



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Martin Stoddard

v

Crushing Services International Pty Ltd
(U2024/13352)

COMMISSIONER SIMPSON

BRISBANE, 13 MARCH 2025

Application for an unfair dismissal remedy – application out of time - legal advice obtained – ongoing legal representation not obtained due to cost - action taken to dispute dismissal – initial filing in incorrect jurisdiction – application in incorrect jurisdiction filed in time - extension of time granted – minimum employment period – transfer of business – period completed – jurisdictional objection – multiple applications – objection dismissed – application to proceed.

[1] On 7 November 2024, Mr Martin Stoddard (**Mr Stoddard/ the Applicant**) applied to the Fair Work Commission (**the Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**the Act**) for an unfair dismissal remedy, alleging he was unfairly dismissed from his employment with Crushing Services International Pty Ltd (**the Respondent**).

[2] The Respondent objected to the application as it said the Applicant's application was filed outside of the 21-day statutory timeframe, and subsequently on the basis that the Applicant had multiple applications on foot. The Applicant also appeared not to have served the Minimum Employment Period according to the information provided on the application. The matter was listed for jurisdictional hearing on the out of time and minimum employment period issues on 12 March 2025. Directions were issued for the filing of submissions and parties filed further material.

[3] The Applicant appeared at the hearing on his own behalf. Mr Michael McGerr, Principal Employee Relations at the Respondent appeared on behalf of the business.

Background and Submissions

[4] The Applicant commenced employment with Silverstone Recruitment on 5 October 2023 to work at MRL at the Carina site.

[5] On 1 January 2024, the Applicant asked Silverstone Recruitment and MRL management how he could transfer to MRL. He received an email from the Superintendent confirming the company would transfer him from Silverstone to MRL. The transfer took effect somewhere between 7 and 21 March 2024.

[6] Between 30 August 2024 and 10 September 2024, the Applicant was involved in an investigation into his conduct at the workplace.

[7] On 6 September 2024, the Applicant started but did not submit an unfair dismissal application to the Western Australia Industrial Relations Commission (**WAIRC**).

[8] On 9 September 2024, the Applicant was notified that his employment would end on 11 October 2024. On 12 September 2024, the Applicant received an amended dismissal letter with the same effective termination date as the initial letter.

[9] On 18 September 2024, the Applicant partially completed his Commission application, but did not submit it.

[10] On 30 September 2024, the Applicant contacted MKI Legal to make an appointment to receive legal advice which was set for the following week.

[11] On 7 October 2024, the Applicant attended the consultation with MKI Legal by video. The Applicant was provided a quote for the law firm to act on his behalf in an unfair dismissal claim. The Applicant sought a payment plan and continued to correspond with the law firm regarding a payment plan for the quoted fees in the following days.

[12] On 22 October 2024, MKI Legal contacted the Applicant to confirm if they would be acting on his behalf, and if so, would require partial payment of the fees:

“Hi Martin

I hope you are keeping well.

I understand your last day of employment was 11 October 2024. Therefore the 21-day deadline falls on 1 November. If you miss the deadline you can't proceed with your dismissal claim without leave of the court (and that is hard to get and unlikely to be given).

I confirm we can't start work until we have the part payment of \$6,600 paid into our trust account.

Can you confirm when you anticipate that will be paid?

In order for us to have enough time to draft the claim, we'd ask the funds be transferred by the end of this week so we can start work on Monday.”

[13] The Applicant continued to correspond with the law firm on 23 October 2024, however on 29 October 2024, the Applicant was not able to pay the required legal fees and therefore did not continue to engage the law firm. The law firm reminded the Applicant of the 21-day filing deadline and the deadline date:

“Hi Martin

Just confirming we haven't received the funds in trust, so we can't prepare your claim.

If you're able to get the funds by tomorrow morning, reach out, and we might be able to make time (but check with me first as the last-minute drafting may not be possible).

Otherwise, thanks for your instructions, and I wish you the best of luck in your matter.

Remember the 21-day deadline I mentioned."

