SUPREME COURT OF QUEENSLAND

CITATION:	*Chibanda v Chief Executive, Queensland Health & Anor* [2018] QSC 128
PARTIES:	**JOHN CHIBANDA** (applicant) **v** **CHIEF EXECUTIVE, QUEENSLAND HEALTH** (first respondent) **MEDICAL BOARD OF AUSTRALIA** (second respondent)
FILE NO/S:	BS No 12141 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	24 May 2018
JUDGE:	Applegarth J
ORDERS:	**1. The applicant's application for an extension of time is dismissed.** **2. The applicant's proceeding is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – PROCEDURE AND EVIDENCE – TIME FOR APPLICATION – where applicant applies for judicial review several years after "decisions" made – whether applicant ought be granted extension of time where no adequate explanation for delay *Judicial Review Act* 1991 ss 6, 27, 48 and 49 *Aurukun Bauxite Development Pty Ltd v Queensland* [2016] QSC 263; (2016) 222 LGERA 107 cited *Hoffman v The Queensland Local Government Superannuation Board* [1994] 1 Qd R 369 cited *Kuku Djungan Aboriginal Corporation v Christensen* [1993] 2 Qd R

663; [1992] QSC 417 cited

COUNSEL:	The applicant appeared on his own behalf M T Hickey for the first respondent S A McLeod for the second respondent
SOLICITORS:	The applicant appeared on his own behalf Crown Law for the first respondent Minter Ellison for the second respondent

[1] The applicant seeks judicial review of what are said to be "decisions" made several years ago. Each respondent applies pursuant to s 48 of the *Judicial Review Act* 1991 ("*JRA*") to dismiss the proceeding because:

(a) it was filed years after the time limit for commencing such a proceeding; and

(b) the proceeding does not disclose a reasonable basis to conclude that the decisions are amenable to judicial review.

The applicant cross-applies for an extension of time.

Background

[2] This background is drawn principally from an annexure to the applicant's affidavit filed 16 November 2017 and documents exhibited to his affidavit filed 16 May 2018.

[3] The applicant was employed as a Senior Medical Officer by Queensland Health in 2007 and, after a period in Rockhampton, worked at the Emerald Hospital. He had been registered by the Medical Board of Queensland for the period 17 September 2008 to 16 September 2009 for a "Special Purpose" pursuant to s 135 of the *Medical Practitioners Registration Act* 2001. The special purpose activity was to fill an area of need as a Senior Medical Officer at the Emerald Hospital. His registration required him to comply with various conditions.

[4] In 2009 the applicant failed in his second attempt to pass the Australian Medical Council Multiple Choice Examination. His recent failure was noted at a meeting of the Registration Advisory Committee of the Medical Board of Queensland on 19 October 2009.

[5] Certain allegations in relation to the applicant's conduct and competence were investigated by Queensland Health. By letter dated 4 November 2009, the applicant was advised by the District Chief Executive Officer of Queensland Health that he had been suspended from duty. The letter stated that the suspension was based on the reasonable belief that due to the nature of certain allegations against him he may be liable to disciplinary action.

[6] In January 2010 the Medical Board of Queensland refused to renew his registration. Queensland Health then terminated his employment.

The challenged "decision" of the first respondent

[7] The application for a statutory order of review filed 16 November 2017 indicated that the relevant decision of the first respondent (then incorrectly named) was "Approval of an investigation report of misconduct allegations against Applicant". On 16 March 2018 Mullins J made a number of orders which included an order that the application be amended to clearly state the decisions to which the application relates. The amended application filed on 23 March 2018 is a very confusing document in terms of its identification of each decision which is amenable to judicial review under the *JRA* and the grounds for judicial review. The solicitors for each respondent requested further and better particulars. The applicant's response to the first respondent's request identified the decision sought to be reviewed as follows:

> "Decision made by way of report and its approval on (sic) investigations by the first respondent. The report does not indicate under what section or Act it was made. The report was approved on the 20th of January 2011."

