



The Queensland Government

Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$358.00 (GST inclusive)

ISSN 0155-9362

Vol. 188

FRIDAY, 29 AUGUST, 2008

No. 18

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations (Tribunals) Rules 2000 - r. 200A - application for an order to proceed after delay

Eva Bajon AND Q-COMP (WC/2005/14)

COMMISSIONER ASBURY

22 August 2008

Application for Order to proceed after delay - Rule 200A *Industrial Relations (Tribunals) Rules 2000* - Applications under r. 200A treated in a similar way to applications for extensions of time - Principles in deciding whether an Order should be made - Meaning of "an action" in an application considered - Finding that appellant's solicitors contributed significantly to the delay - Conduct of solicitors will operate less severely against appellant than personal conduct - Conduct of Q-COMP also contributed significantly to the delay - Prejudice to appellant if application refused - No evidence of prejudice to respondent - Appeal involves contested facts - Not a case where it could be found that on uncontested facts the appellant has limited prospects of success - Application for Order granted subject to appellant making written request to Industrial Registrar within seven days of this decision for appeal to be listed for programming of hearing date and directions.

DECISION

Overview

This is an application by Eva Bajon (the appellant) under r. 200A *Industrial Relations (Tribunals) Rules 2000* (the Rules) for an Order so that further action may be taken in an appeal to the Commission against a decision of the Review Unit of Q-COMP. The application also seeks to amend the Notice of Appeal with respect to which the Order under r. 200A is sought. The application was listed for directions on 4 August 2008. At the directions hearing, Q-COMP indicated that it opposed the application for an Order under r. 200A and that the amendment sought to the Notice of Appeal was unnecessary. Both parties informed the Commission that they were prepared to proceed and to have the matter heard and determined on 4 August 2008, notwithstanding that the matter had only been listed for directions. The appellant has at all relevant times been represented by Harmers Workplace Lawyers (Harmers).

Chronology of Events

Both parties have tendered chronologies of events said to be relevant to the question of whether the Order under r. 200A should be made. The chronology tendered for the appellant is Exhibit 1 and that for the respondent is Exhibit 2. The Notice of Appeal which is the subject of the application under r. 200A, was filed with the Queensland Industrial Relations

Commission on 15 December 2005. On 13 January 2006 a Directions Order was issued by the Industrial Registrar's office which included a Direction for the parties to attend a conference under s. 552(2) of the *Workers' Compensation and Rehabilitation Act*, on 16 February 2006. The parties attended the conference on that day.

According to the chronology provided by Q-COMP (Exhibit 2) Counsel for Q-COMP provided draft directions to the solicitor for the appellant (then Mr Yeatman) at the conference on 16 February 2006. Mr Yeatman wanted additional time to fine tune the directions and the parties agreed that they would inform the Commission of the final version of the directions. Thereafter, there was a series of correspondence and discussions between the parties about the terms of directions for a hearing of the application.

On 23 March 2006 Q-COMP wrote to Harmers requesting advice about whether there was agreement to the proposed directions in their current form or whether changes were sought. According to the chronology prepared by the appellant's solicitors, on 7 April 2006, Mr Yeatman corresponded with the appellant and sought instructions about the proposed directions. On 23 May 2006, Q-COMP again wrote to Harmers seeking advice about the proposed directions. That letter also states that given Q-COMP's obligation to ensure that appeals are dealt with expeditiously, if a response was not received within 14 days, a further letter would be sent to the Commission requesting that the matter be listed for mention. On 5 June 2006 Mr Yeatman corresponded with Q-COMP and advised that he had difficulty in obtaining instructions from the appellant and expected to receive such instructions by the end of the week. Mr Yeatman requested that Q-COMP not seek a mention of the matter until that time. According to the chronology tendered for the appellant, there was a telephone conversation between Mr Yeatman and Ms Coulin on behalf of Q-COMP and there was agreement from Q-COMP to an extension. The chronology for the appellant also indicates that on 6 June 2006 the appellant emailed Harmers and requested changes to the proposed direction.

