FAIR WORK AUSTRALIA

Smith v KJM Contractors Pty Ltd

[2010] FWA 5515

Richards SDP

14, 29 July 2010

Termination of Employment — Alleged unfair dismissal — Application for relief brought out of time — Extension of time allowable if exceptional circumstances — Period in which application to be lodged included Christmas period — Access to professional advice thereby difficult — Such circumstances not exceptional — Whether statutory lodgment period inclusive of weekends and public holidays — Fair Work Act 2009 (Cth), ss 394(1), 394(2), 394(3).

Words and Phrases — "Exceptional circumstances".

A person was dismissed from his employment on 17 December 2009. He applied for an unfair dismissal remedy on 8 January 2010. Pursuant to s 394(2) of the *Fair Work Act 2009* (Cth), such application had to be made within 14 days after the dismissal took effect. His application therefore should have been made no later than 31 December 2009.

However, s 394(3) of that Act provided that Fair Work Australia could allow a further period of time for such application to be made if it was satisfied there were exceptional circumstances, taking into account the matters detailed in that subsection.

Held (dismissing the application as having been made out of time): (1) The *Fair Work Act* required an application for an unfair dismissal remedy to be made within 14 calendar days after the dismissal took effect, regardless of the day of the week on which they fell, be it a Saturday, a Sunday, a public holiday, at Easter, on an Anzac Day, at Christmas and so on.

(2) Accordingly, despite the fact that difficulties in making such an application might arise in relation to the Christmas period because access to professional advice might be affected, the Christmas public holidays were a predictable and known event on the calendar, much as any other holiday period; they did not represent an unforeseen or unexpected event insofar as they posed an unanticipated obstacle to the lodgment of an application; and did not, in themselves, constitute "exceptional circumstances" within the meaning of s 394(3) of the *Fair Work Act*.

Application

The applicant was self-represented.

D Tummel and *B Scott*, for the respondent.

Cur adv vult

Fair Work Australia

1 The application to which this decision refers was filed by Mr Christopher Robert Smith. He sought an unfair dismissal remedy (under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) in relation to the termination of his employment by his former employer, KJM Contractors Pty Ltd (the respondent).

2 This decision was initially given in transcript on 13 July 2010.

3 The reasons for decision retained on transcript are now placed in writing. They are the same reasons given verbatim at the time of hearing but for the inclusion of these introductory comments, the relevant statutory provisions and some minor editing indicated by the use of parentheses, which are an aid to fluency.

4 I have taken the step of putting the reasons for decision in writing because of the operation of s 601 of the FW Act, which I have read in conjunction with the Explanatory Memorandum to the FW Act, at Items 2309-2312. Item 2310 of the Explanatory Memorandum states that "[i]t is expected that FWA will provide written reasons for all decisions of significance".

5 Out of caution, I now provide the written reasons for my decision as previously only provided in transcript and not otherwise published.

Statutory context

6 Section 394(2) and (3) of the FW Act reads as follows:

> (2) The application must be made:
>
> (a) within 14 days after the dismissal took effect; or
>
> (b) within such further period as FWA allows under subsection (3).
>
> (3) FWA may allow a further period for the application to be made by a person under subsection (1) if FWA is satisfied that there are exceptional circumstances, taking into account:
>
> (a) the reason for the delay; and
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> (b) whether the person first became aware of the dismissal after it had taken effect; and
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> (c) any action taken by the person to dispute the dismissal; and
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> (d) prejudice to the employer (including prejudice caused by the delay); and
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> (e) the merits of the application; and
>
> (f) fairness as between the person and other persons in a similar position.

Factual matrix and consideration as provided in decision in transcript

7 The application before me was lodged some eight days beyond the 14 day time period as specified under s 394(2) of the FW Act. […] It appears to me that the termination took effect on 17 December 2009.

