



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

George Tisseverasinghe

v

Msquared Capital Funds Management Pty Ltd
(U2022/9389)

COMMISSIONER P RYAN

SYDNEY, 14 MARCH 2023

Unfair dismissal application filed out of time – circumstances not exceptional - application dismissed.

Introduction

[1] This decision concerns an application by Mr George Tisseverasinghe (**Applicant**) for an unfair dismissal remedy pursuant to s.394 of the *Fair Work Act 2009* (**FW Act**) lodged on 20 September 2022 (**Application**).

[2] In the Application, the Applicant states that he was employed by MSquared Capital Funds Management Pty Ltd (**Respondent**) and was notified of his dismissal on 22 June 2022, but the dismissal took effect from 30 August 2022.

[3] In its Form F3 response, the Respondent raised the following jurisdictional objections:

- (i) That the Applicant was not an employee, he was a contractor;
- (ii) That the Applicant's engagement as a contractor was terminated with effect from 22 June 2022; and
- (iii) That in the alternative, the Respondent was a small business employer and complied with the Small Business Fair Dismissal Code.

[4] 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). As the parties are in dispute as to whether there was a dismissal and the date the dismissal took effect, it is necessary to determine firstly whether an extension of time is required, and if so, whether an extension should be granted under s.394(3).¹

[5] The matter was heard before me on 22 December 2022.

[6] I exercised my discretion to grant permission to the parties to be represented by a lawyer, as I was satisfied as to the matters set out in s.596 (2)(a) and (c) of the FW Act. The Applicant was represented by Mr A Strik. The Respondent was represented by Mr T Frost.

[7] For the reasons that follow, I decline to grant an extension of time under s.394(3).

Background

[8] In or around 2018, the Applicant commenced employment with the Respondent.

[9] Over the period of November 2021 to January 2022, the Respondent's managing director, Mr Paul Miron became concerned that the Applicant was focused on other business interests and not performing to the required standard.²

[10] On or about 24 February 2022, Mr Miron met with the Applicant and proposed that he perform work on a contract basis in order to provide the Applicant with the flexibility to source property development transactions for the Respondent, while continuing to pursue his own business ventures.³

[11] It was the evidence of Mr Miron that during this meeting, he provided the Applicant with a one-page document setting out the terms of the contractor arrangement as follows⁴:

Dear George,

You have been part of our professional family for many years, and we feel it is time to restructure your role to suite current growth in the business.

The following is a structure that would provide flexibility with work hours and remuneration based on performance.

We propose contractor arrangement with MSQ with the following payment structure:

- **A retainer will be set at \$100k pa.** Debit and credit basis on a 3 monthly calculation. You will need to cover your base retainer by 2x prior to receiving additional commissions above and beyond this retainer and the commissions will be uncapped.
- **Commission rates** are as per below:
 - 1. Property acquisitions**
Sourcing any property development transactions. 1.1% of the purchase price will be provided as a buy fee. If a DA is to be managed an additional .55% of the property price will be paid as a management fee.
 - 2. Capital inflows**
For any capital sourced by yourself by any means ie personal, bonds etc.
You will be provided a payment of .55% incl GST of the gross inflows of capital
 - 3. Debt opportunities**
For any debt opportunities sourced and funded, you will be provided a brokerage of .55% of the total loan written
 - 4. Expectations of reporting/being in the office**
We appreciate that you require flexibility for both this role and for you to continue doing other business ventures. The expectation is that you are in the office for a minimum of 1 day per week. We also will need reporting via zoom 2 other days on any projects you are working on.

[12] The Applicant disputes that he was provided with a copy of this document or that Mr Miron referred to a contractor arrangement in the meeting but agreed under cross examination that following that meeting he began to invoice a monthly amount of \$8,333.00 plus GST because *“Paul Miron asked me to divide \$100,000 by 12 months and issue invoices on that basis.”*⁵

[13] It is not in dispute that the Applicant issued invoices through an entity known as the Mayura Trust to the Respondent for the months of March, April, May and June 2022.⁶

[14] Over the period between March and June 2022, Mr Miron observed that the Applicant was not meeting the expectations of the arrangement and did not generate any opportunities that would result in the Applicant being entitled to any commission as he was prioritising other business activities.⁷

[15] On 22 June 2022, Mr Miron met with the Applicant and informed him that his services were on longer required.

[16] The Applicant's account of this discussion is as follows:

Mr Miron: You're not going to be getting paid by MSquared Capital anymore.

