



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Jason Tearne

v

Civil Group (Aust) Pty Ltd

(U2024/6438)

COMMISSIONER SIMPSON

BRISBANE, 17 OCTOBER 2024

*Application for an unfair dismissal remedy – application out of time - jurisdictional objection
high income threshold – application dismissed*

[1] On 16 May 2024, Mr Jason Tearne (**Mr Tearne / the Applicant**) applied to the Fair Work Commission (**the Commission**) under section 394 of the *Fair Work Act 2009* (Cth) (**the Act**) for an unfair dismissal remedy, alleging he was unfairly dismissed from his employment with Civil Group (Aust) Pty Ltd (**the Respondent**). The Respondent objected to the application as it said the Applicant's earnings were above the high income threshold and he was not covered by a Modern Award or Enterprise Agreement. In addition, the Respondent also objected to the application on the basis that the Applicant resigned from his employment.

[2] In its Form F3 response to the application, the Respondent did not raise an objection that the application was filed out of time.

[3] The matter was listed for hearing on 30 August 2024 to hear the threshold jurisdictional question on whether the Applicant was eligible to make the application due to the high income threshold, and then subsequently rescheduled to 4 September 2024.

[4] On closer inspection of the material filed in advance of the hearing, it appeared the application may have been filed out of time as the Applicant provided a resignation letter to the Respondent on 13 May 2024 which stated that the resignation was effective immediately. The application was filed on 5 June 2024. It is the Applicant's case that he was forced to resign on the basis that he was told in a telephone call on 13 May 2024 that he could resign or be dismissed.

[5] The Respondent sent an email to the Applicant on the following day, 14 May 2024, confirming receipt of the resignation, advising the Applicant's final pay would be processed on 23 May 2024, and that the Applicant would be paid his accrued entitlements and any outstanding pay up to and including his last day of employment, including the balance of any time off instead of overtime. The Respondent also stated that the Applicant would be paid 2 weeks in lieu of notice as per his contract.

[6] A conciliation conference between the parties listed for 7 August 2024 did not proceed because the Commission was unable to contact the Applicant. The Respondent requested the matter be set down for a jurisdictional hearing.

[7] The matter was listed for a jurisdictional hearing on 4 September 2024 and a hearing by Microsoft Teams proceeded on that date. Mr Tearne appeared on his own behalf and the Respondent was represented by Ms Melissa Hooper, the Respondent's Human Resources Manager, and Mr Jamie Quarrell, the Respondent's General Manager. Both parties confirmed they had the digital hearing book prepared by the Commission.

[8] At the commencement of the hearing on 4 September 2024, it was apparent the parties were not in a position to address the out of time issue. The matter was relisted for hearing on 16 September 2024 in order for the parties to be able to address both the out of time issue and the high income threshold issue in an attempt to avoid the necessity for separate proceedings if an extension of time was granted. At the time of the Applicant's dismissal the high income threshold was \$167,500.00.

[9] In his Form F2 Application, the Applicant said in answer to question 1.3 concerning the effective date of dismissal he did not know the exact date. In answer to question 1.4, he said his application was one day out of time. He also said as follows:

“I am one day late, I did not know there was a time limit. I have been in contact with a solicitor so I waited 2 weeks to get information back from them, only to be told that they will not take on my case. I have been held in limbo by Civil Group who continue to not give me any information regarding my dismissal including my separation certificate. During my employment I have suffered trauma, anxiety and it has raised PTSD issues from being bullied and harassed so I have not been coping with the whole problem properly. My mental health issues were even more exacerbated because I was told to pick between being fired or quitting - I didn't want to do either, I just wanted the bullying and harassment to stop of work in a different section to Matt. I have been busy with trying to deal with these mental health issues and only now have I had the opportunity to address this by filing this claim online.”

[10] The Respondent's Form F3 response to the application contended the employment relationship was ended on 13 May 2024. If the employment relationship was ended on 13 May 2024, the application would be 2 days out of time regardless of whose initiative upon which the employment relationship ended.