On 30 June 2006, Mr Yeatman on behalf of the appellant wrote to Q-COMP apologising for the delay in responding and attaching proposed directions to which he was instructed to agree. According to the chronologies of both parties, the next correspondence was from Mr Yeatman on 15 September 2006, requesting a response to his earlier letter of 30 June 2006. On 22 September Ms Treston on behalf of Q-COMP wrote to Mr Yeatman and proposed some changes. According to the chronology tendered for the appellant, Mr Yeatman left Harmers in or around November 2006 and Mr Robinson took over management of the appellant's matter. On 10 November 2006, Ms Treston again corresponded with Harmers seeking agreement to the amendment proposed in the earlier letter of 21 September 2006. On 18 December 2006 there was further correspondence to Harmers from Q-COMP requesting a response to earlier letters, and advising that if such response was not received within one month, Q-COMP would be seeking to have the appeal listed for mention.

At some point between December 2006 and January 2007 - according to the chronology tendered on behalf of the appellant - Ms Duff joined Harmers and became the solicitor responsible for this matter. On 12 or 15 January 2007 (depending on which chronology is accepted) Mr Robinson of Harmers telephoned Q-COMP and advised that he was seeking instructions from the appellant. Between 24 January 2007 and 21 April 2008 there was a series of telephone discussions and correspondence between Ms Duff of Harmers and Ms Treston, Ms Moroney and Ms Webb of Q-COMP, all of whom had variously been allocated the appeal.

The chronology of events tendered by Q-COMP indicates that in a telephone conversation with Ms Duff on 21 November 2007, Ms Moroney of Q-COMP referred to r. 200A. The Q-COMP chronology also records that the discussion canvassed the proposed directions and that Ms Duff would send a further draft. This occurred on 4 December 2007. On 5 December 2007 Ms Treston of Q-COMP corresponded with Ms Duff and objected to certain aspects of the proposed directions. No reference was made in that letter to r. 200A. In further correspondence about the terms of the proposed directions on 13 December 2007, Ms Duff of Harmers confirmed that Ms Moroney had advised that it may be necessary for an Order to be obtained under r. 200A before the appeal could be progressed.

On 18 December 2007 Ms Treston of Q-COMP corresponded with Ms Duff stating that:

"When the draft directions were originally drafted in February 2006, the Queensland Industrial Relations Commission was still in the process of establishing procedures for the hearing of worker's compensation appeals. In the ensuing months the Commission has developed the practice of making the standard directions for disclosure and lists of witnesses when the appeal was set down for hearing.

This practice has now been in place for over eighteen months and we consider that it is proper that we observe the current convention and leave the making of directions on this matter to the Commission.

Q-COMP is prepared to agree with directions as set out in paragraphs 6 to 8 of the directions enclosed in your letter dated 4 December 2007. These directions were proposed as a means of narrowing the issues in dispute and limiting the costs of the parties conducting the appeal.

However, if you consider that the directions are of no value to your client, we suggest that the matter is simply listed for mention at callover as soon as possible."

On 25 January 2008 Ms Duff of Harmers wrote to Ms Treston acknowledging agreement with aspects of the directions proposed on 4 December 2007, and advising that Harmers would file the directions with the Commission and arrange for the matter to be listed for mention at callover. According to the chronology tendered by the appellant, there was a telephone discussion on 1 February 2008 between Ms Webb of Q-COMP and Ms Duff of Harmers, during which Ms Webb advised that she now had carriage of the file and would be in a position to indicate agreement or otherwise in relation to the proposed directions by the end of February, after obtaining the advice of counsel. In April 2008 there was a series of telephone calls between Ms Duff and Q-COMP representatives in relation to the proposed directions culminating in a telephone conversation on 21 April 2008 between Ms Duff and Ms Webb where directions orders were agreed upon, and Ms Webb advised Ms Duff that an application would need to be made under r. 200A. According to Q-COMP's chronology of events, Ms Webb also advised Ms Duff that depending on the explanation of the delay Q-COMP may not oppose such an application. This was confirmed in a letter from Ms Webb to Ms Duff dated 21 April 2008. That letter deals at some length with the now agreed draft directions, and in conclusion, states that:

"We confirm your client will need to make an application pursuant to r. 200A of the *Industrial Relations (Tribunals) Rules 2000*, to seek leave to proceed, given there has been a lapse of more than twelve (12) months.