Notwithstanding that we no longer require your services, I still want you to continue working on the Castle Hill project until I send you a letter confirming our arrangement for your work on that project.⁸

[17] Mr Miron's account of this discussion is as follows:

Mr Miron: George, I appreciate that we've had a new arrangement this year. Under this arrangement, you were supposed to bring in new opportunities. Unfortunately, this has not happened. This arrangement is not working at all. I do have a business partner here, and if you're not doing anything there is no way I can continue this arrangement. So I'd like to inform you that you will not be paid by MSquared any further.

The Applicant: What about Castle Hill?

Mr Miron: Castle Hill is a separate arrangement. You have equity in that so I would not expect that you would be paid for work you do in relation to Castle Hill.

The Applicant: Well, you've paid project managers before.

Mr Miron: Yes, but they didn't have equity in the project, so it was slightly different. Despite that, MSquared will not be paying you going forward, but we need to sit down with you and your parents and work out generally how to deal with Castle Hill. My view is that if you have equity you should not be paid for it but at the end of the day, let's sit down and talk. But this conversation needs to include your parents as well.⁹

[18] Under cross examination, the Applicant agreed that in the meeting on 22 June 2022:

- (i) Mr Miron told him he would not be paid by the Respondent anymore;
- (ii) Mr Miron told him that the current arrangement could not continue; and
- (iii) It was clear to him that his engagement with the Respondent had come to an end at that time.¹⁰

[19] Furthermore, it is not in dispute that following the meeting the Applicant did not return to the Respondent's office again, or use any laptops, computers or other devices belonging to the Respondent.¹¹ The Applicant did retain possession of a corporate credit card. However, the Respondent submitted the credit card was deactivated.¹²

Events after 22 June 2022

[20] The Applicant gave evidence that after considering what Mr Miron had 'disclosed' to him on 22 June 2022, he felt it was necessary to obtain formal documentation which confirmed the termination of his employment, as he was still working on the Castle Hill Project.¹³ The Castle Hill Project is a development known as 'Castle Hill Panorama',¹⁴

[21] This prompted the Applicant to commence corresponding with the Respondent in August 2022 to obtain a letter or other formal documentation confirming the "termination of [his] employment"¹⁵ as well as to deal with other arrangements.

[22] On 6 August 2022, the Applicant sent correspondence to the Respondent in relation to a request to have his mobile telephone released from the Respondent's account as he was "starting a new role next week."¹⁶

[23] On 12 August 2022, the Applicant sent correspondence to the Respondent which relevantly stated, "I have observed you have done this with other investors in the past, so I don't quite understand what the issue is to do this for us now, especially given that I no longer oversight of your business since my redundancy."¹⁷(emphasis added)

[24] On 16 August 2022, the Applicant sent correspondence to the Respondent which relevantly stated, "Also I am still waiting for formal confirmation from you on my redundancy along with payment of my entitlements, it has been several months now so this is well overdue."¹⁸ (emphasis added)

[25] On 22 August 2022, the Applicant sent correspondence to the Respondent relevantly stated, "Paul told me that I was no longer going to be employed at MSquared because I had not brought any business in and had not met my KPI's. He advised me that you would be emailing me a confirmation documenting this, I am waiting for this for an unreasonable amount of time now."¹⁹ Under cross examination, the Application agreed that at the time he sent this email, he understood he was no longer working for the Respondent.²⁰ (emphasis added)

[26] At 12:08pm on 24 August 2022, the Applicant sent correspondence to the Respondent which relevantly stated, “**you have failed to provide me confirmation on my termination or respond to my emails below.**”²¹ (emphasis added)

[27] At 1:42pm, Ms Zhanna Miron, the Respondent’s financial controller responded stating “*In any case, regarding employment, at no stage were you terminated. We simply reverted to the agreement that was agreed upon on the 24 of February 2022. Please see attached.*”²²

[28] At 2:35pm on 24 August 2022, the Applicant sent correspondence to the Respondent stating, “**I just believe that I was unfairly dismissed... Paul told me verbatim that I would no longer be getting paid by MSQ because I had not met performance KPI’s, please confirm how I am expected to not interpret this as a termination**”²³ (emphasis added)

[29] At 8:44pm on 24 August 2022, the Applicant sent correspondence to the Respondent stating, “*Are you going to pay my entitlements or **are you going to continue to pretend that I was not dismissed from my role at MSquared?** If I do not have a response from you in writing by tomorrow morning, **I will be lodging for an independent assessment with the Fair Work Commission.**” (emphasis added)*

[30] On 25 August 2022, the Applicant sent correspondence to the Respondent stating, “*For clarity **I need confirmation of whether this was a termination or redundancy from MSquared Capital outlining the reasons for dismissal.**”²⁴ (emphasis added)*

[31] On 27 August 2022, the Applicant sent correspondence to the Respondent stating, “**Please issue the letter I was promised by Paul Miron confirming my termination/redundancy and the details by Monday midday at the latest.**”²⁵ (emphasis added)

[32] On 30 August 2022, the Respondent sent correspondence to the Applicant which relevant stated:

Dear George

I find it extraordinary that you are raising at the end of August issues about the work you ceased performing for Msquared many months ago.

