[2014] AATA 812

|  |  |
| --- | --- |
| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2014/3509 |
| Re | Confidential |
|  | APPLICANT |
| And | Principal Member, Social Security Appeals Tribunal |
|  | RESPONDENT |

# Decision

|  |  |
| --- | --- |
| Tribunal | **Senior Member CR Walsh** |
| Date | **23 October 2014** |
| Place | **Perth** |

The Tribunal affirms the decision under review.

.....(Sgd) CR Walsh..............................

**Senior Member CR Walsh**

# It is noted that publication of this decision is approved by the Administrative Appeals Tribunal pursuant to s 100X(4)(h) of the *Child Support (Registration and Collection) Act 1988* (Cth)

# Catchwords

Extension of time application – Principal Member, Social Security Appeals Tribunal refused applicant’s application for an extension of time in which to lodge application for review of a decision of the Child Support Registrar refusing to change a child support assessment – Tribunal not positively satisfied that it is proper for it to grant extension of time application – decision under review affirmed

# Legislation

Child Support (Registration and Collection) Act 1988 – Part VIIA – s 89 – s 90(1) – s 91 – s 92(1) – s 92(7)

# Cases

Comcare v A’Hearn [1993] FCA 498

Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344

Phillips v Australian Girls’ Choir Pty Ltd & Anor [2001] FMCA 109

Re Muleron and Australian Telecommunications Corporation (1991) 14 AAR 42

# REASONS FOR DECISION

**Senior Member CR Walsh**

**23 October 2014**

# introduction

1. The Applicant seeks a review of a decision of the Principal Member of the Social Security Appeals Tribunal (**SSAT**), dated 11 June 2014, refusing the Applicant’s application for a review of a decision of the Child Support Registrar (**CSR**) concerning a child support assessment relating to her two children, dated 4 September 2013, on the basis that her review application was received outside the 28 day period prescribed by s 90(1) of the *Child Support (Registration and Collection) Act 1988* (**Act**).

**BACKGROUND**

1. On 10 April 2013, the Applicant applied to the Child Support Agency (**CSA**) for a change of the Child Support Assessment (**Assessment**) relating to her two children.
2. On 21 June 2013, a CSA Senior Case Officer changed the Assessment (**Original Decision**). A result of the Original Decision was that the Applicant’s ex-husband was required to pay 50% of his children’s private school fees from 1 January 2014.
3. On 9 July 2013, the Applicant’s ex-husband lodged an objection to the Original Decision on the following grounds:

* It was [the Applicant’s] decision that the children be educated privately.
* At the time of separation I wished for the boys to be placed in public schooling and [the Applicant] stated she would personally provide the financial security to maintain their private schooling.
* I cannot afford to pay the school fees.
* [The Applicant] has been paying the school fees for the last 4 years and it seems ironic that she is applying now for school fees. (**Objection**)

1. On 4 September 2013, a CSA Senior Objections Officer allowed the Objection and hence refused to change the Assessment to require the Applicant’s ex-husband to pay 50% of his children’s private school fees (**Objection Decision**).
2. In allowing the Objection, the CSA Senior Objections Officer stated:

[The Applicant] maintains that she has been paying 100% of private school fees for [her two children] for the last 4 years. She confirms there was a joint intent for the children to have a private education as [the Applicant’s ex-husband] signed the enrolment forms.

[The Applicant’s ex-husband] responded and states there was an agreement made during their separation that he would pay the mortgage and [the Applicant] would take on 100% of the school fees. [The Applicant’s ex-husband] provided a copy of their Divorce Application where it states under Financial Support: Father pays child support for children only. Mother pays all other expenses (school, doctors, clothing etc).

[The Applicant] confirmed she signed the original documents and agreed to pay the school fees; however she states the stamped order for their divorce makes no mention of the schooling. [The Applicant] provided me with a copy of the stamped order and in relation to the children it states in paragraph 5:

Proper arrangements in all circumstances have been made for the care, welfare and development of those children.

Since the parents separated they have acted in accordance with the expressed intentions of the Divorce application. [The Applicant] has been paying 100% of the school fees over the last 4 years and I have determined the intent of the parents was for [the Applicant] to pay 100% of the school fees and therefore I cannot find special circumstances exist.

Reason 3 is not established.

1. At the end of the Objection Decision, the following appears:

RIGHT OF APPEAL TO THIS DECISION

Either parent may apply to the Social Security Appeals Tribunal for a review of this decision.

1. On 8 May 2014, the Applicant applied to the SSAT for a review of the Objection Decision (**Extension Application**).
2. In the Extension Application, the Applicant stated:

I wish to apply for an extension as my claim was knocked back last year, this year my current partner has had the same claim lodged against him and this has been allowed.