8 The period of time from 17 December to 31 December is 14 days.

9 The application should have been made on 31 December, which is the end of the 14 day period.

10 The application was not made until the eighth day of January.

11 Section 394(2)(a) of the Act states that an application must […] be made within 14 days after the dismissal took effect. This application was made some

22 days after the dismissal took effect. Fair Work Australia can allow an application which is beyond the 14 days, but only when it has satisfied subs (3) of s 394 of the Act.

12 Section 394(3) of the Act reads as follows, […] FWA may allow a further period for the application to be made by a person under subsection (1) – which this application is made under – if FWA is satisfied that there are exceptional circumstances, taking into account those matters that are detailed in the directions.

13 That is, I have to take into account the reasons for the delay, whether the person first became aware of the dismissal after it had taken effect – which is not the case here – any action taken by the person to dispute the dismissal, any prejudice to the employer, the merits of the application, and the fairness as between the person and other persons in a similar position. But the test that I need to [apply to] those various matters [is whether] they generate any exceptional circumstances.

14 […] The applicant was dismissed from his employment on 17 December 2009. He sought legal representation, or he sought to at least approach a solicitor's firm on 24 December 2009, immediately prior to Christmas. A meeting was not arranged with a solicitor until 5 January 2010, a time some five days beyond the statutory time period.

15 […] The circumstances the applicant faced [were] that he only had seven days, in effect, in which he could access legal advice in relation to his application before he faced the onset of the Christmas period, which would see his opportunity to seek professional advice within the 14 day period curtailed.

16 It is reasonable to assume that access to professional advice is more limited over the Christmas period than it is on any other public holiday period in the calendar year, perhaps but for the Easter period. But despite this the applicant still ha[d] 14 days [within which to make] an application […], and he did not do so.

17 Despite the fact that difficulties may arise in relation to the Christmas period, the Christmas public holidays are a known event on the calendar. They do not represent an unforeseen or an unexpected event, in so far as they posed an unanticipated obstacle to the lodgment of an application. They are predictable and known events on the calendar, much as any other holiday period, in fact if not more notorious than that.

18 The FW Act makes no provision for offsetting the 14 day period within which an application must be made for weekends or public holidays. That is, the FW Act requires an application to be made within 14 calendar days, and the calendar days are counted regardless of the day of the week on which they fall, be it a Saturday, a Sunday, a public holiday, at Easter, on an Anzac Day, at Christmas and so on.

19 The FW Act does not discriminate in relation to any of those days in so far as it requires 14 days within which to make an application. Applicants face a requirement therefore to make an application within 14 days regardless of where public holidays and weekends [might] fall, and this includes the Easter period as well.

20 It appears to me that the FW Act places an obligation on employees to make an application aware of, or being cognisant of, the 14 day calendar period, irrespective of intervening public holidays or weekends, which may of course affect access to professional advice, as well as generating other circumstances.

21 That said, what are the wider circumstances relevant to this application, and do these bear on any potential finding in relation to whether there are any exceptional circumstances in relation to the late application?

22 The applicant's evidence did not suggest that he had any knowledge of the statutory framework whatsoever until such time as he met his solicitor on 5 January 2010. The applicant gave no evidence of having sought to obtain that information when he first contacted the applicable law firm. The applicant stated that he did not realise there was a 14 day time period within which to make an application until he met with his solicitor on 5 January 2010, and that was the applicant's evidence at para 43 of the transcript.

23 There was no conversation between the applicant and the solicitor on 24 December 2009. The applicant stated that between 17 December 2009 and 24 December 2009 he was just thinking about what to do, and did not take any further action. That was the applicant's evidence at para 51 of the transcript.

24 The applicant did not make any efforts to identify his rights and obligations in the week leading up to the Christmas break. That is his evidence at para 53 of the transcript, under direct questioning from myself. This was despite the knowledge of the upcoming Christmas break, [which was] of course common knowledge.

25 The applicant made contact with the solicitor's law firm on 24 December 2009 and spoke to a receptionist or administrative person. That was the applicant's evidence at para 74 of the transcript.