[11] At the rescheduled hearing on 16 September 2024, the Applicant failed to appear at the hearing convened by video using Microsoft Teams. Ms Hooper of the Respondent appeared for the business. When the Applicant failed to appear, my associate contacted the Applicant by telephone to query as to why he had not joined the hearing on Microsoft Teams. The Applicant advised my associate that he didn't realise there was a hearing. He asked for the matter to be adjourned and said he could not attend. This is despite the Applicant agreeing to the time and date of hearing at the earlier adjourned hearing of 4 September 2024, and him having been sent detailed directions and the time of listing. I commenced the proceeding in the absence of the Applicant and explained the circumstances to the Respondent's representatives.

[12] The Respondent submitted the Applicant's failure to appear was consistent with the pattern of behaviour it had dealt with while he was an employee. I adjourned the hearing of 16

September 2024 and directed my associate to send an email to the Applicant seeking a written explanation for his failure to appear.

[13] The Applicant subsequently provided a response, and I ultimately decided to list the matter for a further hearing date on 23 September 2024. The appearances at this hearing were the same as the adjourned hearing on 4 September 2024 and the parties were provided an updated digital court book.

Background

[14] The Applicant was employed in the role of Project Manager with the Respondent. On 22 March 2023, he signed a Permanent Full Time Employment Contract confirming a base salary of \$180,000.00 per annum.

[15] The Respondent noted that in December 2023, the Applicant reported experiencing symptoms of acute alcohol withdrawal, and he was placed on leave to allow him to receive treatment. The Applicant returned to work in late January 2024, however the Respondent expressed concerns with his continued need for treatment.

[16] The Respondent submitted that between 28 March 2023 and 28 March 2024, the Applicant took a total of 42.09 days of leave without pay which were mutually agreed with the Respondent. The Applicant submitted that he was on enforced leave without pay despite having obtained medical practitioner clearance as to his fitness for work.

Evidence and Submissions

[17] The Respondent submits that the Applicant's reasons for delay do not constitute a sufficient basis to justify accepting the late application. Ms Hooper and Mr Tearne both provided evidence at this hearing. Ms Hooper adopted both her witness statement concerning the extension of time application¹ and her witness statement concerning the high-income threshold issue.² Mr Tearne also adopted his witness statement concerning the extension of time,³ and his statement in relation to the high income threshold jurisdictional objection.⁴

Relevant legislation

[18] The Act imposes strict criteria for who is eligible to make an application under section 394. Sections 382 and 396 of the Act are extracted below for convenience:

396 Initial matters to be considered before merits

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

- (a) whether the application was made within the period required in subsection 394(2);
- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

- (d) whether the dismissal was a case of genuine redundancy.

382 When a person is protected from unfair dismissal

A person is *protected from unfair dismissal* at a time if, at that time:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

(emphasis added)

Out of Time Issue

[19] Section 394 of the Act reads as follows:

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.
- (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.

[20] The Applicant filed a witness statement in relation to the out of time issue, attaching a letter dated 9 September 2024 provided by one of the Applicant's two treating Senior Medical Officers, in support of his request for an extension of time by 48 hours.

[21] The letter is from Dr Francesco Di Rollo of the Community Health – Alcohol Tobacco and Other Drugs Services (ATODS). Dr Di Rollo stated in the letter that they are a Queensland Health Addiction Psychiatry Senior Medical Officer at Cairns and Hinterland Hospital Health Service. The letter stated that the Applicant has been a long-term client of the service. Dr Di Rollo said whilst they are unable to comment on the intricacies of the work situation, they could comment on the change in the Applicant's presentation to the services over the past few months, the Applicant having been noted as presenting to staff with low mood and flattened affect. Dr Di Rollo stated that the symptomology is in line with a Depressive Episode for which the Applicant is currently receiving treatment. Dr Di Rollo said the Applicant reported the onset of the episode occurred in the months post his employment with the Respondent.

[22] Dr Di Rollo said in the letter that the features of Depression not only affect one's mood state, but can significantly affect one's memory and cognition, and that this should be considered when making a judgement (concerning the extension of time).

[23] In referring to the reasons for the Applicant's delay in filing his application to make its own submissions, the Respondent noted the Applicant initially stated he was only one day late and was unaware of the time limit, and the Applicant's claim that he was waiting for information from a solicitor who declined to take his case after two weeks. The Respondent also noted the Applicant's contention the Respondent had held him in limbo, allegedly failing to provide him with information regarding the dismissal and a separation certificate. The Respondent further noted the Applicant's claims of mental health issues including trauma, anxiety, PTSD, bullying, and harassment during employment and the Applicant's assertions he had only recently been able to address these issues, leading to the delayed filing.

