitted].

[18] In *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/as Richmon Oysters*,⁸ a Full Bench of the Commission rejected the finding at first instance that the decision in *Cheval Properties Pty Ltd (t/as Penrith Hotel Motel) v Smithers*⁹ stood for a decision rule that, absent a credible explanation for the entirety of the delay, there could be no finding of exceptional circumstances. The Full Bench reaffirmed the test for exceptional circumstances as follows:¹⁰

“As we have mentioned, the assessment of whether exceptional circumstances exist requires a consideration of all the relevant circumstances. No one factor (such as the reason for the delay) need be found to be exceptional in order to enliven the discretion to extend time. This is so because even though no one factor may be exceptional, in combination with other factors the circumstances may be such as to be regarded as exceptional.” [emphasis in original]

[19] An applicant for an extension of time has an onus to adduce evidence in support of matters which that applicant asserts constitute exceptional circumstances.¹¹

[20] The test of ‘exceptional circumstances’ establishes a ‘high hurdle’ for an application seeking an extension of time to file an application for the Commission to deal with a dismissal dispute.¹²

The reason for delay – s.394(3)(a)

[21] The reason for the delay in lodging an application is a factor that must be considered. The Act does not specify what reason or reasons for delay might favour granting an extension, although decisions of the Commission have referred to an acceptable or reasonable explanation.¹³ The absence of an explanation for any part of the delay will usually weigh against an applicant in such an assessment. Similarly, a credible explanation for the entirety of the delay will usually weigh in an applicant’s favour, though it is ultimately a question of degree and insight.¹⁴

[22] A reasonable explanation for the delay is not needed for the whole of the period of delay, or may in fact not be required at all, if the circumstances are otherwise exceptional.¹⁵ The period of the delay requiring explanation is the period commencing immediately after the time for lodging an application has expired, ending on the day on which an application is ultimately lodged. That said, regard may be had to any circumstances from the date the dismissal took effect when assessing whether an explanation for the delay is acceptable or credible.¹⁶

[23] Mr Bond posted his application by express post on Friday, 26 September 2025. This date is within the 21-day timeframe. Having paid for an express post envelope, it is reasonable to expect that it would be delivered to a capital city by the following business day. It was, and due to no error on Mr Bond’s behalf, nor of the Commission’s behalf, it was placed in the Commission’s post office box before 5:00am on 29 September 2025, but not delivered to the Commission, as expected.

[24] The delay is not attributable to Mr Bond. Had the application been delivered to the Commission’s office the same day it was delivered to the Commission’s post office box, the

application would have been made within time. The reason for the delay is a failure by Australia Post to meet its service commitments to the Commission.

[25] The explanation for the delay weighs strongly in favour of a finding of exceptional circumstances.

Whether the person first became aware of the dismissal after it had taken effect – s.394(3)(b)

[26] Mr Bond became aware of the dismissal on the day it took effect. I consider this to be a neutral factor in the determination of whether there are exceptional circumstances.

Any action taken by the person to dispute the dismissal – s.394(3)(c)

[27] Where an applicant takes action to contest a termination, it will put the employer on notice that its decision to terminate the applicant's employment is actively contested and may, depending on all the circumstances, favour the granting of an extension of time.¹⁷

[28] It is the Respondent's position that after being informed of his dismissal, Mr Bond reacted aggressively. There is no evidence that Mr Bond took any specific action to contest his dismissal other than the filing of the unfair dismissal application.

[29] I consider this to be a neutral factor in the determination of whether there are exceptional circumstances.

Prejudice to the employer (including prejudice caused by the delay) – s.394(3)(d)

[30] There has been a delay of a number of months in this application being allocated to me. This is due to deficiencies in the paperwork filed by Mr Bond in respect of his application to waive the lodgement fee for his application. This also caused a delay in the Respondent being served the application.

[31] The Respondent contends that it will suffer some prejudice, as some key witnesses have left the business.

[32] I accept that the Respondent may suffer some prejudice should the application proceed arising from the delays in processing the application to date. However, this prejudice was not caused by the delay in the making of the application. I therefore consider this to be a neutral factor in the determination of whether there are exceptional circumstances.