[14] On 30 October 2024 at 7:19am local time, the Applicant applied for an unfair dismissal remedy in the WAIRC.

[15] On the same day, at 4:28pm local time, the Applicant received an email from the WAIRC that he had filed in the incorrect jurisdiction.

[16] On 6 November 2024, the Applicant received an email from the WAIRC following up payment of his application fee. It was the Applicant's evidence that he read the email, paid the fee, and then realised that there was an email below it in the thread from earlier. The Applicant submitted that he did not become aware of the first email from 30 October 2024 from the WAIRC until he received the second email on 6 November 2024.

[17] On 7 November 2024, the Applicant filed his application in the Commission, 6 days outside of the 21-day statutory timeframe.

[18] On 12 November 2024, the Respondent filed its response in the WAIRC noting that it did not believe the WAIRC had the jurisdiction to deal with the matter.

[19] On 15 November 2024, the Respondent filed its response in the Commission. The Applicant notes that the only objection raised was that the application was out of time, not the multiple application objection.

[20] On 4 December 2024, the Applicant applied to the Commission's Workplace Advice Service (WAS) for free legal advice.

[21] On 5 December 2024, the Commission responded to the request stating, "unfortunately we are unable to find an appointment for you due to high demand."

[22] On 25 February 2025, the Applicant formally withdrew his WAIRC application.

Consideration – out of time

[23] In order for the application to proceed, it is necessary for the Applicant to obtain an extension of time to make the application under s.394(2) of the Act. This section provides that the Commission may allow a further period for the application to be made if it is satisfied that there are exceptional circumstances, taking into account the following:

- (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.

[24] In the decision of *Nulty v Blue Star Group Pty Ltd* (**Nulty**), the Full Bench of Fair Work Australia, the predecessor of this Commission, noted that even when ‘exceptional circumstances’ are established, there remains discretion to grant or refuse an extension of time.¹ The Full Bench observed that what it will come down to is a consideration of whether, given the exceptional circumstances found, it is fair and equitable that time should be extended.

[25] The Act does not define ‘exceptional circumstances’ per se, but guidance can be gleaned from previous decisions. In *Nulty*, the Full Bench said that in order to be exceptional, the circumstances must be out of the ordinary course, or unusual, or special, or uncommon, although they need not be unique or unprecedented.² 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 can be considered exceptional.³

[26] In *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd*, the Full Bench provided clarification regarding the assessment of exceptional circumstances:

“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”⁴

(original emphasis)

Reason for the delay

[27] On the material before me, there are several reasons for the Applicant’s delay in filing his application with the Commission.

Incorrect jurisdiction

[28] Firstly, I note the Full Bench Decision of the Australian Industrial Relations Commission in *Poulton v Rail Infrastructure Corporation*, which stated that ultimately, each case where there has been an application made in another jurisdiction, turns on its own facts.⁵

[29] Relevantly, the Full Bench in *Snyder v Helana College Council Inc*⁶ dealt with a case with similar facts to Mr Stoddard’s case. At first instance,⁷ Commissioner Gregory determined not to grant an extension to file an unfair dismissal application where the Applicant had initially filed in the WAIRC before filing with the Commission. Ultimately, the Full Bench upheld the decision not to grant an extension of time to file the application due to:

- The Applicant being on notice from their employer of the correct jurisdiction after filing in the WAIRC; and
- The Applicant receiving legal advice confirming that the WAIRC was not the correct jurisdiction; and
- The Applicant continuing the application in the WAIRC for a further 10 days before making an application to the Commission.

[30] Commissioner Gregory concluded in the original decision:

“...I am satisfied in response that it would have been prudent, and perhaps expected, that Mr Snyder would have made application to the Federal Commission as soon as he became aware that the College was taking issue with his ability to pursue the application in the WAIRC...”⁸

...In conclusion, I am not satisfied that “exceptional circumstances” exist to warrant an extension of time being granted to Mr Snyder in which to make application. It is acknowledged that he made application to the WAIRC on the basis of a mistaken belief that it was the appropriate jurisdiction in which to pursue his unfair dismissal claim. However, I am also satisfied that he should have been alerted to the fact he may have made application in the wrong jurisdiction when the jurisdictional objection was made to his application by the College on 9 March of this year....”⁹

[31] In the present case, the Applicant’s delay appears to have been partially due to a delay in him being aware of the advice from the WAIRC that his application was filed in the incorrect jurisdiction, and that he acted to rectify this.