In this respect, Q-COMP will provide you with our position in relation to whether we intend to object to your client's application, once we have received it."

On 3 July 2008 Q-COMP advised WorkCover and the employer it had been in contact with the Commission and had been advised that the appeal had lapsed. The letter also stated that the appellant would need to make an application to the Commission seeking leave to proceed. The application for an Order under r. 200A was filed with the Industrial Registrar on 25 July 2008.

Submissions

It is contended for the appellant that whilst no formal steps have been taken in these proceedings by either party since 16 February 2006, there has been regular contact between the parties, who have been attempting to progress the matter by limiting the issues in dispute. It is also submitted that the delay in these proceedings is not solely the fault of the appellant or her solicitors. Further, it is submitted that until the application for an Order under r. 200A was filed, Q-COMP's representatives had indicated that they would not be likely to oppose such an application.

Q-COMP contends that the appeal involves complex and detailed facts about events which occurred in August 2004. This may cause difficulty in locating witnesses, and even if witnesses can be located, it may be that their recollections of events will be affected by the considerable time which has elapsed since those events occurred. This will result in prejudice to Q-COMP. It was also contended that when the time in which a step was required to be taken by the appellant lapsed, Q-COMP and the employer were entitled to consider that the appellant was no longer pursuing the appeal.

Principles in deciding whether an Order should be made

Rule 200A provides that an application lapses if it has been filed, and no action has been taken for at least one year since the last action was taken in the application. The Rule goes on to provide that a party may only take further action in the application with an order of the Court, Commission or Registrar, and sets out the matters which must be dealt with in an application for such an order. Rule 201 is in similar terms and applies in circumstances where the Registrar has by written notice, required an applicant to show cause why the application should not be struck out.

There are a number of cases where it is stated that applications under r. 201 and its predecessors, have generally been dealt in the same way as applications to extend time: *Hutter v Gold Coast Arts Centre (No. 2)* (2002) 169 QGIG 310 at 311; *Muscat v Queensland Fasteners* (1999) 160 QGIG 181. Although r. 201 deals with different circumstances than those contemplated by r. 200A, the matters which must be stated in an application for an Order under both rules are the same. In my view, the factors relevant to extending time which have been considered in applications pursuant to r. 201 are also relevant to the determination of applications under r. 200A. Those factors are:

- The length of the delay;
- The reasons for the delay;
- The prejudice to the applicant if the Order is not made and the application cannot proceed;
- The prejudice to the respondent if the Order is made and the application is allowed to proceed; and
- Any relevant conduct of the respondent.

It has also been the case that in applications for extensions of time, the prospect of success on the substantive application is always relevant: *Breust v Qantas Airways Limited* (1995) 149 QGIG 777. However, the occasions on which an application for extension of time will be rejected on the ground that the applicant has poor prospects of success will be few in number, and will be limited to cases where on the basic uncontested facts, the prospects of success are minimal: *Savage v Woolworths (Queensland) Pty Ltd* (1999) 162 QGIG; *Herwin v Flexihire Pty Ltd* (1995) 149 QGIG 709 at 710. That these principles are relevant in relation to applications under r. 200A is made apparent by the requirement in r. 200A(3)(f) for an applicant to state the merits of the proceeding with respect to which the Order is sought.

Conclusions

The length of the delay

There were no detailed submissions from either party about the meaning of the term "an action" in the context of r. 200A. It was implicit in the submissions of the parties that there is a distinction between a formal action required by relevant legislation and other actions such as correspondence and discussions between the parties. In the present case, the last formal action was taken on 16 February 2006, when the parties attended a conference under s. 552(2) of the *Workers' Compensation and Rehabilitation Act 2003*. If that is the meaning to be given to the term "an action" then the twelve months in which an action was to be taken lapsed on 16 February 2007.