[8] The report, which the applicant stated at the hearing was 450 pages, is not in evidence before me. The applicant told me that he had a copy of the report and parts of it were redacted. Exhibited to his affidavit filed 21 May 2018 is an excerpt from the report. In any case, exhibit R1-6 to the applicant's affidavit filed 16 May 2018 is a Memorandum to the Director General of Health. Its subject is an investigation report undertaken by the Ethical Standards Unit which was said to have completed its investigation. The Memorandum refers to four allegations relating to the applicant, three of which were found to be substantiated, and two allegations about the performance of senior staff who were supposed to manage and supervise the applicant at Emerald Hospital. The investigation was said to have been a multi-disciplinary investigation coordinated by the Ethical Standards Unit in conjunction with officers from other entities. The Memorandum was signed by the Manager - Investigation Services, Ethical Standards Unit on 17 November 2010, signed by the Director – Ethical Standards Unit on 15 December 2010 and approved by the Director General on 20 January 2011.

The challenged "decisions" of the second respondent

[9] The amended application for a statutory order of review seeks to review the "refusal of conditional registration of Applicant by the Second Respondent". However, it appears that the applicant seeks to challenge two decisions of the second respondent. His response to the request for further and better particulars refers to the second respondent's "refusal of renewal of Applicant's registration" and "the decision to find the Applicant guilty of misconduct".

[10] The first matter relates to a decision of which the applicant was advised by letter dated 17 February 2010. The Medical Board of Queensland had decided to refuse the applicant's application for renewal of a special purpose registration under s 135 of the *Medical Practitioners Registration Act* 2001. The letter, a copy of which is exhibit AES2-1 to the affidavit of Ms Smith filed by leave on 24 May 2018, enclosed an information notice relating to the Board's decision, which outlined the reasons for the decision and informed the applicant of review rights by which he might apply to review the decision to the Queensland Civil and Administrative Tribunal (QCAT). Shortly stated, the Board was not satisfied the applicant had made reasonable progress towards general, specialist or special purpose s 138 registration. He had twice failed the relevant multiple choice exam. He had received borderline assessments

from his supervisor. His exam results and assessments raised concerns about his suitability to perform the duties of a Senior Medical Officer.

[11] On or about 25 February 2010 the applicant brought a review proceeding in QCAT. On 21 June 2010 he withdrew the proceeding. He contends in this proceeding that the "application fell through on technicality". However, he was legally represented at the time. By letter dated 21 June 2010, the solicitors then acting for the Board informed it that at a directions hearing leave was granted for the application for review to be withdrawn and indicated that the withdrawal of the application concluded the matter.

[12] The applicant, in oral submissions to me on 24 May 2018, said that the application to review the matter in QCAT was withdrawn so as to enable him to look at the legality of the decision. However, there is no evidence before me about this. The applicant has not disclosed any advice to this effect, and there is no basis to contend that QCAT could not have considered the legality of the decision which he sought to review, as well as its merits.

[13] The second "decision" of the second respondent which the applicant apparently seeks to judicially review is a decision made on 6 December 2011. This decision is reflected in a document which is exhibit R2-5 to the respondent's affidavit filed 16 May 2018. It is a letter sent by the Australian Health Practitioners Regulation Agency dated 6 March 2012 to the applicant which informed him about an investigation which had been undertaken and that at a meeting on 6 December 2011 the State Board decided to take no further action on the matter. The Board's decision was said to be based on its investigation report which found that, on the evidence available:

> "• There was sufficient evidence on which the Board could form a reasonable belief that the applicant's conduct amounted to unsatisfactory professional conduct;
>
> • However, having regard to the objects of the Act and in accordance with s 118 of the Act, the Board should take no further action about the matter and close the complaint …"

Extension of time

[14] The applicant confronts the problem that he requires an extension of time of several years to bring an application which ordinarily should have been filed within 28 days.