[32] The Applicant drew parallels with the case of *Palmer v RCR Engineering Pty Ltd*¹⁰ where the Applicant in that case had filed in the incorrect jurisdiction but within the relevant time period and took immediate action once notified of this, to file in the correct jurisdiction within 3 days. He submitted that the facts are analogous to the current case, where he filed within the 21-day time period in the incorrect jurisdiction and further, took immediate action the next day to refile his application with the correct Commission upon becoming aware of the jurisdictional issue.

Legal advice

[33] The Respondent submitted that whilst Mr Stoddard had sought preliminary legal advice in respect of his dismissal, it does not explain why he did not take any other appropriate steps to inform himself of the appropriate jurisdiction, noting by his own admission that he did not seek to consult with the Workplace Advice service until 4 December 2024.

[34] The Respondent submitted that in addition to the 21-day timeframe, the Applicant also had the benefit of the Notice Period in which to seek advice, representation or guidance as to the correct jurisdiction to lodge his claim - an additional 32 days (a total of 53 days) to seek advice with respect to the proper jurisdiction to lodge his claim.

[35] Regarding the legal advice the Applicant obtained, the Respondent referred to the decision of *King v Gourmet Beef Pty Ltd*¹¹ at paragraph 63, where Deputy President Gostencknik said:

“It seems therefore that a significant factor in cases of this kind is the steps that an applicant took to seek advice after becoming aware that there was a jurisdictional problem with his or her state industrial law application. The Applicant took no step to seek advice to ensure that he was pursuing the claim in the correct jurisdiction”

[36] In response, the Applicant submitted that the facts of *King* and his matter were entirely different. In *King* the application was submitted to the Commission about five and a half months late, after initially applying to the WAIRC on the first day after termination, so the Applicant in that case had 20 days remaining within the timeframe to submit the application in the correct jurisdiction. Mr Stoddard submitted that alternatively, he lodged his WAIRC application on 30 October 2024, the day before the deadline. On being informed that he was in the incorrect jurisdiction, he lodged an application with the Commission on 7 November 2024.

[37] Though he did receive legal advice prior to submitting the applications, the Applicant could not recall any specific advice regarding the correct jurisdiction to file his application in, and no email evidence has been provided that demonstrates the Applicant was notified in writing by the solicitor of the correct jurisdiction. As such, it appears that the solicitors never made explicit to the Applicant that he needed to file in the Federal not the State jurisdiction, which was expected given that the solicitors were aware he was employed by a constitutional corporation.

[38] The Respondent also noted that upon the commencement of his employment, the Applicant was provided with a copy of the Fair Work Information Statement, containing the following relevant information:

“If you think your dismissal was unfair or unlawful, you have 21 calendar days to lodge a claim with the Fair Work Commission. Rules and exceptions apply. Find out more at: fwc.gov.au”

[39] In reply, the Applicant submitted that though he had signed to confirm that he had received the information, he did not agree that he should have been aware, as he submitted “6 months earlier I ticked a box to say I read it so my employment would go ahead. If you also look at the time stamps you can see a lot of documents read in a small period of time. I was excited about the offer and wanted to get the ball rolling to a job I thought was going to be my last till I retired. So therefore its not available for use as you can’t log back into that system after acceptance.”

Delay in becoming aware of incorrect jurisdiction

[40] The Applicant’s evidence was that he honestly did not see the email on 30 October 2024 notifying him of the incorrect jurisdiction.

[41] The Respondent raised that the Applicant had access to and was active in his inbox on 30 October 2024, as the Applicant had sent a very long email to a large number of people within

and external to the Respondent company, about his dismissal. I note that this email has now been provided to Chambers, and that it was sent at 7:10am local time. The relevant email from the WAIRC was received at 4:28pm local time on 30 October 2024.