26 He stated that the matter was about an unfair dismissal, it would seem, but provided little other detail. This was the applicant's evidence at para 77 of the transcript. Upon speaking with the receptionist or administrative person, the law firm was provided the applicant's mother's home telephone number to respond to. A solicitor did so, according to the statutory declaration provided by the applicant's mother, at 12.39 pm that same day, on 24 December 2009.

27 According to the applicant's mother's statutory declaration, that is Exhibit A1, the applicant's mother however did not access the telephone voicemail until 5 pm or thereabouts that day, and did not return the solicitor's call, believing that the solicitor's firm would be closed.

28 The solicitor left his mobile telephone number for the applicant in the voicemail message left on his mother's voicemail service. It appears from the applicant's mother's statutory declaration [Exhibit A1] that the applicant's mother sent an SMS text message to the solicitor on 26 December 2009. There appears to have been no response to that text message until 4 January 2010, and I do not know whether that was in response to that text message, or in response to the original effort to contact the applicant's mother's telephone number on 24 December 2009.

29 But in any event, on 4 January 2010 the solicitor again telephoned the applicant's mother and a meeting was arranged, through discussion between the applicant's mother and the solicitor, for the following day on 5 January 2010. There is no evidence that the applicant at any stage indicated the date of termination of his employment, or that there was any urgency in relation to the matter. One would expect that a solicitor would raise this matter as a threshold consideration if that was brought to his or her attention. But equally in the circumstances, all I know as a matter of evidence is that the applicant did not provide much detail about the matter to the receptionist or administrative person, when he contacted the law firm on 24 December 2009.

30 The applicant could have telephoned the solicitor's firm later that day, I presume, at his own initiative but seems not to have done so, for reasons not brought into evidence, despite express opportunities to do so.

31 There is no evidence that the applicant's solicitor spoke to either the applicant or his mother on 24 December 2009, and failed to mention that an application was subject to a statutory timeframe, or in fact had left a message that there was a statutory timeframe. The applicant's mother's statutory declaration, that is Exhibit A1, states that there was no return call of the solicitor on 24 December 2009, and that it appears as from that evidence that the extent of the solicitor's telephone message was to provide a name and a contact mobile telephone number.

32 If there had been a conversation at that time, arguably the delay could have been attributable to a failure by an experienced legal representative to mention the issue of the timetable for lodgment. I adjourned these proceedings on the last occasion to ensure that evidence in relation to this interaction, if any, was given an opportunity to be properly adduced.

33 The evidence before me did not indicate there was any conversation between the applicant or the applicant's mother and the solicitor on 24 December 2009, despite the solicitor having left his mobile telephone number. The applicant was unable to explain why there was a three day gap between 5 to 8 January 2010 before the application was made. That was evidence recorded in transcript in the prior hearing. I might be in a position to presume that that was an administrative delay on the part of the law firm but, equally, instructions may have needed to have been obtained or clarified and that may have caused that further delay. In either case, considerable uncertainty attends to the issue of causation for that further three day delay beyond 5 January 2010.

34 I should add further that I have made repeated efforts to contact the law firm's solicitor and have even written to the managing partner of that law firm, seeking information about what was said to whom and when, but the law firm has not responded on any occasion to me. Neither the managing partner nor the relevant solicitor have responded to my requests and approaches in these regards. Arguably I should not have needed to act on the applicant's behalf in these matters in any event. But that said, the evidence of the applicant's mother, that is Exhibit A1, is sufficiently clear: there was no conversation at all with the applicant and\or his mother and the solicitor until 5 January 2010.

35 I should also add that the applicant appears to have ceased to have been personally active in relation to his application after he telephoned the law firm on 24 December 2009. After that his mother appears to have acted, in effect, as his agent.

36 The matters that I have just been dealing with relate to the reasons for the delay. I need also to consider, for the purposes of s 394(3)(b) of the Act, whether the person first became aware of the dismissal after it had taken effect. But I have previously indicated in my introductory remarks that that matter does not arise in relation to this application.

