SUPREME COURT OF QUEENSLAND

CITATION:	*Devi v Workers Compensation Regulator* [2016] QSC 311
PARTIES:	**GAYATRI DEVI** (applicant) **v** **WORKERS' COMPENSATION REGULATOR** (respondent)
FILE NO/S:	SC No 5854 of 2016
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2016
JUDGE:	Boddice J
ORDER:	**1. The application for statutory order of review is dismissed.** **2. I will hear the parties as to costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IRRELEVANT CONSIDERATIONS – where the applicant applied to the respondent for an extension of time – where the respondent has a statutory power to grant an extension of time if "special circumstances" exist – where the respondent refused that application – where the applicant applies to this Court for a statutory order of review of the respondent's decision to refuse her an extension of time – where the applicant submits the respondent took into account considerations irrelevant to whether "special circumstances" existed – whether the respondent took into account irrelevant considerations ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – where the applicant applies to this Court for a statutory order of review of the respondent's decision to refuse her an extension of time – where the applicant submits the respondent failed to take into account considerations relevant to whether "special circumstances" existed – whether the respondent failed to take into account relevant considerations

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – OTHER CASES – where the applicant applies to this Court for a statutory order of review of the respondent's decision to refuse her an extension of time – where the applicant submits the respondent, in reaching its decision, exercised a discretionary power in accordance with a rule or policy without regard to the merit of the case – whether the respondent had regard to the merits of the case in reaching its decision

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where the applicant applies to this Court for a statutory order of review of the respondent's decision to refuse her an extension of time – where the applicant submits the respondent's decision involved an error of law by failing to apply the correct statutory test – whether the respondent's decision involved an error of law

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 542

Blackwood v Pearce [2015] ICQ 12, considered
Carmody v WorkCover Queensland (1998) 157 QGIG 119, cited
Cloncurry Shire Council v Workers' Compensation Regulatory Authority [2006] QSC 362, cited

COUNSEL:	P Rashleigh for the applicant C Hartigan for the respondent
SOLICITORS:	Queensland Compensation Lawyers for the applicant Crown Law for the respondent

[1] By application, filed 14 June 2016, the applicant applies, pursuant to s 20 of the *Judicial Review Act* 1991 (Qld) ("JR Act"), for a statutory order of review of a decision made by the respondent to refuse her application for an extension of time to review a decision of WorkCover rejecting an application for compensation.

[2] The applicant contends the making of the decision was an improper exercise of the power. At issue is whether the respondent took into account irrelevant considerations, failed to have regard to relevant considerations, exercised the power in accordance with a rule or policy, without regard to the merits, or made an error of law.

Facts

[3] On 9 April 2014, the applicant suffered burns to her right leg in the course of her employment as a cook at a service station. The applicant made an application under the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("Act") for worker's compensation benefits. On 16 April 2014, WorkCover accepted her application.

[4] The applicant was subsequently referred by WorkCover to a psychiatrist, Dr Prabel Kar. This referral was made on the basis of reports from the applicant's General Practitioner of ongoing psychological symptoms. Dr Kar provided two reports to WorkCover, dated 11 August 2015 and 20 August 2015.

[5] The applicant subsequently applied to WorkCover for compensation for a psychiatric or psychological disorder. On 31 August 2015, WorkCover rejected this application on the basis the applicant had not sustained a work-related psychiatric injury. In reaching its decision, WorkCover had regard to Dr Kar's reports.

[6] On 1 September 2015, WorkCover issued a notice of assessment in relation to the injuries sustained to the applicant's leg. On 15 December 2015, the applicant lodged a notice of claim for damages under the common law provisions of the Act. This notice was in respect of the injuries sustained to her leg.

[7] A compulsory conference was scheduled for 12 April 2016. That conference was adjourned to enable the applicant to obtain psychiatric evidence in support of her having suffered a psychiatric or psychological condition, consequent upon the injuries to her leg.

Decision

[8] The applicant had three months from the date WorkCover made its decision rejecting her application in which to apply to the respondent for a review of that decision. The applicant did not apply for a review within that time period.

[9] On 29 April 2016, the applicant applied to the respondent under s 542(2) of the Act for an extension of time in which to review WorkCover's 31 August 2015 decision, to reject her application for compensation for a psychiatric or psychological disorder, and for a review of that decision. That application was accompanied by psychiatric reports from Dr Karen Chau.

[10] The applicant submitted the delay in applying for a review of WorkCover's decision was due to the applicant's solicitors forming the view the opinions expressed in Dr Kar's reports were sound. However, this had turned out to be incorrect.

[11] On 20 May 2016, the respondent refused the applicant's application for an extension of time to review WorkCover's decision.

The application

[12] The application for statutory order of review sets out two grounds of review. At the hearing, the applicant abandoned the first ground. The remaining ground is that the respondent's decision was an improper exercise of power.