However, I note that in *Allerup v Heka Pty Ltd t/a Brisbane Dental Group* (1999) 160 QGIG 112, Hall CC (as he then was) rejected the proposition that the term "any action" meant something in the nature of a formal step or a step taken by the litigant in the prosecution of the action, being a step required by the rules. It was noted that the rules of the Supreme Court are much more detailed than the rules of the Industrial Court and that many of the transactions required by the rules of the Supreme Court are dealt with in an informal way in the Commission. It was also noted that it would be difficult to deny that an applicant had taken action in circumstances where, within the time required for any action to be taken, communication, discovery and inspection had been requested and had occurred.

In that case there was only one letter in which the applicant sought discovery and other information from the respondent, and there was no action taken to follow up those requests when the respondent ignored the letter. It should also be noted that in *Allerup* (supra), the statutory provision considered did not give discretion for a lapsed application to be revived if no action had been taken within the required time. The present case is different in both respects.

I also note the submission of Counsel for Q-COMP in the present case, to the effect that the matter should have proceeded at the point that Q-COMP communicated to the applicant that the directions were acceptable by letter dated 24 May 2007. It was not argued for the appellant that the correspondence between the parties in relation to negotiations about proposed directions orders constituted "an action" for the purposes of r. 200A.

In the circumstances of the present case it is neither necessary nor appropriate to determine whether the correspondence and discussions between the parties constitute an action for the purposes of r. 200A. For the purposes of the present case, I have assumed that the time for taking an action in the substantive application for the purposes of r. 200A lapsed on 16 February 2007, and that no further action was taken until the present application for an Order under r. 200A was filed on 25 July 2008. This is a considerable delay in the context of a Rule which essentially provides that an application lapses (except if an Order is made to the contrary) if an action in that application is not taken within twelve months of it being filed.

The reasons for the delay

In the application for an Order under r. 200A there are a number of reasons for the delay advanced for the appellant. Essentially those reasons are the time taken by the parties' representatives in negotiating directions for the conduct of the substantive application; relocation of the solicitor for Harmers with carriage of the matter and the reallocation of the matter to another member of the firm; changes to the personnel managing the file on behalf of Q-COMP; failure on the part of the representatives of both parties to respond to correspondence in a timely fashion; the appellant moving house in early 2007; and the nature of the appellant's injury making it difficult for instructions to be obtained from her.

Counsel for Q-COMP correctly points out that there was no evidence led for the appellant about difficulties in obtaining her instructions or that she had moved house. It was also submitted for Q-COMP that the contention that both parties are equally to blame for the delay overlooks the fact that it was the appellant's appeal to prosecute.

I do not entirely accept that submission. It is correct to the extent that the solicitors for the appellant have made a significant contribution to the delay. In this regard Harmers has engaged in protracted negotiations about a proposed directions order, when the matter could easily have been resolved by a brief mention of the appeal in the Commission. There was a point when the proposed directions resembled agreed facts, and there may have been some utility in such

agreement. However, when negotiations about directions focused on matters which are not the practice in the Commission, such as the exchange of witness statements, they became an exercise of futility.

As Mr. Clark for Q-COMP observed, there are entire briefs to counsel containing fewer pieces of correspondence than the exchanges between the parties in this matter about proposed directions. Harmers could have easily resolved issues related to directions by seeking a hearing in the Commission. Typically such hearings run for no longer than thirty minutes, particularly when both parties are represented by solicitors. Such a step would have involved considerably less time, effort and cost than that which has undoubtedly been generated by the considerable correspondence on this issue.

The application under r. 200A includes the proposed directions sought by Harmers on behalf of the appellant. The proposed directions provide for lengthy time frames for a response from the respondent; the disclosure of documents; and statements of evidence from witnesses proposed to be called by both parties. If the proposed directions are made, the result will be that this matter will not proceed to hearing until four months after any order is made. I have concerns that the timetable proposed by the appellant's solicitors indicates that even after the lengthy delay which has already occurred, a further four month delay is envisaged before the matter is heard.

