



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Suzy Malhotra

v

People Living with HIV AIDS Victoria Inc T/A Living Positive Victoria
(U2021/2373)

COMMISSIONER BISSETT

MELBOURNE, 20 APRIL 2021

Application for an unfair dismissal remedy.

[1] This decision concerns an application by Ms Suzy Malhotra (Applicant) for an unfair dismissal remedy pursuant to s.394 of the *Fair Work Act 2009* (FW Act).

[2] The Applicant’s employment with People Living with HIV AIDS Victoria Inc T/A Living Positive Victoria (Respondent) was terminated with effect on 1 March 2021. The unfair dismissal application was lodged at 1:12am, on 23 March 2021.

[3] Section 394(2) of the FW Act states that an application for an unfair dismissal remedy must be made “within 21 days after the dismissal took effect”, or within such further period as the Commission allows pursuant to s.394(3) of the FW Act. The period of 21 days ended at midnight on 22 March 2021. The application was therefore filed one hour and 12 minutes outside the 21 day period. The Applicant asks the Commission to grant a further period for the application to be made under s.394(3) of the FW Act. The Respondent opposes this request.

[4] The FW Act allows the Commission to extend the period within which an unfair dismissal application must be made only if it is satisfied that there are “exceptional circumstances”. 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.¹ 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.²

¹ *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [13].

² *Ibid.*

[5] Section 394(3) of the FW Act requires that, in considering whether to grant an extension of time, the Commission must take into account the following:

- (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.

[6] The requirement that these matters be taken into account means that each matter must be considered and given appropriate weight in assessing whether there are exceptional circumstances. I now consider these matters in the context of the Application.

Reason for the delay

[7] The delay required to be considered in s.394(3)(a) is the period after the prescribed 21 day period for lodging an application. It does not include the period from the date the dismissal took effect to the end of the 21 day period.³ However, the circumstances from the time of the dismissal must be considered when assessing whether there is an acceptable reason for the delay, or any part of the delay, beyond the 21 day period.⁴

[8] The Applicant agreed that she was aware of the 21 day time period within which she was required to make her application for unfair dismissal.

[9] The Applicant cited a “series of issues which [she] had no control over” as the reasons for the delay in lodging the application.

[10] Firstly, the Applicant said that on 11 March 2021, she contacted the Australia Services Union (ASU) to seek assistance with her application for unfair dismissal remedy. The Applicant was unable to reach the ASU by telephone and left a voicemail message requesting that she be contacted regarding her application. The Applicant contacted the ASU by telephone again on 16 and 19 March 2021 and was informed that an appropriate person from the organisation would contact her in due course.

[11] The Applicant said when it became apparent to her that the ASU would not be able to provide assistance to her before the end of the 21 day period she “made the call” to submit the application herself.

³ *Long v Keolis Downer T/A Yarra Trams* [2018] FWC 4109 at [40].

⁴ *Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank* [2015] FWC 287 at [12]; *Ozsoy v Monstamac Industries Pty Ltd* [2014] FWC 2149 at [31]; *Diotti v Lenswood Cold Stores Co-op Society t/a Lenswood Organic* [2016] FWC 349 at [29]-[31] as cited in *McClelland v New Horizons Pty Ltd t/a New Horizons* [2020] FWC 5075.

[12] The Applicant further stated that the ASU had agreed to provide representation to her in Commission proceedings however, it was later conceded by the Applicant under cross examination that the ASU had only confirmed that they would provide support to her through the unfair dismissal process.

[13] Secondly, the Applicant submitted the delay is attributed to the fact that she is not technologically savvy and experienced internet connectivity issues on 22 March 2021.

[14] The Applicant said in the past she has relied on support from the Respondent's IT department to assist her in using devices, resolving internet connectivity issues and constructing documents.

[15] The Applicant said that, upon her dismissal, she returned all organisational equipment to the Respondent including a laptop and mobile phone. She then did not have access to a computer or mobile phone until after she received her final pay from the Respondent and could purchase these items for herself.

[16] The Applicant also submitted that she does not have internet at her home and relies on using her mobile phone 'hotspot' connection to access the internet and her email accounts. The Applicant stated that the hotspot connection had a history of being unreliable particularly during 'peak times' when there is high internet usage in the inner-city area where she lives.

[17] The Applicant said that on 22 March 2021 she accessed the FWC website to submit her application at 9:00pm or 10:00pm. During this time, she experienced internet connectivity issues and was not able to submit her application within the 20 minute time-out period she said was provided by the FWC's website. The Applicant also said she had issues in copying and pasting her application from a previously drafted word document and this resulted in her exceeding the timeframe. She was eventually able to overcome the technical issues and submitted her application one hour and 12 minutes out of time, at 1:12am on 23 March 2021.

