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No. 14

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999
Industrial Relations (Tribunals) Rules 2000

NOTICE

The following Agreements have been certified by the Commission:

No/s	Title	Certified on and certificate issued	Cancelling No.
CA/2008/68	Cairns Community Legal Centre Incorporated Agreement 2008 - Certified Agreement	21/7/08	

G.D. SAVILL,
Industrial Registrar.

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INDUSTRIAL COURT OF QUEENSLAND

Workers' Compensation and Rehabilitation Act 2003 - s. 561(1) - appeal against decision of industrial magistrate

Lorraine Richards AND Q-COMP (C/2008/24)

PRESIDENT HALL

22 July 2008

DECISION

On 16 January 2008, Ms Lorraine Richards filed an appeal against a decision of Q-COMP dated 14 December 2007. At a Mention before the Industrial Magistrate on 15 May 2008, the Industrial Magistrate was informed that the matter was to be withdrawn and that no order should be made about costs. The Industrial Magistrate dismissed the appeal and made no order as to costs.

By an appeal filed on 5 June 2008, Ms Richards complained that the appeal to the Industrial Magistrate "was wrongfully dismissed as a result of error" and seeks orders setting aside the decision of the Industrial Magistrate and remitting the matter to the Industrial Magistrates Court to be heard and determined according to law. The relief sought is entirely appropriate and Q-COMP consents in writing to grant of the relief.

I order that the decision of the Industrial Magistrate in Matter No. MAG-15967/08(1), being an appeal by Lorraine Richards against a decision of Q-COMP given at Brisbane on 15 May 2008, be set aside and that the matter be remitted to the Industrial Magistrate at Brisbane to be heard and determined according to law.

Dated 22 July 2008.

D. R. HALL, President

Released: 22 July 2008

Appearances:

Hall Payne Lawyers, solicitors for the Appellant.

Respondent, self-represented.

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 - s. 341(1) - appeal against decision of industrial commission

Sun, Sea & Surf Pty Ltd AND John Hugh Power (C/2008/14)

PRESIDENT HALL

25 July 2008

DECISION

By s. 255 of the *Industrial Relations Act 1999* (the Act), the Queensland Industrial Relations Commission is a court of record. By s. 349 of the Act its decision is final and conclusive and cannot be impeached for informality or want of form, and cannot be appealed against, reviewed, quashed or invalidated in any court; save where the Act itself provides for a right of appeal from the decision. Materially, s. 341(1) of the Act does provide for a right of appeal from a decision of the Commission. However, an appeal may be brought only on the grounds of error of law or want or excess of jurisdiction. Any such appeal is by way of rehearing on the record; save where as a matter of discretion, this Court allows additional evidence, see s. 348 of the Act. Here, on the hearing of the Appeal, a Mr Oliver (who was a director of the Appellant) sought to rely upon the favourable exercise of the discretion, and to expand the record to include two particular documents. I rejected both applications.

One of the documents which Mr Oliver sought to tender was (part of) a document generated by Wageline. The document was available at first instance. There had been an unsuccessful attempt to tender the document at first instance. The Commissioner in whose hands the matter had fallen rejected the attempt on the ground that it was the Commission's function to construe the relevant award of the Queensland Industrial Relations Commission. The Commissioner was plainly right. To treat the opinions of a government agency as controlling the construction of the relevant award would be to breach both the Commissioner's Oath of Office and all accepted understandings of the doctrine about the separation of powers.

The second document which Mr Oliver sought to tender was a document which Mr Oliver described as an "advertisement". On its face, the document purported not to be an advertisement but to be a file note. There was uncertainty about whose file was the original source of the document. To the extent that the document was said to relate to a document which had been tendered as Exhibit [8] below, the employee about whose entitlement the wages case was fought gave evidence on oath that he had not seen the document. Whilst the discretion at s. 348 of the Act cannot be limited by the doctrines applied by the ordinary courts when dealing with the admission of "fresh evidence", the learning upon that matter is of considerable assistance. This Court has consistently given weight to the decision in *Carter v Rosedale Sawmill and Another* [1995] QCA 441, and has declined to allow "additional evidence", unless it is almost certain or reasonably clear that if the Commission had had the advantage of the evidence a different outcome would follow. Here, what is clear, is that if the document had been tendered at first instance, additional witnesses would have been necessary and cross-examination would have been quite different. Further, even if admission of the document had led to a conclusion that it was an advertisement to which the employee had responded (which was not the evidence at first instance), admission of the document would not almost certainly have led to the outcome which Mr Oliver seeks. To determine the employee's classification and level under the relevant awards it was necessary for the Commission to determine the principle purpose for which the worker was employed. Of cardinal importance were the duties which the