[13] While not expressly stated within the application, this ground relies on s 20(2)(e) of the JR Act. The applicant alleges the respondent's decision was an improper exercise of power for the following reasons:

(a) the respondent took into account irrelevant considerations in reaching its decision;

(b) the respondent failed to take into account relevant considerations in reaching the decision;

(c) the respondent exercised a discretionary power in accordance with a rule or policy without regards to the merit of the particular case; and

(d) the respondent's decision involved an error of law.

Legislation

[14] Section 542 of the Act relevantly provides:

"(1) An application for review must be made within 3 months after the person applying for review (the ***applicant***) receives written notice of the decision …

(2) For subsection (1), the applicant may, at any time but not more than once, ask the [respondent] to allow further time to apply for review.

(3) The [respondent] may grant the extension if it is satisfied that special circumstances exist."

Applicant's Submissions

[15] The applicant submits the considerations relevant to whether an extension of time should be granted are: the extent of the delay; the explanation for the delay; prejudice to the applicant, if an extension were not granted, and prejudice to the respondent, if an extension were granted; enthusiasm for prosecuting the review; and merits of the review. The applicant submits these factors, which were set out by de Jersey J (as he then was) in *Carmody v WorkCover Queensland*,[1] represent a constant thread throughout recent decisions of the Industrial Relations Commission and the Industrial Court.

[16] The applicant submits the respondent took into account two irrelevant considerations when reaching its decision. First, that the applicant and her solicitors made a conscious decision to pursue a notice of claim for damages in respect of the applicant's burn injury. Second, that the applicant did not provide evidence to the respondent of how she attempted to comply with the three month limit, or utilise it to further investigate or obtain challenging medical evidence.

[17] The applicant alleges the respondent failed to take into account relevant circumstances when reaching its decisions, specifically: the merits of the review; the prejudice to the applicant should the extension not be granted; the lack of prejudice to WorkCover Queensland if the extension were granted; and the enthusiasm of the applicant for prosecuting the review.

[18] The applicant submits the respondent exercised a discretionary power in accordance with a rule or policy without regard to the merits of her case. In support of this argument, the applicant points to an extract of the respondent's decision, in which the respondent sets out the matters it considers the three month timeframe is sufficient for (such as formulating grounds of appeal to obtain advice).

[19] Finally, the applicant submits the respondent's decision involved two error of laws. The first error is that the respondent did not determine whether "special circumstances" exist, but instead determined whether the applicant "substantially complied" with the three

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[1] (1998) 157 QGIG 119.

month time frame. The second error is that the respondent did not apply the correct statutory test. The applicant submits the correct statutory test is whether special circumstances exist, and that whether special circumstances exist requires a consideration of the factors set out in *Carmody.*

Respondent's Submissions

[20] The respondent submits "special circumstances" presents a threshold test, which must be passed before considering whether to grant an extension. An applicant must first demonstrate that special circumstances exist, and, if successful, then show that an extension ought to be granted, having regard to factors relevant to the individual case.

[21] The respondent submits the decision was made having regard to the relevant legal test. Only relevant considerations were had regard to, and the decision was made on merit, not to any policy or rule.

Consideration

Special circumstances

[22] In *Carmody*, the Industrial Court applied a number of factors in determining whether it ought to grant an extension of time within which to appeal from an Industrial Magistrate's dismissal of a claim for workers' compensation.[2] However, at that time, the relevant statutory provision, s 346 of the now repealed *Workplace Relations Act* 1997 (Qld), gave the Court a broad discretion to "make a decision it considers just".[3] Section 543 is a very different provision. It does not give the respondent a broad discretion to grant extensions if it is "just" to do so. It only permits an extension to be granted if special circumstances exist. The decision of *Carmody* is of little assistance in interpreting s 543(3) of the Act.

[23] A proper reading of s 543(3) of the Act, in the context of the nature and scope of the legislative scheme, supports a conclusion that the respondent must first determine whether special circumstances exist. If the respondent is satisfied such special circumstances exist, the respondent has a discretion as to whether or not it grants an extension of time. It is not bound to grant an extension of time in the event the respondent is satisfied special circumstances have been shown. The legislation permits the respondent to decide that the circumstances, while special, do not warrant an extension.

[24] This conclusion is consistent with Martin J's observations of "special circumstances" in *Blackwood v Pearce*.[4] His Honour wrote that "it would be a question of fact in each case as to what circumstances might be special but the accumulation of new evidence would, ordinarily, not amount to a special circumstance".[5] I respectfully agree with that observation.

[25] Both parties noted in their submissions that an amendment was made to s 542 of the Act, in response to *Blackwood v Pearce.*[6] However, that amendment does not affect those

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2 *Carmody v WorkCover Queensland* (1998) 157 QGIG 119.
3 *Industrial Relations Act* 1997 (Qld), s 346 (a).
4 [2015] ICQ 12.
5 *Blackwood v Pearce* [2015] ICQ 12 at [50].
6 Explanatory Notes, Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015 at 7.

observations. That amendment was to permit an application for extension of time to be at any time; previously an application for an extension of time had to be made within three months (i.e. the time in which a person had to apply for a review). It did not introduce the concept of "special circumstances" or create the respondent's power to grant extensions of time.