[15] There is some contest by the applicant as to whether some items of correspondence were sent to the correct address. However, there is no doubt that he was informed of the decision of the Medical Board of Queensland made in January 2010 because on 25 February 2010 he applied to QCAT in respect of that decision.

[16] As to the decision of the Medical Board made on 6 December 2011, this was communicated by letter dated 6 March 2012 to an address in Emerald which had been listed in the AHPRA database as the applicant's preferred postal address. In any event, a copy of that letter was sent to the applicant on 27 November 2012 in response to a letter which he wrote on 12 November 2012. Assuming that the applicant only was informed of the Board's decision on or about 27 November 2012, he took five years to seek judicial review of it.

[17] It is unclear when the applicant first learned of the investigation report. He has had a redacted copy of it for many years.

[18] Section 26 of the *JRA* requires an applicant to make an application for a statutory order of review within 28 days after the day on which the decision is received or within such further time as the Court may allow.

[19] Judicial review of administrative decisions should be undertaken promptly. The requirement to bring a proceeding within the stipulated or a reasonable time is normally essential to that outcome.[1] As was observed in *Aurukun Bauxite Development Pty Ltd v Queensland,* a party is "not entitled to arrogate the decision when to start a proceeding to themselves, in violation of a statutory requirement to bring it within a particular timeframe…"[2] Entities and individuals are entitled to proceed on the basis that a decision is not going to be the subject of a judicial review challenge if no such challenge is brought within a reasonable time.

[20] Ordinarily, a proceeding commenced outside the limitation period should not be entertained, unless the applicant shows an acceptable explanation for the delay, and that it would be fair and equitable in the circumstances to extend the time.[3] The absence of an explanation is a persuasive factor against granting an extension of time.[4]

[21] The prospects of success of an application may be a relevant factor. An application which is without prospects is unlikely to be granted an extension of time, even if there is a satisfactory explanation for delay.

Application to extend time in respect of the first respondent

[22] Despite being on notice that the first respondent intended to take issue with his delay, the applicant has not provided a reasonable explanation for his delay. His affidavit filed 16 May 2018 says that the investigation report, which was approved on 20 January 2011, was only released to him two years later. That was still several years ago. The applicant says that the report provided to him was "heavily edited with most pages and contents blanked out from applicant". I am prepared to proceed on the basis that the report was heavily redacted. However, the applicant's affidavit suggests that he was aware at some point of the allegations against him which were found to have been "substantiated".

[23] If the applicant considered that he had grounds to obtain a copy of the report with fewer redactions, then it was open to him to promptly pursue remedies under freedom of information or right to information legislation soon after receiving the copy of it which he did.

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1 *Aurukun Bauxite Development Pty Ltd v State of Queensland* [2016] QSC 263 at [74].

2 At [77].

3 *Kuku Djungan Aboriginal Corporation v Christensen* [1993] 2 Qd R 663 at 665.

4 Ibid, see also *Hoffman v The Queensland Local Government Superannuation Board* [1994] 1 Qd R 369 at 372.

[24] If he had a case for judicial review, then the applicant should have pursued it promptly on the basis of what he knew was in the report. Instead, he waited years to do so.

[25] No adequate explanation has been given as to why the applicant delayed so long. The absence of an adequate explanation is sufficient to decline his application for an extension of time. Without such an extension of time, the application is bound to be dismissed.

[26] Even if the applicant had provided a better explanation for his inordinate delay, it would not have been appropriate to order an extension of time in the circumstances. The applicant has not identified a decision under an enactment which is amenable to judicial review. It is unnecessary for present purposes to survey the authorities such as *Griffith University v Tang*[5] concerning the meaning of a "decision" in this context. Not every decision made by a government official is a "decision" to which the Act applies. The applicant appears to labour under the misconception that the investigative report itself is a decision. He may have misunderstood s 6 of the *JRA* which provides:

> "**6. Making of report or recommendation is making of a decision**
>
> If provision is made by an enactment for the making of a report or recommendation before a decision is made, the making of the report or recommendation is itself taken, for the purposes of this Act, to be the making of a decision."