37 For the purposes of s 394(3)(c) of the Act I need to consider whether or not there was action taken by the applicant in relation to this matter to dispute the dismissal. As I understand it from the evidence in this matter, other steps were taken to contest the dismissal but that was in the period prior to the termination taking effect on 17 December 2009. It appears at that time that there was a conversation between the applicant and the respondent about the circumstances

of his dismissal, which was subsequently confirmed; and that is confirmed on 17 December, and to take effect on 17 December 2009. The applicant described this information as having arisen in effect through a miscommunication.

38 I should say that, if anything, I can reasonably conclude from the evidence that the applicant was not entirely passive in response to the impending termination taking effect, and this gives positive weight in relation to the request to allow the late application.

39 Section 394(3)(d) of the Act requires me to consider whether or not there is any prejudice to the employer, including prejudice caused by the delay. This is not a matter that weighs necessarily against the applicant in relation to these matters. The employer does not contend that there is any prejudice arising of any substantive kind that it seeks to ventilate.

40 Section 394(3)(e) of the Act requires me to consider the merits of the application, should they be before me.

41 […] The merits of the application of this matter, as would be expected in these matters, have not been substantively dealt with, and are therefore of neutral effect in relation to my overall considerations.

42 I need finally to consider, for the purposes of s 394(3)(f) of the Act whether or not there is fairness as between the applicant, being the person, and other persons in a similar situation. There are no express instances of people in an identical situation being before me. There are no other employees of the same firm terminated in the same circumstances, who have been dealt with in a different manner at all.

43 But I do observe nonetheless, at least at the Tribunal level, that other applicants who come before this Tribunal must themselves act within the time period, and that is a time period unconditioned by public holidays and weekends. As I explained, the Act does not differentiate between working days and weekends and public holidays. The 14 days are simply 14 calendar days regardless of the nature of the day on which they fall. Consequently, employees who are dismissed in a period, for example such as Easter, face similar circumstances as this applicant, who was attempting to access some professional advice at the time of the expiry of the 14 day period.

Conclusion

44 For the purposes of s 394(2)(b) of the FW Act, I need to consider all of those matters which I have just raised, and about which I have made comment, and I need to come to a view, as I said at the very beginning, on whether or not any of these circumstances, taken together or singularly, generate what the Act says are exceptional circumstances.

45 In all, I do not consider the circumstances that I have discussed and set out, and have been adduced through this evidence, generate exceptional circumstances such as the Act warrants. The external event of the Christmas period was not an unforeseen event. It is a generally known event. The Act makes no allowances for public holidays or weekends. Such public holidays must therefore be accommodated by a dismissed employee.

46 As I said, the issue of the Christmas break was not unforeseen. It is an entirely predictable event which must reasonably be managed, and managed around, by all persons making applications, where their access to advice and other activity is curtailed or limited by public holidays and weekends.

47 I should also add that the dismissed employee did not demonstrate a high

degree, or a degree, of self-agency in relation to effecting his application after 24 December 2009; nor is there any discernable effort to obtain information about rights and obligations.

48 [If] the applicant is not responsible for the delay between 5 and 8 January 2010, he nonetheless remains responsible for the residual period. But as I have said earlier, my findings in that regard remain uncertain, as I do not know with what degree of accuracy the applicant's directions were provided to the legal representative on or after 5 January 2010.

49 None of the matters that I have considered under s 394(3)(a) through to (f) of the FW Act cause me to set aside my general finding that the circumstances of this matter do not generate any exceptional circumstances as the Act requires. This includes any action or inaction by the applicant's solicitor. The evidence does not generate a case for a wider representational argument, [though] I have endeavoured to determine whether such a case existed by way of calling for additional evidence.

50 [On the basis of these findings], it therefore is necessary for me to dismiss this application, as it has been made under s 394(1) of the FW Act.

Application dismissed

DR RJ DESIATNIK