[24] The Respondent objected to these explanations as reasons for the delay on the basis that the Applicant's initial explanation that he was only one day late and also because he did not know there was a time limit was contradictory and inconsistent with his subsequent claims of ongoing interactions with a solicitor and the Respondent, along with his mental health issues, being primary causes for the delay. The Respondent contended this undermined the credibility of the Applicant's reasons for delay.

[25] Regarding the alleged interactions with a solicitor, the Respondent submitted it remained the Applicant's responsibility to comply with the deadline, and his decision to wait for advice was not a valid reason for delay.

[26] The Respondent submitted that the Applicant had not provided evidence that the Respondent failed to provide a separation certificate or information that prevented the timely submission of his application.

[27] The Respondent submitted that while the Applicant later claimed trauma, anxiety, PTSD, and difficulties resulting from workplace conditions, these concerns were not initially the reason for the delay. The claim of medical issues appeared to the Respondent to have been introduced to substantiate the delay retroactively.

[28] The Respondent submitted that given the Applicant acknowledged awareness initially of having brought his application late by one (1) day but was actually two days late, it was therefore evident to the Respondent that there was awareness of the deadline. The Respondent submitted that the Applicant's claim that mental health issues prevented action did not align with the Applicant's initial reasoning of a misunderstanding of time limits, nor did it explain the failure to file immediately upon recognising the delay.

[29] I am satisfied that the medical evidence provided by the Applicant in connection with his medical condition constitutes an exceptional circumstance in relation to the reason for delay and this favours the granting of an extension of one day.

[30] The evidence supports the conclusion that the Applicant first became aware of what he alleges was his dismissal at the time it had taken effect, and he accepted that he did not take any other action to dispute his alleged dismissal. These factors do not favour extending time.

[31] There would be no significant prejudice to the employer by extending time by one day. As there are factual contests in relation to the merits of the application, that is a neutral consideration. There was no evidence concerning any other persons in relation to the matter of fairness as between the Applicant and other persons in a similar position, and it is a neutral consideration.

[32] Having weighed each of the matters I am required to consider in determining whether to extend time by one day, I have determined to grant the extension of time.

High income threshold

[33] Section 332 of the Act outlines what 'earnings' include:

332 Earnings

(1) An employee's earnings include:

(a) the employee's wages; and

(b) amounts applied or dealt with in any way on the employee's behalf or as the employee directs; and

(c) the agreed money value of non - monetary benefits; and

(d) amounts or benefits prescribed by the regulations.

(2) However, an employee's earnings do not include the following:

(a) payments the amount of which cannot be determined in advance;

- (b) reimbursements;
- (c) contributions to a superannuation fund to the extent that they are contributions to which subsection (4) applies;
- (d) amounts prescribed by the regulations.

Note: Some examples of payments covered by paragraph (a) are commissions, incentive - based payments and bonuses, and overtime (unless the overtime is guaranteed).

(3) Non-monetary benefits are benefits other than an entitlement to a payment of money:

- (a) to which the employee is entitled in return for the performance of work; and
- (b) for which a reasonable money value has been agreed by the employee and the employer;

but does not include a benefit prescribed by the regulations.

(4) This subsection applies to contributions that the employer makes to a superannuation fund to the extent that one or more of the following applies:

- (a) the employer would have been liable to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the person if the amounts had not been so contributed;
- (b) the employer is required to contribute to the fund for the employee's benefit in relation to a defined benefit interest (within the meaning of section 291-175 of the *Income Tax Assessment Act 1997*) of the employee;
- (c) the employer is required to contribute to the fund for the employee's benefit under a law of the Commonwealth, a State or a Territory.

[34] The Applicant was engaged as a Project Manager. I am satisfied the Applicant was not covered by an award or an enterprise agreement.

[35] There is a factual contest as to whether the Applicant was fit to work at the times he did not work and whether he was refused his entitlement to work under his contract of employment.

[36] The Applicant submitted that he was not given the opportunity to achieve the \$180,000.00 per annum salary set out in his contract. He contended that in the 2023/2024 Financial Year he received a gross salary of \$125,875.75. He noted that this figure included periods of leave without pay and payment in lieu of notice at the end of his employment. The Applicant submitted at least some of the periods of leave were not optional and therefore he did not have the opportunity to achieve his contracted salary rate and it was because the Respondent could not provide him with a safe work environment.

