DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Sarah Wilson
v
Brisbane Crane Trucks Pty Ltd
(U2024/13918)

DEPUTY PRESIDENT LAKE BRISBANE, 17 FEBRUARY 2025

Application for an unfair dismissal remedy – application filed out of time – exceptional circumstances – extension of time granted

[1] Ms Sarah Wilson (**the Applicant**) lodged an application with the Fair Work Commission (**the Commission**) seeking a remedy pursuant to s.394 of the *Fair Work Act 2009* (**the Act**) in relation to the termination of her employment with Brisbane Crane Trucks Pty Ltd (**the Respondent**).

[2] The Applicant commenced her employment with the Respondent on 4 April 2024. On 15 October 2024, the Applicant was notified that her position had been made redundant.

[3] The Applicant lodged her application on 21 November 2024. The application was lodged 16 days outside the statutory time limit prescribed by s.394(2) of the Act.

[4] The question before me is whether an extension of time pursuant to s.394(3) of the Act should be granted. The Respondent opposes the granting of an extension of time. The Respondent also objects to the application on the grounds of genuine redundancy.

[5] Directions were issued and material was filed by each party regarding the question of whether the Applicant should be granted an extension of time to file her application. A hearing was held before me on 10 February 2025. The Applicant appeared self-represented. The Respondent was represented by Mr Jim Challis of the Queensland Trucking Association.

[6] I informed the parties that if the extension of time were granted, then the matter would be programmed to determine both the genuine redundancy jurisdictional objection and the merits.

Should a further period be granted?

[7] Section 394(3) of the Act sets out the circumstances in which the Commission may allow a further period for an application involving dismissal to be made:

> "(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 like position."

[8] The test of 'exceptional circumstances' establishes a high barrier for an applicant.[1] In *Nulty v Blue Star Group Pty Ltd* (later cited with approval by the Full Bench of the Commission in *Tamu v Australia for UNHCR*),[2] the Full Bench of Fair Work Australia stated that:

> "[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."

[9] Although *Nulty* concerned the expression "exceptional circumstances" in the context of s.365 of the Act, its reasoning applies to s.394(3).

[10] For the Applicant's application to proceed, there must be "exceptional circumstances" for the Applicant to obtain an extension of time under s.394(3) of the Act.

Consideration

Reason for the delay (s.394(3)(a))

[11] The Act does not specify what reasons for delay might suggest allowing for a further period of time, however decisions of the Commission have referred to an acceptable[3] or a reasonable explanation.[4] In *Stogiannidis v Victorian Frozen Food Distributors Pty Ltd*, the Full Bench noted:

> *"*The absence of any 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 the applicant's favour, though, as we mention later, it is a question of degree and insight. However, the ultimate conclusion as to the existence of exceptional circumstances will turn on a consideration of all of the reliant matters and the assignment of appropriate weight to each." [5]

[12] It is important to have regard to any circumstances from the date the dismissal took effect when assessing whether the explanation proffered for the delay is an acceptable or credible explanation.[6] In *Giles v Coal Train Australia Pty Ltd*, Vice President Asbury stated that the Applicant is required to provide evidence to establish the nature and the impact of any exceptional circumstances.[7]

[13] The Applicant gave five main reasons for the delay:

- The Applicant has been attempting to search for another job, as she is the primary earner in her family;
- The Applicant is pregnant and has been diagnosed with gestational diabetes. As a result of the gestational diabetes she has had to attend a number of appointments and clinics;
- The Applicant has had to take on more domestic responsibilities because her partner, who normally works part-time, increased his hours following the Applicant's redundancy;
- The Applicant has "pregnancy brain" and has struggled with absorbing material; and
- The Applicant discovered on 18 November 2024 that the Respondent published a job advertisement which largely corresponded with the role the Applicant had been performing, and this led the applicant to believe the redundancy was not genuine.

[14] The last reason advanced by the Applicant requires further consideration.