worker was employed to discharge and, because the worker was claiming to be a qualified employee under the awards, whether he had those qualifications. I accept that in the case of ambiguity a label applied by the parties may be of assistance in determining the principle purpose of a contract of employment. I accept that because a contract of employment has to be read as a whole, there will be cases in which agreed duties will be read to conform with a label attached by the parties. However, fundamentally, the label is not decisive. It was for those reasons that I refused to admit the document.

The only error of law volunteered by Mr Oliver was that the case against him was not made out beyond a reasonable doubt. With respect, the case was a civil matter pursuant to s. 278 of the Act, and the Commission was required to determine the matter on the civil onus of proof. The Commission was correct to do so. The Applicant was not required to discharge a criminal onus.

Put aside cases in which there has been a deficiency in process (of which this is not one) and cases in which the chasm between the facts and the outcome is so great that one must infer that there is a unidentifiable error of law (of which this case is not one), to show that the Commission erred in law, it is necessary to show that there was not any evidence upon which the decision of the Commission might be reached. Plainly, this is not such a case. Indeed, Mr Oliver's entire argument is that the Commission errs in preferring one body of evidence over another. That is not an error of law. It is the discharge of duty.

I dismiss the Appeal. The Respondent does not seek costs.

Dated 25 July 2008.

D.R. HALL, President.

Released: 25 July 2008

Appearances:

Mr B. Oliver, for the Appellant.

Ms J. Cameron of Legal and Prosecution Services Unit, Department of Employment and Industrial Relations, for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 - s. 474 - approval for eligibility rule amendment

The Australian Workers' Union of Employees, Queensland (RIO/2008/44)

VICE PRESIDENT LINNANE

21 July 2008

DECISION

- [1] This is an application to amend the eligibility rule of The Australian Workers' Union of Employees, Queensland. The application has been made in accordance with the provisions of the *Industrial Relations Act 1999* (Act) and the *Industrial Relations Regulation 2000*.
- [2] I am satisfied that the proposed amendment to the rules has been made in accordance with the rules of the Applicant organisation. There is no objection to the amendment. There is no material before me on the basis of which I could conclude that the persons who will become eligible as a result of the proposed change might conveniently belong to any other organisation. None of the matters outlined in s. 474(3) of the Act have been identified.
- [3] In those circumstances, I am required by the provisions of the Act to grant consent to the amendment of the eligibility rule and I so do.
- [4] The operative date will be 21 July 2008.

D.M. LINNANE, Vice President.

Appearances:

Mr. D. Broanda of The Australian Workers' Union of Employees, Queensland.

Hearing Details:

2008 15 July

17 July Affidavit of Service

Released: 21 July 2008

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Workers' Compensation and Rehabilitation Act 2003 - s. 550 - appeal to Commission

**Paul Taylor AND Q-COMP
(WC/2008/26)**

COMMISSIONER FISHER

22 July 2008

Appeal against decision of Q-COMP - Extension of time - Extent of delay - Explanation for the delay - Appellant awaiting specialist report - Prejudice to both parties - Substantial delay - Appellant disregarded Statutory time limit to file appeal - Application for extension of time refused.

DECISION

Paul Taylor has appealed against a decision of the Review Unit, Q-COMP to confirm the decision of WorkCover Queensland to reject his claim for workers' compensation. The decision of the Review Unit, Q-COMP was given on 15 May 2007 and Mr Taylor's appeal was lodged on 28 March 2008. He requires an extension of time in which to file the application to be granted by the Commission. Q-COMP has opposed the extension of time being granted.