[18] The Applicant stated that she was unaware that she would need to submit her application using an online form prior to her accessing the FWC website.

[19] The Applicant said that but for the technological issues, the application would have been received in time.

[20] The Respondent submits the Applicant did not and could not rely on the ASU to complete or file her application. Further, delayed contact from the ASU would not be considered out of the ordinary course, or unusual, or special, or uncommon as:

- the Applicant did not attempt to contact the ASU until 10 days after her dismissal took effect;
- the Applicant had not demonstrated that any further messages were left with the ASU beyond her first call attempt;
- the Applicant had not demonstrated attempted alternative methods of contact with the ASU such as email or post;

- the Applicant already commenced the Application on 11 March 2021 regardless of any purported failed contact with the ASU and
- the ASU are not engaged as the Applicant's representatives and the Applicant therefore could not rely on them.

[21] The Respondent further submitted that the Applicant had prior knowledge of the internet connectivity issues she commonly experienced and of her limited technological skills. As such, the Applicant assumed the risk of delay when she exercised her choice to wait until 9:00pm or 10:00pm on the evening of 22 March 2021 to file her Application.

[22] The Respondent said that the Applicant ought to have explored alternative methods or filed her application earlier to avoid any issues occurring.

[23] During cross examination, the Applicant conceded that at no point did the ASU confirm that they would assist her in filing her application but rather it was explained that they would "support her through the process". The Applicant went on to note that she understood the term 'support' to mean the ASU would be present in proceedings and assist her in putting her application into a "coherent and cohesive format".

[24] Whilst a delay of one hour and twelve minutes may not appear substantial, the 21 day time limit for making an application must be complied with. In this case the Applicant was aware of connectivity issues – she agreed that she had experienced them throughout the period she was working from home. On those circumstances, she cannot be surprised of such issues and should have planned for such an eventuality.

[25] The Applicant has provided no reason for waiting until 9:00pm or 10:00pm at night on 22 March 2021 – the day she knew her application was due – to commence her application process. The Applicant does not suggest she was still waiting for the ASU to contact her that late in the evening that might otherwise explain why she waited so long.

[26] This is not a case of representative error. The Applicant does not suggest that she directed the ASU (or the ASU agreed) to file her application and then failed to do so.

[27] There was nothing to stop the Applicant filing her application within the 21 day period (save some delay in purchasing her laptop and phone) that could be said to have stopped her filing her application within 21 days.

Whether the person first became aware of the dismissal after it had taken effect

[28] The Applicant was notified of the dismissal on the same day that it took effect and therefore had the full period of 21 days to lodge the unfair dismissal application.

Action taken to dispute the dismissal

[29] The Applicant has taken no action other than this application to dispute his dismissal.

Prejudice to the employer

[30] I cannot identify any prejudice that would accrue to the company if an extension of time were to be granted and the Respondent does not claim any prejudice.

Merits of the application

[31] The FW Act requires me to take into account the merits of the application in considering whether to extend time. The competing contentions of the parties in relation to the merits of the Application are set out in the application (Form F2) and in the Respondent's response to that application (Form F3). I do not repeat them here. Having examined these materials, it is evident to me that the merits of the Application turn on contested points of fact which would need to be tested if an extension of time were granted and the matter were to proceed. It is not possible to make any firm or detailed assessment of the merits at this stage. The Applicant has a prima facie case, to which the Respondent raises an apparent defence.

Fairness as between the person and other persons in a similar position

[32] Neither party brought to my attention any relevant matter concerning this consideration and I am unaware of any relevant matter.

Conclusion

[33] The test of *exceptional circumstances* in s.394(3) of the FW Act is a stringent one. Having considered each of the statutory criteria I am not satisfied that there are exceptional circumstances that support an extension of time. The Applicant has failed to provide a satisfactory explanation for the delay in making her application. There was nothing to stop her filing her application within 21 days. Knowing the application was due by 22 March 2021 the Applicant did nothing to meet the deadline until two or three hours before hand in circumstances where she knew she regularly had connectivity issues with her telephone hotspot.

[34] The remaining matters I need to consider tell neither for nor against the application for an extension of time.

[35] In these circumstances, having considered all submissions, I am not convinced there are exceptional circumstances such that an extension of time should be granted.

[36] The application was made outside the time limit imposed by the FW Act and therefore not in accordance with the FW Act. The application for unfair dismissal remedy is therefore dismissed. An Order¹ to this effect will be issued with this decision.



COMMISSIONER

Appearances:

S. Malhotra on her own behalf.

L. Zisis for the Respondent.

Hearing details:

2021.

Melbourne by telephone.

9 April 2021.

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<PR728550>

Endnote:

¹ PR728754.