[15] The Applicant was made redundant on 15 October 2024.[8] The Applicant's role was a Customer Service Officer. The Applicant's colleague, another customer service officer, was also made redundant on the same day.[9]

[16] The Applicant said the redundancy came as surprise to her.[10] The Applicant was told that the redundancy was for financial reasons.

[17] On 18 November 2024, the Applicant discovered a new advertisement on Seek for a "Customer Service Officer" role with the Respondent. According to the Applicant, the list of duties matched her usual duties before she was made redundant. The Applicant stated that the job advertisement made her realise that "there might be more to the story." The Applicant lodged her unfair dismissal application three days after seeing the advertisement.

[18] The discovery of the job advertisement is a material fact. It forms the basis of the Applicant's claim that the redundancy is not genuine. A distinguishing factor is whether the

Applicant had a reasonable belief that the redundancy was not genuine *prior* to finding about the job advertisement.

[19] In *Higgins v Coopella Nominees Pty Ltd T/A Sea & Vines Property Management*, Deputy President Anderson considered whether the discovery of facts following a purported redundancy can give rise to exceptional circumstances:

> [48] Past decisions of the Commission have accepted that material facts known by a redundant employee only after the statutory time limit has expired may constitute exceptional circumstances warranting an extension of time. However each matter is decided on its own facts, and not each case of an employee learning of circumstances post a purported redundancy will constitute exceptional circumstances.
>
> …
> [52] Whilst waiting to confirm a fact explains the delay, doing so in circumstances where a belief or apprehension was held by Ms Higgins at the time of dismissal has the effect of holding the statutory time limit hostage to a factual confirmation.
>
> [53] There is no reason why an application could not have been filed within time based on a reasonably held belief, and the Employer then put to proof on the merit of its decision.[11]

[20] The Applicant gave evidence that she was shocked by her redundancy, as she had believed that the company was in a good financial position. On the Applicant's evidence, the Respondent had recently opened new depots.

[21] I note that the Applicant gave evidence that she had been "reading cases" prior to lodging her claim, though she struggled with this task due to her "pregnancy brain".[12]

[22] In the Applicant's Form F2 she writes: "I was delayed in the submission of this claim as I received important information relating to this dismissal after the 21-day deadline that confirmed my suspicions on the real reason myself and another employee were made redundant."[13]

[23] I find that the Applicant did in fact suspect that her redundancy was not genuine during the 21-day time period. Setting aside the Applicant's other reasons for delay, it was open to her to lodge the unfair dismissal claim within the 21-day period rather than waiting for a "smoking gun". The Applicant gave evidence that one of the reasons why she suspects the redundancy is not genuine is because she had made a workplace bullying complaint and then announced her pregnancy shortly before being made redundant.[14] I make no finding on whether those assertions are true, noting there has not been a hearing on the genuine redundancy jurisdictional objection, but I note that the Applicant had reasons to suspect the genuineness of the redundancy prior to discovering the advertisement.

[24] However, I find that taking into account the matters relating to the Applicant's pregnancy and associated gestational diabetes, she has provided a credible explanation for the delay which covers the whole period of the delay of 16 days. The Applicant has failed to provide medical evidence in support of her "pregnancy brain" but she did give compelling testimony of

how her pregnancy has affected her physically and mentally, in combination with her increased caring responsibilities for her school-aged three children. The Applicant is the primary earner in her family and she has rightly prioritised searching for new jobs in order to provide her children over filing the application. The Applicant noted that the job search has been prolonged for reasons she suspects are due to her being visibly pregnant.[15] The reasons provided by the Applicant to explain the delay, when considered together, demonstrate a situation which is uncommon and exceptional. I have taken into account the Applicant's circumstances and consider they weigh 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))

[25] The Applicant was aware of her redundancy on 15 October 2024. She was notified during a meeting with the Respondent's representatives that her role was being made redundant for financial reasons.

