[2015] AATA 457

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2015/0031 |
| Re | Bryce Killoch |
|  | APPLICANT |
| And | Van Oord Australia Pty Limited |
|  | RESPONDENT |

# Decision

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| Tribunal | **Senior Member J F Toohey** |
| Date | **30 June 2015**  |
| Place | **Sydney** |

The applicant is granted an extension of time until 26 June 2015 in which to file his application for review.

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**Senior Member J F Toohey**

***CATCHWORDS*** *– PRACTICE AND PROCEDURE – extension of time – whether acceptable explanation for delay – delay on part of solicitor – prejudice – merits of the substantive application – public interest – Tribunal satisfied it is reasonable in all the circumstances to grant the extension of time*

**Legislation**

Seafarers Rehabilitation and Compensation Act 1992 ss 79(6)

Administrative Appeals Tribunal Act 1975 s 29

**Cases**

Hunter Valley Developments Pty Limited v Cohen [1984] FCA 176

Gabor v Secretary, Department of Education, Employment and Workplace Relations [2010] FCA 706

Comcare v A’Hearn (1993) 45 FCR 441

Grundy and Comcare [2006] AATA 1019

Grundy v Wattyl Australia Pty Ltd [2002] FCA 1480

Lukic v Nolan (1982) 45 ALR 411

Brisbane South Regional Health Authority v Taylor (1996) 139 ALR 1

# REASONS FOR DECISION

**Senior Member J F Toohey**

**Background**

1. This matter concerns applications for extensions of time in which to seek review of decisions deemed to have been made by the respondent on or about 6 December 2012 and on or about 25 December 2012.
2. Mr Bryce Killoch sustained an injury to his left knee on 3 December 2010 while working as a deckhand for the respondent. On 10 December 2010, he claimed compensation under the *Seafarers Rehabilitation and Compensation Act* 1992 (SRC Act). The respondent accepted liability for his injury.
3. On 12 August 2012, the respondent determined that, as at 26 July 2012, it had no present liability for incapacity or medical expenses resulting from Mr Killoch’s injury. Because the letter advising of that determination was incorrectly addressed, Mr Killoch did not become aware of the determination until 19 October 2012.
4. On 30 August 2012, Mr Killoch, through his solicitors, made a claim for permanent impairment in relation to his knee condition. That matter is the subject of separate proceedings currently before the Tribunal.
5. On 3 September 2012, Mr Killoch, through his solicitors, claimed compensation for the cost of medical treatment for chronic pain and major depression secondary to his knee injury. On 5 October 2012, when the respondent had not determined his claim within the statutory 12-day period in the SRC Act, Mr Killoch through his solicitors requested reconsideration. The respondent failed to issue a reviewable decision and, on or about 6 December 2012, was deemed by s 79(6) to have made a decision disallowing Mr Killoch’s claim.
6. On 22 October 2012, having received notice of the determination of 12 August 2012, Mr Killoch through his solicitors requested a reconsideration of that determination. On 26 November 2012, his solicitors asked for a reply “without further delay”. The respondent failed to issue a reviewable decision and, on or about 21 December 2012, was deemed to have made a decision disallowing Mr Killoch’s claim.
7. There was no further communication between the parties until 4 June 2013 when Mr Killoch’s legal representatives wrote to the respondent, referring to their letter of 22 October 2012 and enquiring if a reviewable decision had been made. On 19 June 2013, the respondent’s legal representatives replied advising that the deemed reviewable decisions were considered to have been made and that the time for seeking review by the Tribunal had expired.
8. There was no further communication between the parties until, by letter dated 22 July 2014, Mr Killoch’s legal representatives wrote to the respondent’s legal representatives enclosing a copy of the original claim for compensation made on 10 December 2012, advising they had recently re-established contact with Mr Killoch and seeking the respondent’s consent to an application for an extension of time in which to seek review by the Tribunal. By letter dated 31 July 2014, the respondent’s legal representatives advised they would oppose such application.
9. On 12 August 2014, Mr Killoch’s legal representatives wrote to the respondent’s legal representatives requesting a reconsideration of the claim for incapacity payments made on 22 July 2014. There followed correspondence between the parties as to the validity of the claim and, on 15 September 2014, the respondent’s legal representatives wrote confirming their opposition to any application for an extension of time. On 20 October 2014, Mr Killoch through his legal representatives requested a further reconsideration of the claim. The respondent declined that request.
10. On 6 January 2015, Mr Killoch through his legal representatives lodged an application with the Tribunal for review of what was said to be a deemed reviewable decision made on or about 20 December 2014 in respect of the claim for incapacity payments. On 18 May 2015, he lodged an application for review of the decision deemed to have been made on or around 6 December 2012.
11. At a preliminary hearing on 28 April 2014, there was argument about the validity of, and the Tribunal’s jurisdiction to deal, with the “new claim”. I determined that the proper course was for Mr Killoch to seek an extension of time in which to seek review of the original deemed reviewable decisions. He did so by an application lodged on 22 May 2015.