Section 550 of the *Workers' Compensation and Rehabilitation Act 2003* (the Act) provides that an appeal must be made within 20 business days after the appellant receives the review decision. In *McQuade and Hayes v WorkCover Queensland* (2000) 165 QGIG 126 Hall P considered s. 499 of the *WorkCover Queensland Act 1996*, the predecessor section to s. 550 of the current legislation. Hall P decided that s. 499 was directory rather than mandatory and further that s. 505 (now s. 557) vested power to extend time. Accordingly, the Commission is satisfied it has power to extend time for filing an appeal against a decision of the Review Unit, Q-COMP.

The power to extend time is discretionary. The issue is whether the Commission ought to exercise its discretion to extend time in the circumstances of this case.

In *Carmody v WorkCover Queensland* (1998) 157 QGIG 119 (*Carmody*) de Jersey P set out relevant considerations when determining whether to exercise discretion in relation to an appeal from a decision of the Magistrates Court to the Industrial Court. Although the type of appeal is not identical to that considered in *Carmody*, the principles determined by de Jersey P are apposite to the decision the Commission is now required to make.

(i) Extent of the delay

The appeal was filed approximately 9 1/2 months after the decision of the Review Unit, Q-COMP was made. Mr Taylor complained that the review decision was four weeks beyond the permitted statutory time period. He submitted that as the Review Unit, Q-COMP did not respect the time limits provided by the Act he should be permitted an indulgence with respect to the time for filing his appeal.

In response Q-COMP admitted that its decision was five days beyond the 20 business days required by s. 545 of the Act but was nonetheless within the total time period of 35 business days provided by ss. 545 and 546 the Act for the Review Unit to make and provide its written decision to Mr Taylor. Q-COMP argued that its lateness was not "an explanation or reasonable excuse for delay" such that the Commission's discretion should be exercised.

The Commission is satisfied that the review decision was communicated to Mr Taylor within the totality of the statutory time period. Delay on the part of Q-COMP may have been an argument to extend time for filing the appeal by the equivalent amount of time but it is unreasonable to expect a five day delay on the part of one party to justify a delay of over 9 months by the other party.

(ii) Explanation for the delay

The explanation provided by Mr Taylor for the delay in filing the appeal is that he was waiting for a Specialist's appointment at the Redcliffe Hospital. An appointment was sought in April 2007 but by May 2008 no consultation had occurred despite Mr Taylor writing to the Redcliffe Hospital on two occasions seeking to expedite an appointment.

In evidence Mr Taylor said he believed a Specialist's report was required and referred to his dealings with Centrelink where a Specialist's report was required before benefits could be accessed. Mr Taylor indicated he believed that filing an appeal was also dependent on such a report being available. Ultimately, however, when the appeal was filed no such report had been obtained.

In cross-examination Mr Taylor freely admitted that he was aware of the time limit of 20 business days in which to file the appeal and this was made known to him in the correspondence from the Review Unit, Q-COMP dated 15 May 2007. His awareness of this was also identified in correspondence he sent to Q-COMP on 10 June 2007. Despite knowing of the statutory constraints Mr Taylor did not seek any legal advice nor did he ask Q-COMP for further time to appeal: s. 550(3) of the Act.

The only available explanation for the delay is Mr Taylor's belief that a Specialist's report was required before the appeal could be filed. The Commission is concerned to ensure that unrepresented litigants are informed of the types of matters to be considered: the nature of the evidence that may be required to be produced and endeavours to provide assistance in ensuring this material is made available so that an informed decision can be made. Such a course was adopted here. Mr Taylor was also encouraged to elaborate on his explanation or provide further reasons. Only the matter of the Specialist's report was raised.

Even accepting Mr Taylor was a little confused as to the different requirements of the two processes in which he was involved, it is difficult to understand why Mr Taylor continued to await a Specialist's appointment when he was aware of the statutory time period for filing an appeal. Moreover, when the appeal was ultimately filed such a report had not been obtained. The absence of such a report calls into question the validity of Mr Taylor's explanation.

