

## *Matthews and Commonwealth Securities Limited [2013] AATA 726* (9 October 2013)

### Key Points

- The Tribunal had to determine whether an application for an extension of time to seek reconsideration of a determination should be granted.
- In considering the application, the Court took into account the length of delay, the reason for delay, whether there was an arguable case and the extent of any prejudice to the respondent.

### Background

Ms Matthews commenced employment as a merchant sales associate with Commonwealth Bank of Australia (**CBA**) in 2002.

On 29 March 2011, Ms Matthews lodged a claim for workers' compensation in respect of '*acute left elbow/shoulder/cervical parathesis, tear in elbow and shoulder – RS!*'.

By determination on 21 June 2011, liability was accepted by CBA for an injury described as '*(L) lateral epicondylitis*', but rejected in respect of the claims for '*cervical condition*' and '*(L) rotator cuff tendinosis*' (**the First Determination**).

In a second determination dated 23 June 2011, CBA advised that Ms Matthews was entitled to weekly compensation benefits for the period 22 February 2011 to 1 April 2011 but, thereafter, there was no present liability in respect of her accepted condition (**the Second Determination**).

On 21 July 2011, CBA granted an extension of time to request reconsideration of the First Determination and the Second Determination until 5 August 2011. No further action was taken by Ms Matthews in this regard.

By further determination dated 31 August 2011, CBA rejected Ms Matthews' request for a surgical procedure and advised that there was no present liability to pay medical expenses (**the Third Determination**).

Attached to each determination was a statement of rights which advised that Ms Matthews must request a reconsideration within 30 days or within such further period as CBA allowed, and that an extension of time may be sought.

On 31 October 2012, an application for an extension of time was lodged in respect of the First Determination, the Second Determination and the Third Determination by Ms Matthews' solicitors. Ms Matthews' solicitors explained that the reason for the delay was due to confusion between Ms Matthews and her solicitors about action being taken, Ms Matthews moving interstate and Ms Matthews' lack of familiarity with the process. CBA refused an extension of time and advised that Ms Matthews could lodge an appeal against the reviewable decision with the Administrative Appeals Tribunal, which Ms Matthews proceeded to do.

## The Law

Section 62(3) of the SRC Act provides that:

*“A request for reconsideration of a determination shall:*

*(a) set out the reasons for the request; and*

*(b) be given to the determining authority within 30 days after the day on which the determination first came to the notice of the person making the request, or within such further period (if any) as the determining authority, either before or after the expiration of that period, allows.”*

In the case of *Hunter Valley Developments Pty Ltd v Cohen*,<sup>1</sup> Wilcox J provided the following non-exhaustive considerations for determining whether an extension of time should be granted:

1. Whether the applicant is able to show an acceptable explanation for the delay and that extending the time is fair and equitable in the circumstances;
2. Action taken by the applicant, other than applying for a reconsideration, to continue to make the decision-maker aware that the applicant contests the finality of the decision, or whether the decision-maker was allowed to believe that the matter had concluded;
3. Any prejudice to the decision-maker occasioned by the delay;
4. Public considerations, such as the unsettling of other people or of established practices;
5. The merits of the substantial application; and
6. Fairness between the applicant and other persons otherwise in a like position.

Additionally, the Full Court of the Supreme Court of Western Australia in *Jackamarra v Krakouer*<sup>2</sup> identified four main factors to be considered when considering an application for extension of time, including the length of delay, the reason for delay, whether there is an arguable case and the extent of any prejudice to the respondent.

The four factors were accepted by the Court of Appeal in *Palata Investments v Burt & Sinfield Ltd*,<sup>3</sup> however Kirby J also considered that there were further factors to be considered such as whether the delay was intentional, and whether the delay was by the applicant or by their lawyers, with which the applicant should not be ‘saddled’.

## Conclusion

In determining whether an extension for time to request a reconsideration of a decision ought to be granted, the Tribunal took into account all the considerations listed in the above cases.

The application for an extension of time was made by Ms Matthew’s lawyers more than 17 months after the First Determination and the Second Determination, and more than 15 months from the

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<sup>1</sup> *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344.

<sup>2</sup> *Jackamarra v Krakouer* (1998) 195 CLR 516.

<sup>3</sup> *Palata Investments Ltd v Burt & Sinfield Ltd* [1985] 1 WLR 942 at 946; [1985] All ER 517 at 520.

Third Determination. Whilst Ms Matthews was aware of the 30 day time limit, she relied on her legal representatives to act in a timely manner. The Tribunal considered Ms Matthew's reliance on her representatives to be quite proper, given that she was advised by her solicitors that the whole claim process may take up to two years to resolve.

Counsel for CBA argued that, due to the inconsistencies in Ms Matthews' evidence, she had no real prospect of success and therefore an extension should not be granted. Whilst the Tribunal agreed that inconsistencies existed, it considered that this would be relevant in assessing the credit of the merits of Ms Matthews' claim and that it could not be said that her case was 'hopeless, unarguable or bound to fail'<sup>4</sup> and therefore futile.

It was also submitted by Counsel for CBA that CBA would be prejudiced should the extension be approved, due to evidential inconsistencies and an absence of rehabilitation reports close to the time of the injury. The Tribunal acknowledged that there were inconsistencies and that, through the passage of time, CBA may have difficulty in finding appropriate witnesses to Ms Matthews' alleged trauma. However, in the absence of evidence that CBA could not find appropriate witnesses, and as it was the CBA that withdrew their services in relation to Ms Matthews' claim, the Tribunal held that CBA would not be prejudiced by a grant of the extension.

Therefore, as there was a reasonable excuse for the delay in applying for an extension of time, there were prospects of success for Ms Matthews' claim and CBA would not be prejudiced, the Tribunal set aside the decision under review and approved Ms Matthews an extension of time to request a reconsideration of the First Determination, the Second Determination and the Third Determination.

## Lessons Learnt

The decision of the Tribunal further clarifies the considerations applicable when determining whether an application for an extension of time to seek a reconsideration of a decision should be granted. When considering an application, the Tribunal may take into account the length of delay, the reason for delay, whether the applicant has an arguable case and the extent of any prejudice to the respondent, and so these factors should also be considered by decision makers when determining whether an extension of time should be granted. In addition to this, the applicant's intentions in respect of the delay should also be considered, and it should be remembered that delay caused by the applicant's solicitors will rarely result in the application being rejected.

For more information on this article, please contact:

Brett Ablong  
Partner  
Email: [brett.ablong@hbalegal.com](mailto:brett.ablong@hbalegal.com)  
Direct Line: (08) 9265 6001

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<sup>4</sup> *Jackamarra v Krakouer* (1998) 195 CLR 516 at 540.