[37] The Respondent submitted that the periods of leave without pay should not negate the fact that the Applicant's contracted salary was over the high income threshold. The Respondent

submitted that in the 2023/2024 Financial Year the Applicant received a gross salary of \$159,606.26.

[38] Ms Hooper gave evidence that the periods of leave taken by the Applicant were agreed on the basis that the Applicant was not ready to come back to work after having acute alcohol withdrawal in December 2023. Ms Hooper said the Applicant was sent home in December 2023 and the Respondent worked with him such that Mr Quarrell the General Manager had numerous conversations with the Applicant and it was agreed he would return to work in January 2024.

[39] Ms Hooper said the Applicant was still not in a condition to be able to return to work in January 2024 and he had numerous conversations with various managers including the Managing Director and the Operations Manager, and it was agreed on both occasions that the Applicant would not return to work and should have further time to rest and recover. Ms Hooper said numerous attempts were made for the Applicant to return to work from January 2024 until the time when the Applicant resigned, and agreements were reached with the Applicant during this time. Ms Hooper said the Respondent could produce correspondence and statements to support this evidence.

[40] The Applicant said his claim for unfair dismissal is related to alleged bullying by his direct manager to whom he reported, which led to his dismissal. The Applicant did not dispute he was suffering from the symptoms of alcohol withdrawal at the relevant time. He said he brought the bullying to the attention of the Respondent in November 2023.

[41] The Applicant said Ms Hooper's evidence that he had to have time off due to acute alcohol withdrawal was correct to a degree. The Applicant said he reached out to Mr Quarrell as the General Manager who he had a lengthy working relationship with about the alleged bullying. The Applicant asserted this was related to his falling back into a PTSD and alcohol related condition he had not had for many years. The Applicant then appeared to adjust his evidence to the point that he believed he did not have a choice about taking the leave.

[42] At the conclusion of the hearing, I granted the Respondent its request to provide further evidence by the following Monday, 30 September 2024, to support its assertion that the periods of leave were by agreement. The Applicant was advised he would be afforded an opportunity to respond to that material by the following Wednesday, 2 October 2024. I advised the parties on seeing the material I would determine whether a further hearing was required.

[43] On 1 October 2024, the Respondent filed a further submission setting out the particulars of the periods of leave taken, that the periods of leave without pay were mutually agreed upon by the Applicant and the Respondent, and the periods of leave without pay were due to personal circumstances and do not reflect the Applicant's performance or the Respondent's willingness to continue providing regular remuneration for his work.

[44] The Respondent also filed four witness statements from management claiming they confirmed that the periods of leave without pay were mutually agreed upon and requested by the Applicant. The Respondent submitted that it recognised the Applicant as a valued employee who encountered personal difficulties during his employment, and they made every effort to support the Applicant through flexible working arrangements, including leave without pay, while maintaining his overall remuneration package.

[45] The Applicant was granted an extension of time to file his response by 7 October 2024. The Applicant requested a further extension of time until 9 October 2024 to file his material. The Applicant did not file any material on 9 October 2024 and instead sent email correspondence to chambers on 9 October 2024 requesting a further extension of time to file his material by Wednesday 16 October 2024. On 9 October 2024, the Applicant was advised that, as he had already previously been granted an extension to file material, an extension would not be provided for another week but was instead granted to no later than 5pm AEST on Friday 11 October 2024. The Applicant responded by email on 9 October 2024 noting this direction. The Applicant then did not file any material by the deadline.

[46] At 5pm on Friday 11 October 2024 when the Applicant's response material was due, the Applicant sent email correspondence to chambers which, amongst stating other things, requested a further week to file further evidence and submissions. He contended the Respondent's further material addressed matters beyond what was directed at the conclusion of the hearing on 23 September 2024 and therefore his request for a further week's extension to file his further material in response was to the extent of addressing matters beyond what was directed. The Applicant's email making this request did not attach any material for filing in the interim.

[47] I have concluded it is unnecessary to list a further date for hearing or to admit the further witness statements filed by the Respondent for the reasons set out below.