**Principles**

1. An application for review of a decision must be lodged with the Tribunal within 28 days from the day on which the applicant received the decision (or when it was deemed to have been made: sub-sections 29(1)(d) and 29(2)(a) of the *Administrative Appeals Tribunal Act* 1975. The Tribunal may extend the time for lodging an application if it is satisfied that it is reasonable in all the circumstances to do so: s 29(7).
2. The principles by which a decision whether to grant an extension of time should be guided were described by Wilcox J in *Hunter Valley Developments Pty Limited v Cohen* [1984] FCA 176 as including:
	1. whether there is an acceptable explanation for the delay;
	2. whether the applicant has rested on his or her rights;
	3. whether the respondent or the general public would suffer any prejudice as a result of the extension;
	4. the merits of the case; and
	5. considerations of fairness as between the applicant and other persons in a similar position.
3. These principles were described by Bromberg J in *Gabor v Secretary, Department of Education, Employment and Workplace Relations* [2010] FCA 706 at [7] as follows:

*(a) whilst special circumstances need not be shown, applications for an extension of time are not to be granted unless the Court is positively satisfied that it is proper to do so; the legislated time limits are not to be ignored. The applicant must show an “acceptable explanation for the delay”, and it must be “fair and equitable in the circumstances” to extend time;*

*(b) action taken by the applicant, other than by way of making an application for review, is relevant to the consideration of the question whether an acceptable explanation for the delay has been furnished; a distinction is to be drawn between a person who has made it known that the finality of the decision is contested and a person who has allowed other parties to believe that the matter was finally concluded. The reason for this distinction includes the need for finality of disputes.*

*(c) any prejudice to the respondent in defending the proceedings that is caused by the delay is a material factor militating against the grant of an extension;*

*(d) however, the mere absence of prejudice is not enough to justify the grant of an extension;*

*(e) the merits of the substantial application are to be taken into account in considering whether an extension of time should be granted; and*

*(f) considerations of fairness as between the applicants and other persons otherwise in a like position are relevant to the manner of exercise of the court’s discretion.*

1. These principles are not to be applied mechanically. All of the circumstances of the case must be considered, the overriding consideration being whether it is *reasonable in all the circumstances* to grant the extension.