How can two claims in the one house for the same claim get different decisions made.

This is unfair and this is why I would like to apply to get this looked at.

1. On 11 June 2014, a delegate of the Principal Member of the SSAT decided not to grant the Applicant the Extension Application (**SSAT Decision**). In reaching its decision, the SSAT concluded (at [23]):

I find the substantive application may have some merit. However given the substantial delay in the lodging of the application; the fact that [the Applicant] rested on her rights; and the likelihood of there being prejudice to the other party; I find it would not be just and equitable to grant the extension application.

1. On 7 July 2014, the Applicant applied to this Tribunal for a review of the SSAT Decision. The Applicant’s stated “Reasons for Application” are:

I feel that I should have been given an extension of time extension as in the final paragraph of the [SSAT’s] statement of reason it states (I find substantive application may have some merit). I understand that the time delay was over 28 days but as I explained it was only come to my attention as my partner has had the same application applied to him and they won’t use the divorce papers, even though it states in his Father pays child support Mother pays all other costs.

I was told by Julie the case manager that she had spoken to the[ir] (sic.) legal team and I didn’t have any chance, divorce papers were legal documents.

As you can understand I am now once again trying to get my head around the two different rulings. I have suffered personal tra[u]ma (sic) from all this and had to seek help after my knock back last year, and just as I get my self back on track this happens.

It also says in the final paragraph [of the SSAT Decision] that it is prejudice to the other party, but what about my kids and what is right for them. I am trying to give our boys the education that from birth we promised ….

To asked that this be looked at.

I understand that this is over the time but when your told it’s the end of the road theres no where else for you to go except to get your divorce papers changed, when given information like this by people who are supposed to be doing what’s right for the children, you believe what your told.

I ask for my children…you please con[s]ider (sic) to look at our case.

I only want to give my boys the best I can as a mother.

# Analysis

1. Provisions relating to the review of decision made by the CSA are contained in Part VIIA of the Act. In particular, s 89 of the Act provides that a person may apply to the SSAT for a review of an objection decision of the CSR.
2. Section 90(1) of the Act states that an application for review of a decision of the CSR must be made by a person within the period of 28 days, starting on the day which the relevant notice is served on the person.
3. Section 91 of the Act provides:

**Application for extension of time**

(1) If the period for applying for review under this Part has ended, a person may make an application for review under this Part that includes a written application (the **extension application**) asking the SSAT Principal Member to consider the application for review despite the ending of the period.

(2) The extension application must state the reasons for the person's failure to apply for the review within the period required by section 90.

1. Section 92(1) of the Act provides that the SSAT Principal Member must then consider the extension application and, within 60 days of receiving the extension application, decide whether to grant or refuse it.
2. Section 92(7) of the Act states that a person whose extension application has been refused by the SSAT Principal Member may apply to this Tribunal for review of the SSAT’s decision on the extension application.
3. In *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 (***Hunter Valley***), Wilcox J referred (at 348 to 350) to a number of principles relevant to an exercise of the discretion to grant an extension of time application. These principles were subsequently modified by the Full Federal Court in *Comcare v A’Hearn* [1993] FCA 498 (***A’Hearn***). The modified principles are conveniently summarised by the Federal Magistrates Court in *Phillips v Australian Girls’ Choir Pty Ltd & Anor* [2001] FMCA 109 (***Phillips***) (at [10]) as follows:

In the light of A’Hearn’s case, it is clear that at least one of the principles referred to by Wilcox J in the Hunter Valley decision needs to be modified namely that it should not be any longer regarded as law that the inexcusable delay on the part of a solicitor should be visited upon the client and nor should it be a principle that there is in fact a pre-condition to the exercise of discretion in favour of the applicant for extension to show an acceptable explanation for delay or that it’s fair and equitable in the circumstances to extend time. In the light of the decision in Ahearn’s [sic] case it is useful to set out in modified form the relevant principles in relation to the exercise of the Court’s discretion when considering an extension of time in a human rights application based upon those principles distilled by Wilcox J in Hunter Valley as follows:

1. There is no onus of proof upon an applicant for extension of time though an application has to be made. Special circumstances need not be shown, but the court will not grant the application unless positively satisfied it is proper to do so. The ‘prescribed period’ of 28 days is not to be ignored (Ralkon v Aboriginal Development Commission [1982] FCA 153; (1982) 43 ALR 535 at 550).
2. It is a prima facie rule that the proceedings commenced outside the prescribed period will not be entertained (Lucic v Nolan (1982) 45 ALR 411 at 416).
3. It is not a pre-condition for success in an application for extension of time that an acceptable explanation for delay must be given. It is to be expected that such an explanation will normally be given as a relevant matter to be considered, even though there is no rule that such an explanation is an essential pre-condition (Comcare v A’Hearn [1993] FCA 498; (1993) 45 FCR 441 and Dix v Client Compensation Tribunal [1993] VicRp 21; (1993) 1 VR 297 at 302).
4. Action taken by the applicant other than by making an application to the court is relevant in assessing the adequacy of the explanation for the delay. It is relevant to consider whether the applicant has rested on his rights and whether the respondent was entitled to regard the claim as being finalised. (See Doyle v Chief of Staff [1982] FCA 124; (1982) 42 ALR 283 at 287).
5. Any prejudice to the respondent, including any prejudice in defending the proceeding occasioned by the delay, is a material factor militating against the grant of an extension. (See Doyle at p 287).
6. The mere absence of prejudice is not enough to justify the grant of an extension. (See Lucic at p 416).
7. The merits of the substantial application are properly to be taken into account in considering whether an extension of time should be granted. (See Lucic at p 417).
8. Considerations of fairness as between the applicant and other persons otherwise in a like position are relevant to the manner of exercise of the court’s discretion (Wedesweiller v Cole (1983) 47 ALR 528).[[1]](#footnote-1)
9. For the following reasons, the Tribunal is, on balance, not positively satisfied that it is proper for it to grant the Applicant the Extension Application and, consequently, it affirms the SSAT Decision.

***Whether Extension Application made outside the prescribed period***

1. As stated above (in paragraph 17), it is a prima facie rule that extension of time applications made outside the prescribed period will not be entertained. The Applicant acknowledges that she received a copy of the Objection Decision on or about 4 September 2013 but that she did not apply to the SSAT for a review of that decision until 8 May 2014 (being almost seven months after the 28 day period prescribed by s 90(1) of the Act had expired). To satisfy s 90(1) of the Act, the Applicant would have had to lodge the Extension Application within 28 days of receiving the Objection Decision (being on or about 2 October 2013). She did not. Consequently, the Extension Application was made outside the 28 day period prescribed by s 90(1) of the Act and should prima facie not be entertained by the Tribunal.

## *Whether the Applicant rested on her rights*

1. In a letter to the Tribunal, dated 29 September 2014 (**29 September 2014 Letter**), the Applicant noted the following in support of her application:

I received a letter from the CSA around 4th September 2013, which was to confirm what Julie the Senior Case Officer had told me on the phone. I was very upset with the call which is when she informed me that my case had gone in favour of my ex husband and they were allowing the objection. I couldn’t understand how this was possible and she told me that Divorce papers were legal documents and she had been to the CSA legal team who had also informed her that this was a legal document and this is what they were going to use. She also told me the only way it would be possible to change this was to go to the Family law court and change the order to include school fees.

1. The Applicant told the Tribunal that she relied on the telephone advice she received from Julie, a CSA Senior Case Officer, believing that her only recourse in relation to the Objection Decision was to go to the Family Court to have her and her ex-husband’s divorce orders changed. Further, according to the Applicant, in her telephone conversation with Julie, the CSA Senior Case Officer, no mention was made to the Applicant of her right to appeal the Objection Decision to the SSAT. This is consistent with a computer generated file note of the telephone conversation the Applicant had with Julie the CSA officer on 4 September 2013.
2. The 29 September 2014 Letter further states:

Upon receiving the mail, **I was still very upset and obviously didn’t read the print that said I could lodge and objection to the SSAT**, plus I thought what Julie [the CSA case officer] had told me was final.

……….

The reason my case is now up again, is because my current partner has had the same application through the CSA, being the application to get the father to pay towards school fees. Now the evidence in his [decision] (sic) states that he submitted divorce papers and it states Father pays child support and mother pays all other expenses to raising the child. It also states that “The order made by the courts is silent on the financial support of the child” now how come in my case its saying that I have acted in accordance with the intention of the divorce application, and on this granted that the objection was allowed. It also stated that the issue relating to the application for the divorce is that it is a statement of fact rather than one of intent….I feel that this is a bit unfair.

1. The Applicant made similar verbal submissions at the hearing.
2. It is clear from the evidence that the Applicant did not form an intention to contest the Objection Decision by making the Extension Application until she learnt of the outcome of her current partner’s response from the CSA, as described above. This was well after the 28 day period prescribed by s 90(1) of the Act had expired. As such, the Tribunal finds that the Applicant “rested on her rights”. It is, with respect, the Applicant’s own fault that did not read the last paragraph in the Objection Decision which notified her of her right to appeal the Objection Decision to the SSAT: see paragraph 7 above. She is, in this sense, the author of her own misfortune. Further, the Applicant’s claim that she did not apply to the SSAT for a review of the Objection Decision within the prescribed 28 day period because she was acting in reliance of the advice she had received from Julie, a CSA Senior Case Officer (i.e. that her only recourse in relation to the Objection Decision was to apply to the Family Court to have her and her ex-husband’s divorce orders changed) is not relevant to the decision under review. The Tribunal is not the appropriate forum in which to address concerns that the Applicant may have concerning the advice she was given by the CSA in relation to the Objection Decision and how it could be challenged.