[48] In a decision of a Full Bench of the Commission in *Zappia v Universal Music Australia Pty Ltd* [\[2012\] FWAFB 6108](#) the Full Bench said as follows:

“[9] On the appeal, Mr I Latham, of counsel, who appeared for the appellant both at first instance and on the appeal, submitted that his Honour had erred in his construction of the expression ‘annual rate of earnings’. In our view his Honour was clearly correct. Section 382 of the Act relevantly provides that a person is protected from unfair dismissal at a time if, at that time, the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold. It is clear that the time at which the annual rate of earnings must be ascertained is at the time of the termination of the person's employment. What needs to be ascertained is the annual rate of earnings **at** that time, not the annual earnings **to** that time (the amount earned in the 12 months to that time).”

[49] A similar issue was considered in *Trezise v Universal Music Australia Pty Ltd* [\[2011\] FWA 5960](#) by Commissioner Harrison who concluded as follows:

“[11] The consistent use of the word “earnings” in ss332 and 382(b)(iii) as distinct from the term “payment” is no mere coincidence. Counsel for Universal submitted that if a period of unpaid leave such as parental leave was to be considered for the purpose of determining the annual rate of earnings, referred to in s.382, parliament would have said so **plainly** and **expressly**. I **agree**.”

[12] In my view a period of unpaid leave does not affect the annual rate of earnings as referred to in s.328.”

[50] The same conclusion was reached by Deputy President Lake in *Bolland v Solgen Energy Pty Ltd* [\[2020\] FWC 5005](#).

[51] It is plain from clause 6.1 and item 11 of Schedule A of the employment contract between the Applicant and the Respondent that the Applicant’s annual rate of earnings was \$180,000 (gross) per annum, exclusive of superannuation.

[52] The Applicant’s case that he has not exceeded the high income threshold rests on the premise that the Respondent has not complied with the contractually obligated annual rate of earnings owed to the Applicant under the employment contract up to the point of the ending of the employment relationship as his periods of leave without pay were not agreed, and he was fit for work at the relevant times when he was not paid.

[53] Having considered the evidence of Ms Hooper, and concessions made by the Applicant in the course of his evidence during the hearing conducted on 23 September 2024, I have concluded that the periods of leave taken by the Applicant were related to his acute alcohol withdrawal condition. The Applicant more or less accepted this was the reason for the leave however also gave evidence to the effect that the underlying cause of the medical condition was connected to bullying by an employee to whom he reported. Ultimately that issue would be relevant if the matter were to progress past the jurisdictional objection in relation to the high income threshold, however I am satisfied on the basis of the evidence that the circumstances in this case did not amount to the Respondent’s conduct resulting in a lowering of the Applicant’s “rate of earning” as established in his contract of employment.

[54] The effect of the Full Bench determination referred to above is that it is the “rate of earnings” at the time of termination that matters. The fact that the Applicant had periods of unpaid leave in the preceding 12 months will not reduce the rate of earnings below the actual rate when the Applicant was dismissed.

Conclusion

[55] As I indicated to the parties at the conclusion of the hearing on 23 September 2024 and in subsequent directions issued, I would allow parties to file further material after the conclusion of the hearing on 23 September 2024 and would determine whether it would be necessary to conduct a further hearing after parties had filed further material. As I have reached the conclusion that the Applicant’s rate of earnings exceeded the high income threshold on the basis of the evidence before me as at 23 September 2024, I have not considered the further evidence filed. It follows that the Applicant having failed to file material in response to the Respondent’s material filed post-hearing is moot as I have not had regard to the evidence of the four witnesses filed by the Respondent.

[56] As I have concluded the Applicant exceeded the high income threshold at the time of termination, his application is outside the jurisdiction of the Commission and his application is dismissed. An order to this effect will be issued separately and concurrently with this decision.

The image shows a handwritten signature in black ink, which appears to be 'C. J. Anderson', written over a circular official seal. The seal features the text 'THE FAIR WORK COMMISSION' around the perimeter and a central emblem depicting a shield with a scale of justice and a sword, with the motto 'FAIRNESS' below it.

COMMISSIONER

Appearances:

J Tearne, Applicant
M Hooper, of the Respondent

Hearing details:

2024
Brisbane (by video)
4 September, 16 September, 23 September

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<PR780342>

¹ Exhibit 1

² Exhibit 2

³ Exhibit 3

⁴ Exhibit 4