**Mr Killoch’s explanation for the delay**

1. Mr Killoch explains the delay in bringing his applications to the Tribunal by reference to oversights by his solicitor, his anxiety and depression and the effects of the medications he was taking for chronic pain and his psychological conditions, and that he was unaware there was a time limit for bringing an application to the Tribunal.
2. Mr Killoch’s solicitor, Mr David Trainor, gave evidence before the Tribunal. He acknowledged a number of oversights on his part which contributed to the delay. He said that, after writing to the respondent on 26 November 2012 asking for a reply “without further delay” to his letter of 22 October 2012 seeking reconsideration of the deemed refusal, he returned his file to his filing cabinet pending receipt of the respondent’s reply, which he expected to receive shortly thereafter. He overlooked to mark the matter for further action in the event that the respondent did not meet the statutory timeframes for reconsideration. It was not until he reviewed his files in early June 2013 that he discovered that neither the respondent nor its insurer had replied.
3. On 4 June 2013, Mr Trainor wrote to the respondent’s workers compensation insurer asking whether a reviewable decision had been made in relation to the claim for psychological injury. On 19 June 2013, the insurer’s solicitors replied to the effect that it had not.
4. Mr Trainor gave evidence that, on 19 August 2013, he met with Mr Killoch and had a lengthy discussion about the circumstances of his accident “with a view to investigating the common law claim against the respondent and other third parties.” By letter dated 20 August 2013, Mr Trainor provided written advice to Mr Killoch asking him to follow up various matters they had discussed in conference. His letter concluded with advice that the three-year limitation period would run out on 4 December 2013 “and accordingly we look forward to receipt of this information as soon as possible.” Due to a further oversight, Mr Trainor said, he did not progress the matter thereafter.
5. Giving evidence, Mr Trainor agreed that he could have obtained Mr Killoch’s instructions when they met in August 2013 to pursue the claim for incapacity benefits and permanent impairment which the respondent had failed to deal with, but he said the impending three-year statutory limitation on a common law claim was the focus of their discussion; in any event, he already had instructions in relation to the incapacity and medical expenses, and psychological claims.
6. Mr Trainor gave evidence that he telephoned Mr Killoch on 10 December 2013 in response to a message Mr Killoch left him the previous day and they spoke briefly. During that conversation they discussed mainly issues relevant to the potential common law claim, in particular Mr Killoch’s efforts to obtain the information Mr Trainor had asked him to follow up. At the time, Mr Killoch was taking medications including OxyContin, OxyNorm, Venlafaxine, Metazepam, Endep and Lyrica, and obtaining instructions was difficult.
7. Due to a further oversight, Mr Trainor did not progress the matter further between January 2014 and July 2014 and he did not hear from Mr Killoch during this time. In July 2014, he re-established contact with Mr Killoch and received instructions to pursue both the claim for incapacity benefits and the permanent impairment and non-economic loss claim. On 22 July 2014 he wrote to the respondent’s solicitors asking that they consent to an application for an extension of time to litigate the matters in the Tribunal.
8. Mr Trainor gave evidence that he at no time received instructions from Mr Killock to abandon his claims; had Mr Killoch given such instructions, he would have obtained express written instructions to that effect. To the contrary, Mr Killoch indicated to him several times that he was without income once his incapacity payments had ceased and, at one stage, he advised Mr Killoch to explore with his union the possibility of salary continuance under his enterprise agreement; Mr Killoch continued to tell him that he was impecunious and, in December 2013, described himself as “bankrupt”, although Mr Trainor understood this to be by way of general description rather than a reflection of his legal status.
9. Mr Trainor gave evidence that, having been advised that the respondent would resist an application for an extension of time, he thought the best way to proceed would be to lodge a fresh claim which he did by his letter dated 22 July 2014 which advised that Mr Killoch wished to pursue both his permanent impairment and incapacity claims. It is not clear why that letter, or subsequent correspondence, did not refer also to the claim for psychological injury. Mr Trainor gave evidence that, because he considered a fresh claim the appropriate way to proceed, he did not lodge an application with the Tribunal for an extension of time.
10. Mr Killock provided a written statement dated 19 May 2015. He was not required for cross-examination. He states that, in mid-2011, he developed symptoms of anxiety and depression as a result of his injuries and was referred to a psychologist whom he saw several times for counselling and therapy. In late 2011 the workers compensation insurer organised for him to see a psychiatrist, Dr John Roberts, but, for reasons which are not clear, he was unable to attend the appointment and one was never rescheduled. Mr Trainor assumed the conduct of his matter in early 2012.
11. In about May 2012, Mr Killoch states, he moved to Mackay in Queensland. He remained in regular contact with Mr Trainor and, in October 2012, instructed him to take steps to challenge the cease effects determination. He did not recall having any contact with Mr Trainor between October 2012 and mid-2013 and states that he was under the impression he would receive further correspondence “at some stage”. Meanwhile, he says, he was struggling to cope with anxiety and depression and taking “significant amounts of medication”. He next spoke with Mr Trainor in mid-2014 and, in the meantime, “remained heavily medicated and was having difficulty coping with [his] anxiety and depression”. He had not seen a psychologist or psychiatrist because he could not afford to do so. Since July 2014, he has been in regular contact with Mr Trainor and has attended a number of medical appointments.
12. Mr Killoch concludes by stating that he was not aware of the time limits in relation to claims to the Tribunal and left the matter in the hands of his solicitor on the understanding that the appropriate steps were being taken to have his payments reinstated and to pursue his claim.

