

Complete dismissal for continual failure to proceed by applicant *Mitchell v Comcare [2020] AATA 257*

Key Points

- The Tribunal was required to consider whether an Application should be dismissed, on the grounds that the applicant failed to progress her Application.
- The Tribunal found in favour of Comcare.

Background

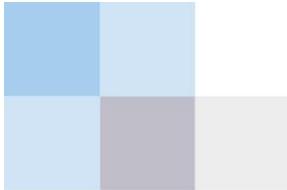
Ms Mitchell had an accepted claim for a lower back condition. She lodged an Application for Review with the Tribunal on 27 June 2018, regarding a decision which denied liability to pay compensation for ongoing chiropractic treatment, massage and acupuncture. Over the course of proceedings, a number of issues arose which delayed the progress of the matter. Specifically, Ms Mitchell:

1. Requested that two independent medical examinations arranged by Comcare be rescheduled;
2. Twice requested that the Tribunal be reconstituted;
3. Requested that a directions hearing be adjourned;
4. Was directed to file and serve submissions and asked for three extensions of time to comply;
5. Failed to comply with a direction to provide a hearing certificate.

Despite the delays, the matter was listed for substantive hearing to commence on 19 June 2019. On 14 June 2019, Ms Mitchell provided two medical certificates, advising that she was unwell and unable to participate in the hearing. As a result, the hearing was adjourned to 16 September 2019.

Ms Mitchell then provided a report from her GP advising she was not fit to attend the September hearing. The Tribunal adjourned the hearing to 6 November 2019. At that stage, Ms Mitchell provided a report from her psychologist, stating she was unable to attend the hearing because it would aggravate her psychological condition. The Tribunal subsequently directed that Ms Mitchell provide a report from her GP advising when she would be fit. Ms Mitchell's GP was unable to say when she would be fit to attend hearing.

The Tribunal asked the parties about the possibility of the hearing being undertaken on the papers. Ms Mitchell consented to this. Comcare did not consent on the basis that it required that the witnesses be cross-examined. The Tribunal therefore could not proceed with a hearing on the papers and, given Ms Mitchell's inability to attend a hearing, her Application was essentially stuck.



The Tribunal listed a directions hearing to discuss the applicant's inability to proceed with her Application. At the directions hearing, Comcare requested that the Application be dismissed. The applicant opposed the dismissal of her Application.

The Law

Section 42A(5)(b) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**the AAT Act**) provides that where an applicant fails, in a reasonable time to proceed with their application, the Tribunal has the power to dismiss the application.

Conclusion

The Tribunal noted that under section 2A(b) of the AAT Act, its objective is to provide a mechanism of review which is fair, just, informal and quick. The Tribunal noted that the burden lies with the applicant to be ready to bring their matters forward in a timely manner. The Tribunal appreciated that Ms Mitchell was unable to participate in the hearing due to her health, however, as a result, it had been unable to review her matter.

The Tribunal said self-represented litigants are subject to the same rules as represented parties. The Tribunal noted that over the course of the Application, it had been very lenient towards the applicant in allowing various extensions of time and not dismissing her Application for her non-compliance with directions.

The Tribunal noted the importance of procedural fairness for both parties. The Tribunal accepted that the applicant was not able to proceed with her Application currently, or in the foreseeable future. However, the Tribunal considered that it was procedurally unfair to have the proceedings on fit for an unspecified time into the future. On this basis, The Tribunal dismissed the Application.

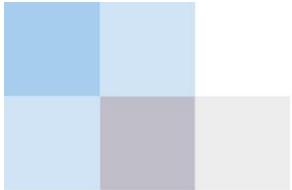
Lessons Learnt

Each applicant is required to push proceedings forward. In circumstances where an applicant delays proceedings or does not actively move things forward, it is appropriate for the respondent to request that the Tribunal dismiss the application.

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