[42] The Applicant's evidence was that when he received and viewed the email on 6 November 2024 from the WAIRC seeking payment for his application, he immediately paid the application fee. He then reread the thread of the email, and only then did he become aware of the email from 30 October 2024 notifying him that he had filed in the incorrect jurisdiction.

[43] The Applicant's rigorous attitude in pursuing his application, demonstrated by the background of the matter above, supports his evidence that he acted as soon as he became aware of the jurisdictional issue, and was not aware of the 30 October 2024 email prior to 6 November 2024.

[44] I accept the Applicant's submission that he honestly did not see the email on 30 October 2024 from the WAIRC, and that as soon as he became aware of it on 6 November 2024, he filed in the correct jurisdiction the next day.

Conclusion on delay

[45] The totality of the facts satisfy me that the circumstances are exceptional and that weighs in favour of extending time.

[46] This is taking into account the fact that an application was filed in the wrong jurisdiction within time; that the Applicant sought and paid for a consultation with a solicitor well before the expiration of the 21 days, and it would seem likely that he did not receive clear advice that the Commission was the correct jurisdiction to file in; and that I accept that he only first became aware of the incorrect jurisdiction on 6 November 2024, and he moved immediately to address the error.

Delay in being made aware of the dismissal

[47] The Applicant was aware of the dismissal on and prior to the date it took effect. This factor is neutral.

Action taken to dispute the dismissal

[48] The Applicant submitted that he took action prior to and immediately after the dismissal. The Applicant was in a unique situation where he had a significant period of notice of his dismissal date and has demonstrated that he started to take action immediately, up to and after the effective dismissal date to dispute the dismissal.

[49] As demonstrated in the background outlined above, the Applicant was not idle during the period prior to filing his application. I consider this factor weighs in favour of the Applicant.

Prejudice to the employer

[50] Neither party made any submissions on this point.

[51] I consider this to be a neutral factor.

Merits of the application

[52] In *Telstra-Network Technology Group v Kornicki*,¹² the Full Bench of the Australian Industrial Relations Commission said, in respect to the merits of an application:

“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.”

[53] Evidence on the merits is rarely called at an extension of time hearing and was not called in this case. The Commission ‘should not embark on a detailed consideration of the substantive case’ for the purpose of determining whether to grant an extension of time to an applicant to lodge her or his application.’¹³ The merits of the application more generally would need to be scrutinised and would include consideration of the circumstances of the dismissal. If an extension of time were granted and the matter proceeded this would need to be examined.

[54] I consider the merits to be a neutral factor.

Fairness between the person and other persons in a similar position

[55] There was no evidence that there was another person in a similar position to that of the Applicant and this is a neutral matter.

Conclusion – Out of time

[56] I have weighed each of the matters I am required to take into account and have determined that there are exceptional circumstances in this case justifying an extension of time of 6 days. On that basis the objection is dismissed and time is extended for the Applicant to file his application.

Consideration – Minimum Employment Period

[57] The Respondent does not seek to advance any submissions in relation to the minimum employment period, other than to accept that the Applicant has met the minimum employment period.

[58] The Respondent referred to the decision of Deputy President Gooley in *Burdziejko v ERGT Australia Pty Ltd*¹⁴ where the Deputy President determined that there was a transfer of employment within the meaning of s.22(5) and s.22(7) of the Act, where the period of service with the first employer counted as service with the second employer for the purpose of determining whether the minimum employment period had been satisfied.

[59] They submitted that this jurisdictional objection should be set aside. The Applicant concurred.

[60] Based on the background set out at [4] and [5] of this decision and in consideration of the above submission from both parties, I am satisfied that the Applicant completed the minimum employment period.

Consideration – Multiple Applications

[61] The Respondent raised the objection in their submission that it is uncontested that the Applicant has made an application regarding the same dismissal to the WAIRC.