**Consideration**

1. In this case, the time between the deemed reviewable decisions and the applications for review is considerable, warranting careful consideration of the relevant factors.
2. Mr Trainor accepts responsibility for most of the delay in bringing the matters before the Tribunal. Delay on the part of a solicitor may be an acceptable explanation for delay (*Comcare v A’Hearn* (1993) 45 FCR 441; and see *Grundy and Comcare* [2006] AATA 1019). That said, it is not enough for an applicant simply to sit back and rely on inaction on the part of his legal representative; it is up to the applicant to pursue the matter as well.
3. Medical reports show that, by 2011, Mr Killoch had developed a very substantial substance dependency and, while there is no evidence directly relating the effects of his medication to delay in this case, it is reasonable to infer that, combined with his chronic pain, it played some part in his failure to pursue his claim more actively with Mr Trainor. I accept Mr Trainor’s evidence that he was having difficulty getting instructions on account of the medications Mr Killoch was taking.
4. According to Dr Alan Home, who assessed Mr Killoch in August 2011 for the respondent, there was “evidence of physiological addiction to strong analgesia… which exceeded that required to control pain associated with [his] known pathology”, and Dr Home recommended a supervised “drug withdrawal process”. At that point, Mr Killock was taking Oxycontin, Tramadol and Valium daily, and Endone for breakthrough pain and Prozac. Workcover medical certificates in 2011 and through to November 2012 refer to Mr Killock’s chronic pain; on 27 August 2012, Dr Shane Christensen noted he had chronic pain syndrome and secondary major depression and that he “must see clinical psychologist for management of chronic pain”.
5. I have no reason to doubt Mr Killoch’s claim that he expected he would hear from his solicitor “at some stage”. I am satisfied that Mr Trainor’s acknowledged inaction was the principal factor contributing to the delay, and that Mr Killoch’s physical and psychological state contributed as well.
6. There is a public interest in finality and certainty in the processes of public administration. The respondent was entitled to believe that Mr Killoch did not seek to challenge its deemed determinations and that the matters were concluded. However, I do not think, on the information before me, that it can reasonably be said that Mr Killoch abandoned his incapacity claim and claim for psychological injury in favour of a common law claim. I accept that Mr Trainor regarded the potential common law claim as pressing given the statutory time limit, and that it was the focus of his discussions with Mr Killoch in the second half of 2013; it does not follow that Mr Killoch abandoned his workers compensation claims or rested on his rights.
7. For the respondent it is submitted that it would suffer substantial prejudice were the application to be granted. It is submitted that the respondent has lost the opportunity of having Mr Killoch medically assessed for a reasonably lengthy period as a direct result of his delay. For Mr Killoch it is submitted that any prejudice would be minimal, that nothing prevents the respondent from obtaining evidence in the relatively short period of the delay. In particular, it is submitted that the respondent could obtain labour market information as a matter of historical record without difficulty, and that it has obtained medical evidence for the purposes of the permanent impairment claim while these other applications have been underway, and could obtain further information if required.
8. Where there is no prejudice to another party, delay will more readily be excused: *Grundy v Wattyl Australia Pty Ltd* [2002] FCA 1480. However, the mere absence of prejudice is not, in itself, sufficient to justify the grant of an extension: *Lukic v Nolan* (1982) 45 ALR 411. Where “actual prejudice of a significant kind is shown, it is hard to conclude that the legislature intended that the extension provision should trump the limitation period”: *Brisbane South Regional Health Authority v Taylor* (1996) 139 ALR 1.
9. I accept that the delay poses some difficulty for the respondent in obtaining medical evidence in that there is a period of some 18 months between December 2012 and July 2014, when Mr Killoch purported to lodged a fresh claim, during which he was been independently assessed. That is a factor to be weighed when considering whether to exercise the discretion to grant the extension. I am not persuaded in this case that the prejudice to the respondent is such that it outweighs other factors. The period in question is not so long, or Mr Killoch’s conditions so changeable that satisfactory medical evidence cannot now be obtained.
10. As to the substance of Mr Killoch’s claims, the respondent properly concedes they are not without some merit. The T- documents include a number of medical certificates and reports from treating and assessing doctors expressing a range of views about his claimed injuries. Mr Killoch is not required to have an unassailable case; only that there is evidence to establish a right of action: see *Brisbane South Regional Health Authority v Taylor* (1996) 139 ALR 1.

**Conclusion**

1. It is fair to say that the respondent’s approach to Mr Killoch’s claims has, until recently, been one of inaction but that is not reason itself to grant an extension of time; an applicant cannot rely on a respondent’s inaction as reason for his own. That said, the SRC Act is beneficial legislation. That is not to say that an extension of time should be granted in circumstances where it is not otherwise reasonable to do so but in this case, I am satisfied that the circumstances as a whole tip the balance in favour of exercising the discretion to grant the extensions of time sought.
2. Taking into account: that Mr Killoch suffered a serious injury; that he has an arguable case in both matters; that the delay rests largely with his solicitor and, to the extent that it rests with him, some latitude is reasonable given his medical condition; that the prejudice to the respondent will not be substantial and where there is prejudice, that it should be able to be overcome with medical evidence; I am satisfied it is reasonable in all the circumstances to grant the extensions sought.

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| 1. I certify that the preceding 39 (thirty-nine) paragraphs are a true copy of the reasons for the decision herein of Senior Member J F Toohey.
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Dated 30 June 2015

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| Date(s) of hearing | **23 June 2015** |
| Representatives for the Applicant | **Mr Howard Halligan, Counsel****Mr Damien Hill, W.G McNally Jones Staff** |
| Representatives for the Respondent | **Mr Brendan Kelly, Counsel****Ms Keyana Low, Sparke Helmore** |