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Better come with a good excuse: Postman's Application for Extensions of time in the Administrative Appeals Tribunal rejected

Devlin and Australian Postal Corporation (Compensation) [2016] AATA 487
(7 June 2016)

Key Points

- This decision underpins the onus and standard of proof borne by an applicant who has delayed in seeking review, and therefore makes an application for an extension of time under section 29(7) of the *Administrative Appeals Tribunal Act* 1975 (Cth) (**AAT Act**).

Background

Brian Devlin, an Australia Post worker, made a workers' compensation claim for an injury suffered in the course of his employment when he twisted his ankle stepping out of a van to empty a postbox.

Australia Post accepted liability by way of determination 23 August 2013. The determination stated that Mr Devlin could seek to have any decision relating to his claim reconsidered by Australia Post. It further stated that he could apply to the AAT for review of any reconsideration decision within 60 days of such a decision being made.

Australia Post subsequently made separate determinations to cease liability for costs associated with physiotherapy treatment, and to reduce Mr Devlin's Normal Weekly Earnings. Mr Devlin then lodged a claim with Australia Post for permanent impairment and non-economic loss. This claim was rejected on 19 December 2014.

On 6 January 2015, Mr Devlin sought reconsideration of Australia Post's rejection of his claim for permanent impairment. Australia Post affirmed the decision on 8 January 2015.

On 9 May 2016, roughly 16 months after the reviewable decision, Mr Devlin lodged an Application with the AAT. His Application for Review was accompanied by an application for an extension of time under section 29(7) of the AAT Act. Senior Member Egon Fice heard the parties as to the merits of the extension of time application.

The Law

Applications for Review of decisions must be made to the AAT within 60 days after the initial reconsideration decision, pursuant to Section 65(4) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**).

In deciding whether to exercise its discretion to allow an extension of time, the Tribunal requires the

applicant show that his or her case is a justifiable exception to the rule that the interests of the State are best served by a statutory limitation period: McHugh J in *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25.

The Tribunal relies on the principles expounded in the Federal Court cases of *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 and *Comcare v A'Hearn* [1993] FCA 498. These cases demonstrate that while special circumstances are not required to be shown by an applicant seeking an extension, an applicant must provide an acceptable explanation for any delay. An extension must be fair and equitable in the circumstances, for the Tribunal to even consider granting an extension.

Factors the Tribunal will give weight to in considering an application include the merits of the applicant's case, prejudice an extension would cause to the respondent, and fairness as between the applicant and other persons in a similar position to the applicant.

The length of delay itself is not an explicit factor, but could affect the Tribunal's consideration of what might constitute an "acceptable explanation".

In some respects, the most important of all considerations in assessing extension of time applications to properly ascertain an applicant's prospects of success, should the Application proceed. This being because it would not be appropriate to allow an applicant an extension to pursue a meritless case: von Doussa J in *Windshuttle v Commissioner of Taxation* [1993] FCA 553.

Such a consideration is not to constitute a hearing on any substantive proceedings; rather, a mere assessment on face value of the evidence presented thus far as to the applicant's chances of achieving a favourable outcome.

Conclusion

Mr Devlin's sole explanation for the delay was that he believed he was incorrectly advised by his solicitors that his ankle injury would not satisfy the requirement for a minimum 10% degree of permanent impairment under section 24(7)(b) of the SRC Act. He was advised by his employer prior to the original determination of the relevant statutory limitation period. He did not provide any evidence that he had sought out a second opinion from an independent expert. There were no apparent medical reasons for the delay.

Noting the evidence, the Tribunal had reason to believe that Mr Devlin would not succeed in his Application. Mr Devlin had eventually sought a second medical opinion, but this evidence did not conclusively suggest Mr Devlin's injury would satisfy the 10% or more permanent impairment threshold, and in any event, Mr Devlin did not present this evidence in support of his application for extension.

The Tribunal determined that the applicant's explanation for the delay was unsatisfactory and, in any event, the applicant would not succeed in the substantive proceedings.

The Tribunal held that neither party would have suffered prejudice as a result of the delay, although this consideration was immaterial in the circumstances.

Lessons Learnt

This decision serves as a reminder of the evidentiary standard borne by the applicant in an application for extension of time before the AAT.

Not only must an applicant provide an acceptable explanation for the delay that would justify granting an extension, they must also adduce sufficient evidence to suggest that their case, on face value, has merit.

It is therefore doubly as burdensome on an applicant who delays in making an Application for Review, as they must not only explain the delay but also prepare sufficient evidence to establish a case with reasonable prospects of success.

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