[26] The issue in *Blackwood* was whether there was any power for the respondent to consider an application for review made outside the three-month time limit. In *Cloncurry Shire Council v Workers' Compensation Regulatory Authority*,[7] A Lyons J held that a failure to comply with the time limit in s 542 did not invalidate an application for review. *Cloncurry* was followed in a number of cases. In this context, Martin J wrote:[8]

> "In the cases that have followed *Cloncurry* further glosses have been put on s 542. In addition to the unwarranted creation of a new power to extend time, that "power" has been made subject to a restriction – that there must have been substantial compliance or other special circumstance. There is no legislative basis for either accretion."

[27] A consideration of whether "special circumstances" exist such as to permit an extension of time pursuant to s 543 will depend on an assessment of the facts of the relevant case. Depending on those individual circumstances all, or none, of the factors set out in *Carmody,* may be relevant.

Irrelevant considerations

[28] The legislation provides a three month period in which to apply for a review. This balances two competing interests: to permit time for a person to consider the decision, take advice and decide whether they wish to challenge it; and to provide finality to the parties affected by that decision.

[29] The fact the applicant pursued her common law claim was a relevant consideration in determining whether special circumstances existed in the present case. It is consistent with the applicant and her solicitor having considered the original decision and having made a decision to not review it. The purpose of the power to extend time is to alleviate the potential injustice that could result from strict enforcement of the time limit. It is not to provide a person with the opportunity to revisit a decision, made under advice, to not pursue a right of review. It does not exist to allow a person to review a bad decision that person later regrets.

[30] A consideration of the steps taken during the three month period is also a relevant consideration. The evident purpose of the three month limit is to strike a balance between permitting an applicant time to consider a decision, and finality. It is relevant if a person takes no steps towards a review in that timeframe. It suggests the applicant did not consider the review worth pursuing in the circumstances. This reinforces a finding that the applicant made a decision she now regrets. The discretion to permit an extension of time does not exist for that purpose.

[31] The respondent did not take into account irrelevant circumstances.

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7 [2006] QSC 362 at [26].
8 *Blackwood v Pearce* [2015] ICQ 12 at [42].

Relevant considerations

[32] In its decision, the respondent wrote:

> "In considering whether or not special circumstances exist to grant an extension, the Office of Industrial Relations will consider the reasons for the delay, the length of the delay in applying for review and the merits of the review."

[33] I respectfully agree with Martin J in *Blackwood v Pearce* that:

> "The capacity to seek an extension of time within the three month period does not require an applicant for such an extension to demonstrate to the [respondent] that the applicant has a particularly good case. All that need be shown is that special circumstances exist."[9]

[34] The prospects of success of any review of WorkCover's decision is not a circumstance that affected the applicant's ability to comply with the three month timeframe. Similarly, prejudice, either to the applicant or WorkCover, were not circumstances that affected the applicant's ability to prepare her review. Having regard to the particular circumstances of the applicant's case, those considerations were not relevant to the respondent's decision.

[35] The fact the applicant acted on her solicitor's advice, and that advice turned out to be incorrect, was also not a consideration relevant to the respondent's decision. Taking into account such a decision would have the potential for any decision made under legal advice to be called into question. The review process is not the appropriate forum in which to seek compensation for decisions taken on the basis of poor legal advice.

[36] The applicant has not shown the respondent failed to take into account relevant considerations.

Rule or Policy

[37] The respondent's statements as to the matters it considered relevant do not support a conclusion the respondent inflexibly applied a rule or policy without regard to the merits of the case. In the present case, the "merits of the case" required a consideration of whether special circumstances existed.

[38] The respondent explicitly stated "it is recognised that in some cases, due to special circumstances, an applicant may not be able to properly prepare the review within three months." The respondent went on to consider whether special circumstances did exist in the applicant's case. The respondent did not apply any policy to reach its decision. It applied the legislative test.

[39] The applicant has not demonstrated the respondent applied a policy or rule without regard to the merits of the case.

Error of law

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[9] *Blackwood v Pearce* [2015] ICQ 12 at [50].

[40] On the first page of its decision, the respondent stated it had "determined that [the applicant] did not substantially comply with the 3 month timeframe for lodging the application for review".[10] However, a consideration of the entire decision makes clear the respondent did consider whether special circumstances existed.

[41] At page two of its decision, the respondent stated "it is recognised that in some cases, due to special circumstances, an applicant may not be able to properly prepare the review within three months." The respondent then set out the matters it takes into account in determining whether special circumstances existed, and considered whether special circumstances existed in the present case.

[42] For the reasons I have previously given, *Carmody* does not set out factors the respondent must take into account in determining whether or not special circumstances exist. The respondent did not err in failing to consider the factors set out in *Carmody*.

[43] The respondent's decision was not affected by an error of law.

Conclusion

[44] The applicant has not demonstrated that the respondent's decision involved an improper exercise of power, the sole remaining ground of the application.

Orders

[45] The application for statutory order of review is dismissed. I will hear the parties as to costs.

[10] Affidavit of Wesley Lerch filed 29 July 2016, CFI 6, annexure WL-12.