[62] They submitted that this gives rise to a further potential jurisdictional bar given that s.725 of the Act prohibits the making of multiple applications in relation to the same dismissal. Specifically, a second application must not be made in relation to the same dismissal if the first application had not concluded at the time the second application was made. An application filed in the WAIRC in relation to an employee's dismissal is an application made under another law as set out in s.732 of the Act.

[63] In support of the Respondent's submissions, they referred to the decision of Commissioner Williams in *Kevin Govender v City of Swan*¹⁵ where it was determined that the Applicant was barred from making the Commission application due to not having discontinued the WAIRC application prior to making the Commission application.

[64] Mr Stoddard discontinued his application with the WAIRC on 24 February 2025 and submitted that he was unaware that he needed to withdraw it, as he was told he couldn't proceed due to it being filed in the wrong jurisdiction.

[65] I note the Full Bench appeal in *Appeal by ABC Transport Pty Ltd*¹⁶, where Senior Deputy President Kaufman's decision at first instance was upheld. The initial decision determined:

"In my view, an application that is lodged out of time is not made unless and until Fair Work Australia allows a further period for the making of it. When an out of time "application for relief" is lodged the only function that Fair Work Australia is empowered to perform is to determine whether time for the making of the application should be extended. If time is extended the application is made "within such further period as FWA allows under subsection (3)" and the application is made within the time frame required by subsection (2). An application that is lodged within time is, however, made at the time of filing. A proper reading of section 394 (2) compels the conclusion that that is so.

The making of the application must occur within 14 days after the dismissal or within such further period as Fair Work Australia allows. If neither of those requirements is fulfilled the application is not made.

I do not accept the respondent's submission that regard to the overriding objective of section 725 of the Act - "to avoid the problems that arise from 'double-dipping'" -

supports its contentions. That objective only arises where there have been two valid dismissal remedy applications made.

As there was no unfair dismissal application made, section 725 is not triggered. The general protections application has been validly made.”¹⁷

[66] I adopt the reasoning above. As such, according to the Full Bench, until and unless I determine to extend time on the application before me, there is no second application ‘made’ that conflicts with the WAIRC application, which was discontinued on 24 February 2025.

[67] Given the WAIRC application is no longer on foot, this application does not enliven s.725 of the Act, and is not in conflict with the WAIRC application.

[68] This jurisdictional objection is dismissed.

Conclusion

[69] I have determined that that Applicant should be granted an extension of time to file his application and that there is no conflict with the multiple applications provisions of the Act by the making of the Commission application. The application will proceed.

[70] This matter will be remitted to the Commission’s conciliation team to conduct conciliation between the parties, and if required will be assigned to another Member of the Commission to determine the merits of the dismissal.



COMMISSIONER

Appearances:

M Stoddard, Applicant.

M McGerr, of the Respondent.

Hearing details:

2025

Brisbane (by video)

12 March.

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¹ (2011) 203 IR 1, 6 [15].

² Ibid 5 [13].

³ Ibid 5–6 [13].

⁴ (2018) 273 IR 156, 165 [38].

⁵ [PR966972](#), AIRCFB, Watson SDP, Hamberger C, Richards C, 22 December 2005, [42].

⁶ [\[2018\] FWC FB 4734](#).

⁷ *Snyder v Helena College Council, Inc. T/A Helena College* [\[2018\] FWC 4432](#).

⁸ *Snyder v Helena College Council, Inc. T/A Helena College* [\[2018\] FWC 4432](#), [41].

⁹ Ibid, [49].

¹⁰ [\[2009\] FWA 1431](#).

¹¹ [\[2017\] FWC 3866](#).

¹² (1997) 140 IR 1.

¹³ *Kyvelos v Champion Socks Pty Ltd*, 10 November 2000) [14]; *Collier v Saltwater Freshwater Arts Alliance Aboriginal Corporation* [\[2016\] FWC 2899](#), [37]–[38].

¹⁴ [\[2015\] FWC 2308](#).

¹⁵ [\[2012\] FWA 5217](#).

¹⁶ [\[2012\] FWA FB 3212](#).

¹⁷ [\[2012\] FWA 101](#), [11]–[14]