[27] The applicant does not identify the terms of any enactment which makes provision for the making of such a report. I dare say that tens of thousands of reports are generated within the Queensland public service every year, including many reports about investigations. That does not mean that they are the types of reports to which s 6 refers. It relates only to reports where provision is made in an enactment (for example a statute) for the making of the report. A person may be authorised as part of his or her official duties to write a report without there being a section in a statute which specifically makes "provision" for such a report to be made.

[28] As for the Memorandum which is exhibit R1-6, and which was approved by the Director-General on 20 January 2012, it indicates that the report was being reviewed by the Crime and Misconduct Commission which was treating it as "an interim report". The Memorandum did not recommend any action against the applicant. The Director-General approved the Memorandum.

[29] The applicant has not made out a case that either the investigative report or the approval of the Director-General is a decision to which the *JRA* applies. This, in itself, would be a ground to dismiss the principal application on the grounds that no reasonable basis for it is disclosed. However, the lack of any apparent merit in the principal application is an additional reason why the application for extension of time should be refused.

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[5] (2005) 221 CLR 99.

Application to extend time in respect of the second respondent

[30] The applicant has not provided an adequate explanation for his delay in seeking judicial review of the decision made in January 2010, or in respect of the decision made on 6 December 2011. This alone is a sufficient reason to not grant the extension of time.

[31] An additional reason is that the applicant had, was advised of, and pursued an available remedy in relation to the decision not to renew his registration. He brought proceedings in QCAT, but then withdrew them. He has not provided any evidence as to the reason the application was withdrawn, or to explain the basis for his assertion that the "application fell through on technicality". As noted, QCAT was in a position to review the material before the Medical Board and the process by which it arrived at its decision. The applicant having not pursued the available form of review, it is inappropriate to grant him an extension of time, many years later, to pursue judicial review.

[32] The second decision of the second respondent which he wishes to challenge was not a finding of misconduct. It was a finding that there was sufficient evidence on which the Board could form a reasonable belief that his conduct amounted to unsatisfactory professional conduct. However, the Board made no finding of unsatisfactory professional conduct and, in fact, decided to take no further action in respect of the matter. The basis upon which the applicant seeks to judicially review a decision to take no further action against him is not evident. The applicant has been aware of the decision for years, including the identity of the members of the Board which made the decision. He has not explained why it is necessary for him to pursue a judicial review proceeding to set aside a decision to take no further action. This is not an appropriate case to grant an extension of time, given the lengthy delay in pursuing judicial review.

[33] The applicant has not justified the exercise of the discretion to grant an extension of time in respect of the second respondent, particularly because he has not provided an adequate explanation for his lengthy delay.

Conclusion

[34] The application for judicial review was filed years after the applicant became aware of the relevant "decisions". He has not provided an adequate justification for the grant of an extension of time in the circumstances. Because the application was filed out of time, and an extension of time has been refused, the appropriate order is that the applicant's proceeding is dismissed.

[35] There seems to be no reason why the ordinary rule that costs should follow the event should not apply. The applicant has not made out a proper basis for the making of a special order as to costs under s 49 of the *JRA*. Neither respondent should have been put to the expense of defending a misconceived application for judicial review. The applicant, although given the opportunity, did not discontinue the proceeding. As a result, each respondent was put to the costs of filing applications to dismiss, and preparing for and appearing at the hearing.

[36] Subject to any submissions as to why costs should not follow the event in accordance with r 681 of the *UCPR* 1999 which applies by virtue of s 49(4) of the *JRA*, I propose to order that the

applicant pay the first respondent's costs and the second respondent's costs of and incidental to the proceeding.

[37] The other orders will be:

1. The applicant's application for an extension of time is dismissed.

2. The applicant's proceeding is dismissed.