The merits of the application – s.394(3)(e)

[33] In the matter of *Kornicki v Telstra-Network Technology Group*,¹⁸ the Commission considered the principles applicable to the exercise the discretion to extend time under s.170CE(8) of the *Workplace Relations Act 1996*. In that case the Commission said:

“If the application has no merit then it would not be unfair to refuse to extend the time period for lodgement. However we wish to emphasise that a consideration of the merits of the substantive application for relief in the context of an extension of time application

does not require a detailed analysis of the substantive merits. It would be sufficient for the applicant to establish that the substantive application was not without merit.”

[34] The reason for the dismissal relates to allegations of theft of property by Mr Bond. These are serious allegations, and it would not be desirable nor possible to determine them without a substantive hearing as to the merits of the application.

[35] My consideration of the parties’ respective merits is that this is a neutral factor in the determination of whether there are exceptional circumstances.

Fairness as between the person and other persons in a similar position – s.394(3)(f)

[36] The criterion of “fairness as between the person and other persons in a similar position” was considered by Deputy President Gostencnik in *Morphett v Pearcedale Egg Farm*,¹⁹ where it was said:

“...cases of this kind will generally turn on their own facts. However, this consideration is concerned with the importance of an application of consistent principles in cases of this kind, thus ensuring fairness as between the Applicant and other persons in a similar position, and that consideration may relate to matters currently before the Commission or matters which had been previously decided by the Commission.”

[37] I am not satisfied that the criterion of fairness between Mr Bond and other persons in a similar position weigh strongly in favour of either party. As such, I consider it a neutral consideration.

Conclusion

[38] Mr Bond has made his unfair dismissal application one day outside the statutory 21-day timeframe prescribed by s.394 of the Act. He therefore requires an extension of time in order for his application to proceed.

[39] Taking into consideration the matters I am required to take into account under s.394(3) of the Act, I am satisfied that there are exceptional circumstances in this case. I consider that the circumstances of this case are out of the ordinary course, unusual and uncommon.

[40] I will exercise my discretion to allow an extension of time for the making of the application until 30 September 2025.

[41] Having allowed the extension of time, I will shortly issue directions requiring the parties to file material in preparation for a hearing of the substantive application.



COMMISSIONER

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<PR795964>

¹ *Fair Work Act 2009* (Cth) s.394(2)(a).

² *Acts Interpretation Act 1091* (Cth) s.36(2).

³ *Fair Work Act 2009* (Cth) s.394(2)(b).

⁴ *Gore v Coles Supermarkets Australia Pty Ltd* [2022] FWC 2341, at [33].

⁵ *Ibid.*

⁶ *Ibid* at [21]–[23].

⁷ [2011] FWAFB 975.

⁸ [2018] FWCFCB 975.

⁹ (2010) 197 IR 403 at [16]–[18].

¹⁰ [2018] FWCFCB 901 at [38].

¹¹ *Smith v Canning Division of General Practice* [2009] AIRC 959.

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

¹³ *Manoj Ellikuttige v Moonee Valley Racing Club Inc* [2018] FWCFCB 4988 at [30] and [36].

¹⁴ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd t/a Richmond Oysters* [2018] FWCFCB 901 at [35]–[45].

¹⁵ *Ibid*; *Elliott v LEAP Legal Software Pty Ltd t/a LEAP Legal Software* [2018] FWCFCB 3288.

¹⁶ *Shaw v Australia and New Zealand Banking Group Limited* [2015] FWCFCB 287 at [12]; *Ozsoy v Monstamac Industries Pty Ltd* [2014] FWCFCB 2149 at [31]–[33]; and *Perry v Rio Tinto Shipping Pty Ltd T/A Rio Tinto Marine* [2016] FWCFCB 6963.

¹⁷ *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298.

¹⁸ Print P3168, 22 July 1997 per Ross VP, Watson SDP and Gay C.

¹⁹ [2015] FWC 8885 at [29].