Over time, you have been engaged on a range of terms and conditions for the work you performed for Strategic Financing and related companies. However, up until February this year, you had been treated as an employee, and had received benefits on that basis.

As you know, we had a discussion in February this year because you were pursuing a number of other opportunities and acting for other businesses, and this had led to you not turning up to work for Msquared. As a result of these discussions, you moved onto new terms which were intended to provide a more flexible opportunity for you to continue to identify leads and opportunities for Msquared as well as pursuing those other opportunities. These terms were set out in the attached document dated 24 February 2022 and accurately described this as a contractor arrangement. This was an arrangement that was acceptable to you at the time.

As stated in this document, you were to be paid a retainer of \$100,000pa, paid in equal monthly instalments, and was to be covered on a debit and credit basis from the commissions provided for by both property development transactions, capital inflows and debt opportunities. As set out in the document, the expectation was that you would make some effort to seek to pursue these sorts of transactions, and would attend the office at least 1 day per week, with reporting via Zoom 2 other days on any projects you are working on.

For the 4 months of March, April, May and June 2022, this arrangement operated, and you submitted invoices for the monthly retainer payment (ie consistently with the 24 February 2022 arrangement) and were paid in accordance with it. However, you did not make any meaningful effort to seek to achieve the property acquisitions, capital inflows and debt opportunities which would generate commissions to cover your retainer. For this reason, you and Paul met on 22/06/2022 and Paul informed you that this arrangement was not working and would cease. You raised a question about how this impacted on your interest in the Castle Hill opportunity, and Paul reassured you that Castle Hill always fell outside this arrangement and was being dealt with separately.

In summary, this was a contractor arrangement in which you were not living up to your side of the bargain in terms of generation of opportunities for Msquared and, after paying over \$30,000 under that arrangement, we took the decision to terminate your engagement. You were not an employee, so concepts such as 'dismissal' and 'redundancy' do not arise.

[33] On 20 September 2022, the Applicant filed the Application.

When did the dismissal take effect?

[34] The parties are in dispute about when the 'dismissal took effect'.

Applicant's Submissions

[35] The Applicant submitted that although the Respondent advised the Applicant that his services were no longer needed on 22 June 2022, the Respondent failed to provide formal notice of termination.

[36] The Applicant submitted that the situation was confusing and complicated due to the various arrangements between the Applicant, the Respondent and other projects or entities.

[37] The Applicant submitted that he continuously requested formal documentation as to the reasons for his dismissal and was only provided with that confirmation on 30 August 2022, and that is the date that should be regarded as the date of dismissal.

Respondent's Submissions

[38] The Respondent submitted that the Applicant's oral evidence was clear in that he understood his engagement came to an end on 22 June 2022.

[39] The Respondent submitted that the Applicant did not perform any work for the Respondent beyond 22 June 2002 and that the various emails sent to the Respondent were no more than the Applicant seeking confirmation of the basis upon which his engagement had been concluded.

[40] The Respondent submitted that the email sent to the Applicant on 30 August 2022 was not a letter of termination of any sort. Rather, the correspondence provided clarification on a range of matters.

[41] The Respondent submitted that the Application was substantially out of time.

Consideration – when did the dismissal take effect

[42] Having regard to the evidence before me, there can be no doubt that whatever arrangement was on foot between the parties, it ended on 22 June 2022.

[43] The Applicant agreed under cross examination that he understood his engagement with the Respondent ended in the meeting on 22 June 2022. Furthermore, the emails sent by the Applicant to the Respondent throughout August 2022 invariably refer to his ‘termination’, ‘redundancy’ or ‘dismissal’, and that he believed as at 24 August 2022 (prior to receiving the Respondent’s correspondence of 30 August 2022) that he had been unfairly dismissed and was contemplating lodging an application with the Commission.

[44] This is consistent with the Applicant’s LinkedIn Profile which he amended to state that he worked for the Respondent from April 2018 to June 2022.²⁶

[45] In relation to the Respondent’s email of 30 August 2022, I do not accept the Applicant’s submission that it is a letter of termination. It is unambiguously clear that the Respondent was responding to the Applicant’s correspondence, and in doing so, clarified its position in relation to past events.