Further, when the application under r. 200A was filed by the solicitors of the appellant, it was accompanied by an application to amend the original notice of appeal. The amendments sought plead errors of fact and law in the original decision of the Q-COMP Review Unit. An appeal to the Commission against a decision of the Q-COMP Review Unit is by way of a hearing *de novo*. There is no requirement to establish error in the original decision. The original notice of appeal filed on 15 December 2005 is in the required form. At the hearing in the present proceedings, it was accepted by the appellant's solicitors that there was no need to press for the amendment of that original notice. It is likely that the drafting of an unnecessary application to amend the original appeal notice may well have caused further delay in taking action in the appeal.

While it is apparent that there were changes in the personnel at Harmers with carriage of the matter, and that this contributed to the delay, there are also significant lapses of time both before and after the file was reallocated between solicitors, during which no action was taken at all. For example, Mr Yeatman wrote to Q-COMP on 15 September 2006 and received a response to that letter on 22 September 2006. When Mr Yeatman left Harmer's in November 2006 and Mr Robinson took over the file, there was no contact with Q-COMP until 12 January 2007, notwithstanding a letter from Q-COMP to Harmers on 18 December 2006. While it appears that Ms Duff joined Harmers and took over the file somewhere between December 2006 and January 2007, it was Mr Robinson who made contact with Q-COMP on 12 January 2007. These delays occurred within the twelve month period during which further action should have been taken on the appeal and would not be of concern if some action had been taken within a relatively short period after the twelve months had elapsed. However, there were also significant delays in the period between 16 February 2007 and 25 July 2008 when the r. 200A was filed. It is also of concern that there was a significant delay between 21 April when Q-COMP informed the appellant's solicitors that there was agreement on the proposed directions, and the filing of the application under r. 200A.

However, it is also the case that there are periods of time in the overall chronology, where Q-COMP did not respond to correspondence from the appellant's solicitors in a timely manner and this contributed to the delay. Other conduct on the part of Q-COMP is considered below.

Prejudice to the applicant if the Order is not made

I accept that the appellant (the applicant in the present proceedings) will be prejudiced if the Order under r. 200A is not granted. The nature of that prejudice will be an inability to seek compensation for injuries said to have been suffered in the course of her employment. I also accept that the substantial part of the delay is not occasioned by the appellant herself. I do not accept that the delay was occasioned by the appellant's medical condition. There is no basis for such a conclusion other than a bare statement in the application under r. 200A, unsupported by any evidence. In my view, the delay on the part of the appellant was occasioned by the conduct of the appellant's solicitors, rather than her own conduct. As Hall CC (as he then was) observed in *Breust v Qantas Airways Ltd* (1995) 149 QGIG 777 at 779, there is authority for the proposition that a solicitor's error will operate less severely against an applicant than personal error. While Harmers did not make errors in handling the appeal, the way in which the matter was generally dealt with was far from satisfactory.

Prejudice to the respondent if the application proceeds

I accept that there will be prejudice to the respondent if the application proceeds, in that Q-COMP will be required to defend the appeal. I also accept that there has been a considerable period of lapsed time between the events said to have given rise to the injury and the date when the application is likely to be listed for hearing. This lapse of time may result in the recollections of witnesses being affected. However there is no evidence to this effect. Nor is there any evidence that

critical witnesses have moved or are no longer available as was the case in *Taylor v Q-COMP* (2008) 188 QGIG 298 at 299.

I do not accept the submission that Q-COMP was entitled at any point to consider that the appeal was no longer being pressed. Q-COMP was actively engaged in negotiations about directions to progress the appeal both within the period in which an action was required to be taken, and after that period had expired. On 21 April 2008, in excess of twelve months after the expiry of the period in which an action was required to be taken in the appeal, Q-COMP informed the appellant's representatives that that draft directions, the subject of extensive negotiations, were now agreed. Q-COMP also noted the need for the appellant's representatives to make an application under r. 200A and indicated the possibility that there would be no objection to such an application. It can hardly have come as any surprise when that application was made by the appellant's solicitors. In these circumstances, Q-COMP cannot rely on advice from the Industrial Registrar that the appeal had lapsed as a basis for arguing it had an expectation that the appeal would not be pressed. There is no evidence that the employer had any expectation about the matter proceeding or otherwise.