[26] This consideration does not weigh in favour of a finding of exceptional circumstances.

Action taken to dispute the dismissal (s.394(3)(c))

[27] The Applicant did not take any action to dispute the redundancy prior to lodging her application. I note at the time, the Applicant was informed that she was being made redundant, rather than being told she was dismissed.

[28] This consideration does not weigh in favour of a finding of exceptional circumstances.

Prejudice to the employer (s.394(3)(d))

[29] The Respondent did not provide any evidence of prejudice to the employer that may be caused by granting an extension. I consider this factor to be neutral.

Merits of the Application (s.394(3)(e))

[30] The Applicant primarily relied on the merits of her application to support her argument for an extension of time. The Applicant claims that her redundancy was not genuine and that she dismissed due to her pregnancy and so that the Respondent could avoid dealing with the Applicant's workplace complaint.

[31] The Applicant's witness, former operations manager for the Respondent, Mr Brett Lomacchio, gave evidence that he overheard a conversation between the Director of the Respondent and General Manager of the Respondent in which the Respondent's Director allegedly stated: "we need to make sure we don't employ anyone that could get pregnant and or have any health issues."[16] The Respondent denies that the conversation took place, stating that the Director was not in Brisbane on the day in question.

[32] I consider this factor is a neutral consideration as it is sufficient for the Commission to establish the substantive application was not without merit.

Fairness as between the Applicant and other persons in a like position (s.394(3)(f))

[33] The Applicant's colleague was made redundant on the same day as her. There was no evidence led by the Applicant or the Respondent to suggest that her colleague was treated any differently during the redundancy process. The Applicant suggests that her colleague's redundancy was also not genuine. The Applicant's colleague has not lodged an application in the Commission.

[34] The Commission may have consideration to fairness in matters of a similar kind that are currently before the Commission or have been decided in the past.[17] The parties have not brought to my attention any cases of Applicants in similar circumstances.

[35] I find this is a neutral factor, given the Applicant's colleague has not made an application in the Commission and therefore no extension of time has been granted to the Applicant's colleague.

Conclusion

[36] I find that there are exceptional circumstances in considering the above factors. The Commission may consider whether to allow a further period for the application to be made once exceptional circumstances are established.

[37] I exercise my discretion to extend the period for the application to 21 November 2024. My chambers will issue further directions programming the matter to be determined on the genuine redundancy jurisdictional objection as well as the merits.

DEPUTY PRESIDENT

Appearances:

S Wilson for herself as the Applicant.
J Challis of the Queensland Trucking Association for the Respondent.

Hearing details:

10 February 2025.
Brisbane.
Microsoft Teams.

Printed by authority of the Commonwealth Government Printer

<PR784210>

[1] *Stogiannidis v Victorian Frozen Food Distributors Pty Ltd* [2018] FWCFB 901[14].

[2] [2019] FWC 25.

[3] *Blake v Menzies Aviation (Ground Services) Pty Ltd* [2016] FWC 1975, [9].

[4] *Roberts v Greystances Disability Services; Community Living* [2018] FWC 64, [16].

[5] [2018] FWCFB 901 [39].

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

[7] *Giles v Coal Train Australia Pty Ltd* [2020] FWC 2274 at [38].

[8] Letter from the Applicant to the Respondent dated 15 October 2024

[9] Brett Lomacchio Witness Statement [10].

[10] Applicant Submissions on Extension of Time [3].

[11] *Higgins v Coopella Nominees Pty Ltd T/A Sea & Vines Property Management* [2021] FWC 1126 at [48]

[12] Applicant Submissions [4].

[13] Applicant Form F2, Item 1.4

[14] Applicant Submissions [3] and [9].

[15] Applicant Form F2, Item 2.

[16] Brett Lomacchio Witness Statement [13].

[17] *Andrew Green v Bilco Group Pty Ltd* [2018] FWC 6818, [31].