‘Other Work’

[46] The Applicant also contended that his employment continued beyond 22 June 2022 because:

- (i) He continued to receive emails to an active work email address provided by the Respondent; and
- (ii) He continued to work on the Castle Hill Project.

[47] These contentions cannot be accepted for the following reasons.

[48] First, in relation to the email he received on 16 August 2022, the Applicant was copied into an email trail by external lawyers inviting him to attend a meeting.²⁷ The Applicant agreed that he did not attend the meeting, nor did he send any emails relating to his work for the Respondent beyond 22 June 2022.²⁸

[49] Furthermore, upon being made aware that this email account was still active, Mr Miron, took immediate steps to have it deactivated.²⁹

[50] Second, in relation to the Castle Hill Project, that is a development owned and managed by Castle Hill Panorama Pty Ltd.³⁰ The Applicant confirmed that he is a shareholder in that development and that any work performed by him in relation to the Castle Hill Project beyond 22 June 2022 was in his capacity as a shareholder of Castle Hill Panorama Pty Ltd and not as an employee or contractor of the Respondent.³¹

Conclusion – date the dismissal took effect

[51] Having regard to the evidence before me, I find the Respondent terminated the arrangement between it and the Applicant in the meeting between Mr Miron and the Applicant on 22 June 2022.

[52] At this stage of the proceedings, it is not necessary that I determine whether the Applicant was an employee or contractor. Irrespective of the determination of that matter, the ‘date of dismissal’ for the purposes of the Application was 22 June 2022.

[53] This means the Application was filed 90 days after the date the alleged dismissal took effect, and 69 days outside the 21-day period. Accordingly, the Applicant will require an extension of time.

Exceptional Circumstances

[54] 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.³² 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.³³

[55] The requirement that there be exceptional circumstances before time can be extended under s.394(3) contrasts with the broad discretion conferred on the Commission under s.185(3) to extend the 14 day period within which an enterprise agreement must be lodged, which is exercisable simply if in all the circumstances the Commission considers that it is ‘fair’ to do so.

[56] Section 394(3) 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.

[57] 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.

[58] The test of ‘exceptional circumstances’ establishes a ‘high hurdle’ for an applicant seeking an extension of time to file an unfair dismissal application.³⁴

[59] I now consider these matters in the context of the application.

Reason for the delay

[60] The FW Act does not specify what reason for delay might tell in favour of granting an extension, however decisions of the Commission have referred to an acceptable or reasonable explanation. The absence of any explanation for any part of the delay will usually weigh against an applicant in the assessment of whether there are exceptional circumstances, and a credible explanation for the entirety of the delay will usually weigh in an applicant’s favour, however all of the circumstances must be considered.³⁵

[61] The Applicant submitted that the sole reason for the delay was confusion and uncertainty as to when the termination of his employment or arrangement with the Respondent took effect, and this only became apparent after he received the email correspondence on 30 August 2022.³⁶

[62] The Applicant submitted that the confusion and uncertainty surrounding the status of any employment or arrangement was compounded by the Applicant continuing to work on the Castle Hill Project and the correspondence from Ms Miron on 24 August 2022 which stated, inter alia, *“In any case, regarding employment, at no stage were you terminated. We simply reverted to the agreement that was agreed upon on the 24 of February 2022. Please see attached.”*³⁷

[63] The Applicant submitted that the Respondent contributed to the delay by failing to provide written documentation to the Applicant.

[64] I do not accept the submission that there was confusion and uncertainty. As stated above, the Applicant agreed in cross examination that he understood that his employment or arrangement with the Respondent ended on 22 June 2022. Furthermore, the Applicant’s emails to the Respondent throughout August 2022 confirms he was aware and understood that a ‘termination’ or ‘redundancy’ or ‘dismissal’ took effect that day.

[65] I also do not accept the submission that there was confusion about the Applicant continuing to ‘work’ on the Castle Hill Project. It was clear on the Applicant’s evidence that any work undertaken in relation to this development was in the Applicant’s capacity as a

shareholder of Castle Hill Panorama Pty Ltd and not as an employee or contractor of the Respondent.

[66] In relation to the email from Ms Miron dated 24 August 2022, I do not accept that could cause confusion. On a fair reading of that document, Ms Miron is referring to the Respondent's position that in February 2022, the Applicant's status as an employee changed to contractor.

[67] I do not consider the Applicant's reason for the delay to be an acceptable or reasonable explanation. The absence of an acceptable explanation weighs against a conclusion that there are exceptional circumstances.