Relevant conduct of the respondent

Although the appellant's solicitors have significantly contributed to the delay, Q-COMP personnel have also played a part. To put it in the vernacular, it takes two to tango, and both parties have danced around this appeal for some time. It is apparent from Q-COMP's correspondence with Harmers that it participated in negotiations about directions long after Q-COMP knew that it was standard practice for the Commission to issue its own directions for the conduct of appeals under s. 549 of the *Workers Compensation and Rehabilitation Act 2003*.

Notwithstanding this, Q-COMP continued to correspond with Harmers about directions which Q-COMP knew were not consistent with practice in the Commission, and long after the twelve months in which an action was required to be taken by the appellant had passed. In correspondence to Harmer's dated 18 December 2007 Ms Treston for Q-COMP points out that the practice of the Commission in relation to making directions had been established for over eighteen months and that this practice should be followed. This begs the question as to why Q-COMP had continued to engage in correspondence with Harmers about directions. Further, on 31 August 2007 Q-COMP agreed to directions proposed by Harmers providing for statements of evidence from witnesses to be exchanged between the parties, and then on 5 December informed Harmers that it had not been the practice in the Commission to exchange statements of evidence and that this was not agreed. It appears that the earlier drafts of the proposed directions had included this provision. It is certainly found in the draft prepared by Harmers and sent to Q-COMP under cover of a letter dated 30 June 2006. This point should have been raised by Q-COMP at an earlier time.

Q-COMP did not act on several threats to have the matter listed for mention. This would have been a relatively simple step for Q-COMP to have taken, and would certainly have been more effective in terms of cost, time and effort, than the litany of correspondence on the subject of directions. Q-COMP did not raise the issue of the application lapsing until a telephone conversation between Ms Moroney of Q-COMP and Ms Duff of Harmers on 21 November 2007, some nine months after the date by which an action was required to be taken. This matter was not mentioned in correspondence until 13 December 2007. As late as 21 April 2008, Q-COMP's stated position was that it may not oppose an application under r. 200A depending on the explanation provided for the appellant. There was no reservation of Q-COMP's position on the basis of possible prejudice, and there is no evidence of any change in circumstances which may give rise to prejudice in the period between 21 April 2008 and 25 July 2008 when the application for an Order under r. 200A was filed.

Merits of the substantive application

This is not a case where there are uncontested facts upon which it could be found that the appellant's prospects of success are minimal. The decision of the Q-COMP Review Unit subject of the appeal, and the grounds set out in the application for an Order under r. 200A, make it clear that this is a case where the issues will involve a finding about whether actions taken by the appellant's previous employer were reasonable management action taken in a reasonable way. These matters can only be determined by a hearing of the appeal.

Order

On balance (albeit a fine balance) I am satisfied that this is a case where an Order under r. 200A should be made, so that the appellant may take further action in the appeal and I have decided to make that Order. However, in light of the delays which have already occurred on the part of the appellant's solicitors, the Order will lapse if the appellant has not, within seven days of the date of the Order, sent a written request to the Industrial Registrar that the appeal be listed for the purposes of the Commission setting a hearing date and making appropriate directions for the conduct of the appeal.

Solicitors for the appellant should note that it is likely that a date of hearing will be allocated which is significantly earlier than the four months sought in the application under r. 200A. It is also unlikely that there will be a direction requiring

exchanges of witness statements, given that this is not the practice for appeals to the Commission under s. 549 of the *Workers Compensation and Rehabilitation Act 2003*.

I Order accordingly.

I.C. ASBURY, Commissioner.

Hearing Details:

2008 16 February
4 August

Appearances:

Ms P.J. Hay, instructed by Harmers Workplace Lawyers,
for the Appellant.
Mr C.J. Clark, instructed by Q-COMP for the Respondent.

Released: 22 August 2008

CONTENTS

(Gazette No. 18—pp. 389-396)

INDUSTRIAL COURT NOTICES

	Page
DECISION—	
Eva Bajon AND Q-COMP	389-395