(iii) Prejudice to the respondent

On this aspect Mr Dwyer, who appeared for Q-COMP, submitted that Q-COMP would be prejudiced were an extension of time to be granted. The prejudice would arise in two ways. Firstly, the case to be run at trial was largely a dispute on the facts. Mr Taylor could not establish his injury occurred in the way he described nor were relevant witnesses able to support his claim. The case would largely be resolved on the basis of witness evidence and given the length of time since the injury was alleged to have occurred (12 January 2007) the recollections of critical conversations by the witnesses would be increasingly problematic.

Further, one of the key witnesses for Q-COMP has since moved to New South Wales and is himself injured. Because he would be a witness of credit Q-COMP believed he may be required to give his evidence in person in the Commission. In such circumstances Q-COMP would be put to cost when, in its submission, the case would not succeed on a hearing of the merits.

(iv) Prejudice to the applicant

Mr Taylor would clearly be prejudiced if an extension of time was not granted as his claim would not survive to be scrutinised and determined by the Commission. Q-COMP conceded this prejudice would be suffered by Mr Taylor but referred to the competing prejudice it would experience if the extension was granted.

(v) Enthusiasm for prosecuting appeal

Mr Dwyer submitted that despite being aware of his rights and obligations and knowledge that he was involved in a legal process Mr Taylor did not demonstrate any enthusiasm for prosecuting his appeal. No contact was made with Q-COMP in an attempt to inform them of the reasons for the delay. Given that he took no action to file an appeal and in the absence of a satisfactory explanation for the delay Q-COMP submitted the Commission should determine not to exercise its discretion to extend time.

(vi) Merits of the appeal

As previously noted Mr Dwyer submitted that the case involved a dispute on the facts and having regard to the review decision which forms part of the appeal notice, the Commission could be reasonably satisfied the prospects of the appeal's success were limited. Mr Dwyer referred to three separate, key factual disputes:

- whether the injury occurred in the manner alleged by Mr Taylor;
- whether the accident was reported; and
- that the treating doctor (who Mr Taylor saw 21/2 weeks after the alleged accident) recorded in his clinical notes a different date and time to that nominated by Mr Taylor.

Mr Dwyer submitted that in this context the merits "start to look ... quite unfavourable".

Conclusions

The starting point in any extension of time application is that the time limit prescribed by the legislation must be respected. Time limits represent the view of Parliament that justice requires disputes be settled as quickly as possible; they provide certainty about the prospects of litigation and ensure relevant evidence is not lost. An extension of time is an exception to the statutory time limit. Although the Commission has the power to extend time the onus rests with Mr Taylor to show that his case is worthy of an exception being made such that the justice of the case requires an extension of time be granted.

The Commission has considered the evidence and submissions presented by both parties. Nine and a-half months is a substantial delay in the context of a statutory requirement of 20 business days in which to file an appeal. The extent of the delay is an important factor weighing against the grant of an extension of time. This is not a case where the appellant only became aware of the appeal period after it had expired.

Although the Commission endeavoured to assist Mr Taylor in ensuring relevant information was before the Commission, at the end of the day the only explanation provided by Mr Taylor was his belief that a Specialist's report was required. This is not sufficiently compelling to grant an extension of time given Mr Taylor's acknowledgement of the time period for filing the appeal. The Commission concludes that Mr Taylor made a calculated decision to disregard the statutory time period.

Mr Taylor failed to take action to keep Q-COMP apprised of his position regarding the appeal. In the absence of any other activity regarding the prosecution of his case, pursuing the Redcliffe Hospital for an early appointment is not sufficient to warrant an extension particularly given the length of the delay involved here. Moreover, the appeal was ultimately filed without the Specialist's report - a step that could have been taken within the time period.

In addition the extent of the delay is likely to negatively impact on the quality of the evidence that can be made available to the Commission. It is inevitable that due to the delay the recollections of key witnesses will be affected. This is a particularly important consideration, where, as is the case here, resolution of the dispute rests primarily on a determination of the competing facts.

After considering all of the material before me and for the foregoing reasons, I am not satisfied that the interests of justice would be best served by granting an extension of time in this case. The application to extend time for filing the appeal is refused.

G.K. FISHER, Commissioner.

Hearing Details:

2008 23 May
8 July

Appearances:

Mr P. Taylor represented himself.
Mr J. Dwyer instructed by Q-COMP on behalf of the Respondent.

Released: 22 July 2008

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