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

[68] For the reasons set out at paragraphs [43]-[53] above, I find the Applicant was notified that his engagement with the Respondent ceased on the same day that it took effect and therefore he had the full period of 21 days to lodge the Application. This circumstance does not weigh in favour of a conclusion that there are exceptional circumstances.

Action taken to dispute the dismissal

[69] The Applicant did not take any action within the 21-day period to dispute the 'dismissal'. From 16 August 2022, 55 days after the 'dismissal', the Applicant sent a number of emails to the Respondent seeking written confirmation of his 'dismissal' and whether it was a termination or redundancy. The Applicant also foreshadowed the possibility of making an application to the Commission.

[70] In all the circumstances, I do not find that the Applicant took any action to dispute the 'dismissal' within the 21-day period after his 'dismissal'. However, I do find the Applicant did take action to dispute the 'dismissal' prior to the Application being filed. I consider this factor to be a neutral consideration.

Prejudice to the employer

[71] I cannot identify any prejudice that would accrue to the Respondent if an extension of time were to be granted. However, the mere absence of prejudice is not in my view a factor that would point in favour of the grant of extension of time. I therefore consider this to be a neutral consideration.

Merits of the application

[72] 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 above and I do not repeat them here. 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. I consider the merits to be a neutral consideration.

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

[73] Neither party brought to my attention any relevant matter concerning this consideration and I am unaware of any relevant matter. I therefore consider this to be a neutral consideration.

Conclusion

[74] Having regard to the matters I am required to take into account under s.394(3), and all of the matters raised by the Applicant, I am not satisfied that there are exceptional circumstances, either when the various circumstances are considered individually or together.

[75] Because I am not satisfied that there are exceptional circumstances, there is no basis for me to allow an extension of time. I decline to grant an extension of time under s.394(3).

[76] The Application must be dismissed. An order to that effect will issue with this decision.



COMMISSIONER

Appearances:

Mr A Strik, of counsel for the Applicant.
Mr T Frost, solicitor for the Respondent.

Hearing details:

2022.
Sydney (via Microsoft Teams video-link):
22 December.

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¹ *Lisha Herc v Hays Specialist Recruitment (Australia) Pty Limited* [\[2022\] FWCFB 234](#) at [15], [17].

² Exhibit R1 at [9]-[12].

³ Exhibit R1 at [13]-[14].

⁴ Exhibit R1 at [14], Exhibit PM1 (Hearing Book p.79)

⁵ Transcript at PN207-PN217.

⁶ Exhibit R1 at [17]; Exhibit R3, Annexure B; Exhibit A1 at [6]; Transcript at PN208.

⁷ Exhibit R1 at [18]-[19].

⁸ Exhibit A1 at [9].

⁹ Exhibit R1 at [23].

¹⁰ Transcript at PN119-PN121.

¹¹ Exhibit R1 at [24], Transcript at PN122-PN126.

¹² Exhibit A1 (Hearing Book p.104-105); Transcript at PN702.

¹³ Exhibit A1 at [14].

¹⁴ Transcript at PN142.

¹⁵ Exhibit A1 at [15]-[16].

¹⁶ Exhibit R3, Annexure C.

¹⁷ Exhibit A3 (Hearing Book p.61).

¹⁸ Exhibit A3 (Hearing Book p.60).

¹⁹ Exhibit A3 (Hearing Book at p.60).

²⁰ Transcript at PN307.

²¹ Exhibit A3 (Hearing Book at p.59).

²² Ibid.

²³ Exhibit A3 (Hearing Book at p.58).

²⁴ Exhibit A3 (Hearing Book at p.56).

²⁵ Exhibit A3 (Hearing Book at p.55).

²⁶ Exhibit R1, Annexure D.

²⁷ Exhibit A2.

²⁸ Transcript at PN238-PN244.

²⁹ Exhibit R3 at [25].

³⁰ Transcript at PN152-PN156.

³¹ Transcript at PN276-PN288.

³² *Nulty v Blue Star Group Pty Ltd* [\[2011\] FWAFB 975](#) at [13].

³³ Ibid.

³⁴ *Lombardo v Commonwealth of Australia as represented by the Department of Education, Employment and Workplace Relations* [\[2014\] FWCFB 2288](#) at [21].

³⁵ *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [\[2018\] FWCFB 901](#) at [39]

³⁶ Applicant's Submissions at [24]; Applicant's Reply Submissions at [9]-[10].

³⁷ Applicant's Reply Submissions at [9], [11].