

How not to get an Extension of Time in the Administrative Appeals Tribunal *Emery and Comcare* [2017] AATA 2281

Key Points

- Mr Emery filed a late application for review of a decision, along with a request for an extension of time.
- The decision under review was actually favourable to Mr Emery. Mr Emery had also been provided with independent legal advice that his claim had minimal prospects of success.
- The extension of time was not granted, and Mr Emery's conduct labelled "extraordinary" by the Senior Member.

Background

In 1989, Comcare accepted a claim in respect of "generalised anxiety disorder" lodged by Ian Douglas Emery. On 10 January 2017, Comcare affirmed a determination in respect of liability for medical treatment. The reviewable decision provided the usual warning that there was a time limit of 60 days in which to lodge an application for review but, in some cases, an extension of time may be granted by the AAT.

Mr Emery first contacted the Tribunal about a review of the decision on 20 March 2017. However, the Tribunal did not receive a valid application until 18 April 2017. This was because Mr Emery failed, on multiple occasions, to provide the Tribunal with any proper reasons for why he was applying to the Tribunal for review of Comcare's decision.

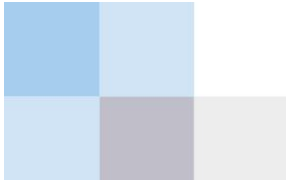
When Mr Emery filed his valid application for review on 18 April 2017, he was roughly 5 weeks out of time. Mr Emery sought an extension of time on the basis that he had sought independent legal advice in respect of his claim.

The law

In determining whether to grant an extension of time, the Tribunal considered two issues:

1. Whether there could be reasonable satisfaction in the mind of the Tribunal to extend the time for making an application for a review of the decision dated 10 January 2017; and
2. Whether, pursuant to s 42B(1) of the AAT Act, Mr Emery's substantive application should be dismissed on the basis that it is frivolous, vexatious, misconceived or lacking in substance, has no reasonable prospects of success, or is an abuse of process.

At the outset, Senior member Tavoularis noted the conduct of Mr Emery, who:

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- Had a history of a previous unsuccessful extension of time application in 2016 for another matter, and so was no doubt aware of the 60-day time limit;
 - Had, for reasons he could not explain to the Tribunal, sought review of a reviewable decision accepting liability to pay ongoing medical treatment;
 - Adjourned the Hearing of the extension of time application three times;
 - Sought separately to ventilate his claim before the Commonwealth Ombudsman and the Superannuation Complaints Tribunal, each to no avail; and
 - Obtained independent legal advice which advised him his substantive claim had poor prospects of success.

Senior Member Tavoularis set out the four principles to consider in granting an extension of time application, expounded by the Federal Court in the decision of *Hunter Valley Developments Pty Ltd v Cohen, Minister for Home Affairs and Environment* (1984) 4 FCR 344 (**Hunter Valley**).

Applying these principles to Mr Emery's case (and taking into account his rather strange conduct, as listed above), the Tribunal found:


1. The **length of delay** in filing his application for review was minor, and had been conceded by Mr Emery;
2. The applicant's reason for seeking an extension of time, namely that he was seeking independent legal advice, was **not an acceptable explanation** for the delay;
3. Comcare had been **unfairly prejudiced** for a multitude of reasons, predominantly Mr Emery seeking review of a reviewable decision that was entirely in his favour; and
4. Mr Emery's substantive application had **little to no prospects of success**, and he had received independent legal advice telling him so.

Conclusion

Senior Member Tavoularis, in finding that the four Hunter Valley criteria had not been fulfilled, dismissed the extension of time request, offering the following critique of Mr Emery's conduct:

“one ought have both empathy and a high level of caution when dealing with self-represented applicants. However, the Applicant in this case... has moved beyond the realm of perceived disadvantage sometimes attributable to self-representation and has graduated into an applicant who... delays the Tribunal's capacity to process his application through repeated adjournments on largely spurious grounds.”

A decision as to whether the applicant was frivolous or vexatious, or an abuse of process, was not made as the extension of time had not been granted.





In Senior Member Tavoularis' view, Mr Emery's claim was "*verging... on the absurd.*"

Lessons Learnt

As respondents are acutely aware, it is difficult to defend applications for an extension of time. *Emery* is a timely example of a case that crosses the line.

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