## *Whether granting the Extension Application would cause prejudice*

1. The Tribunal finds that the significant time delay in the Applicant making the Extension Application (being some seven months after she received the Objection Decision) is, by itself, enough to cause prejudice to the other party, being the Applicant’s ex-husband. The Tribunal may be less inclined to this view if the Extension Application had been made closer in time to the expiration of the prescribed 28 day period. In circumstances where almost seven months have passed since the Objection Decision, the Tribunal considers that the Applicant’s ex-husband is entitled to proceed on the basis that the Objection Decision was final.
2. Further, the Tribunal acknowledges with approval the following statement in the SSAT Decision (at [17]) concerning time limits for the review of administrative decisions and prejudice to the public:

Time limits for the review of administrative decisions should be observed as strictly as possible in order to assist the proper administration of government agencies. There is also a public expectation that there be a degree of certainty of time limits.

## *Merits of the substantive application*

1. In reviewing the SSAT Decision on the Extension Application, the Tribunal is not required to form a final view on the merits of the substantive application (namely the correctness of the Objection Decision, being a refusal to change the Assessment to require the Applicant’s ex-husband to pay some percentage of his children’s private school fees). Consideration should nevertheless be given to whether the substantive claim has sufficient merit to justify granting an extension application outside the prescribed 28 day period.
2. The reasons the CSA Senior Objections Officer allowed the Objection are set out in paragraph 6 above. In reaching the conclusion that it was not the intention of both parents (i.e. the Applicant and the Applicant’s ex-husband) that their two children be educated privately, the CSA Senior Objections Officer relied upon a copy of the Applicant and her ex-husband’s Divorce Application which he noted *“stated under Financial Support: Father pays child support for the children only. Mother pays all other expenses (school, doctors, clothing etc)”.* A copy of the Divorce Application was not provided to this Tribunal. In opposing the Objection Decision, the Applicant instead relies on her and her ex-husband’s stamped Divorce Order (which was also before the Senior Objections Officer but not this Tribunal) which makes no mention of their children’s school fees and which parent is (or if both parents are) required to pay those fees.
3. Based on the available evidence, it is difficult to say with any degree of certainty whether the Applicant’s substantive claim has sufficient merit to grant the Extension Application outside the 28 day period prescribed by s 90(1) of the Act. Although, it is possible that the Applicant’s substantive claim may have some merit if the CSA is entitled to rely on the Divorce Application and the stamped Divorce Order in reaching its decision on the Assessment and if the content of the stamped Divorce Order is to be relied on in preference to the content of the Divorce Application.

***Medical evidence***

1. The Applicant provided the Tribunal with medical evidence detailing her poor mental health in the period following the Objection Decision. On 25 July 2014, Ms Hewlett, Psychologist, wrote to the Tribunal detailing the Applicant’s mental health history from 10 November 2013 (***Hewitt Report***). In the Hewitt Report, Ms Hewett, a psychologist, stated that the Applicant has reported symptoms of depression and anxiety as a reaction to the stress caused by her dealings with the CSA.[[2]](#footnote-2) The Applicant’s poor mental health following the Objection Decision is not a relevant consideration for the Tribunal in deciding whether to grant the Extension Application outside the 28 day period prescribed by s 90(1) of the Act. As already stated, the Tribunal is not the appropriate forum for the Applicant to pursue any concerns she may have in relation to her dealings with the CSA.

# decision

1. For the above reasons, the Tribunal affirms the SSAT Decision.

|  |
| --- |
| I certify that the preceding 31 (thirty one) paragraphs are a true copy of the reasons for the decision herein of Senior Member CR Walsh |

...(Sgd) T Freeman....................

Dated 23 October 2014

|  |  |
| --- | --- |
| Date of hearing | **22 October 2014** |
| Representative for the Applicant | **Self** |
| Representative for the Respondent | **Unrepresented** |
|  |  |

1. See also Re Muleron and Australian Telecommunications Corporation (1991) 14 AAR 42. [↑](#footnote-ref-1)
2. “The Applicant” also provided a letter to the Tribunal from Dr W A Thyer, dated 21 July 2014. [↑](#footnote-ref-2)