QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Workers' Compensation Regulator v Joseph Kelly* [2019] QIRC 004
PARTIES:	**Workers' Compensation Regulator** (Applicant) **v** **Kelly, Joseph** (Respondent)
CASE NO:	WC/2017/28
PROCEEDING:	Application to dismiss appeal pursuant to r 45(3)
DELIVERED ON:	14 January 2019
HEARING DATES:	5 July 2017, 21 September 2017
HEARD AT:	Brisbane
MEMBER:	Black IC
ORDER:	**Appeal dismissed pursuant to r 45 of the *Industrial Relations (Tribunals) Rules 2011*.**
CATCHWORDS:	WORKERS' COMPENSATION – APPLICATION TO DISMISS – non-compliance with directions – undertakings not fulfilled - failure to expeditiously prosecute appeal.
LEGISLATION:	*Industrial Relations Act 2016* s 451, s 452, s 541 *Industrial Relations (Tribunals) Rules 2011* r 45 *Workers' Compensation and Rehabilitation Act 2003* s 32
CASES:	*Lenijamar Pty Ltd and Ors. v AGC (Advances) Ltd* (1990) FCR 388
APPEARANCES:	Mr J Kelly, self represented. Mr P Rashleigh for the Workers Compensation Regulator, directly instructed.

Decision

History of Appeal

[1] By notice of appeal dated 24 February 2017, Mr Joseph Kelly (the appellant) appealed a decision of the Workers' Compensation Regulator dated 25 January 2017 rejecting his application for compensation in relation to a psychological injury.

[2] Directions facilitating the expeditious conduct of the appeal were issued by the Industrial Registrar on 24 February 2017. The directions included the scheduling of a conference on 6 April 2017.

[3] The conference was not productive and the file was returned to the Registry for the setting of dates for trial. On 10 May 2017, trial dates were set for 3 July 2017 to 7 July 2017.

[4] On 14 June 2017, the appellant filed his statement of facts and contentions and also provided the names of witnesses intended to be called to give evidence in the trial. On 16 June 2017 the appellant provided outlines of evidence and added to his witness list.

[5] In the week before the trial the regulator became aware that the appellant had not taken steps to either arrange or to confirm the attendance at trial of one or more of his medical witnesses. Following an email exchange between the regulator and the appellant on 28 June 2017, the appellant decided to seek an adjournment of the hearing scheduled to commence the following Monday.

[6] As a consequence, the trial was adjourned but a mention was scheduled for 5 July 2017 to enable the parties to address the future course of the matter. In explaining his circumstances at this mention, the appellant said *inter alia* that he would make a decision on the future conduct of his appeal in approximately a month's time. He also said that he was "trying to release some funds at the moment. As soon as that happens, I'll be fine to run with it".

[7] Various other exchanges took place during this hearing about the appellant's capacity to fund his appeal and his own capacity to prosecute his appeal in the event that he could not fund a lawyer. In respect to the issue of funding, the transcript discloses the following discussion (T1-8):

> MR RASHLEIGH: … Look, from Q-COMP's point of view – I beg your pardon, the regulator's point of view on my instructions are unless Mr Kelly, to use the vernacular, comes up to the mark fairly quickly, then there will be an application to strike his - - -
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> COMMISSIONER: Appeal out.
>
> MR RASHLEIGH: Out, yes.
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> COMMISSIONER: Yes. I think you've got to understand that sort of process.
>
> APPELLANT: Yeah, I definitely do.
>
> COMMISSIONER: If it drifts on for too long and the - - -
>
> APPELLANT: Yes. Most definitely.

> COMMISSIONER: - - - regulator keeps incurring costs and - - -
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> APPELLANT: Correct.
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> COMMISSIONER: - - - Mr Rashleigh has to come down here every day and costs to the regulator mean - - -
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> MR RASHLEIGH: Yes.
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> COMMISSIONER: - - - they inevitably file that application.

[8] The hearing concluded on the basis that the appellant would inform the Commission no later than 14 July 2017 about the future conduct of his appeal including the resourcing of his appeal. A discussion also took place about the desirability of referring the appeal back for further conciliation.

[9] On 14 July 2017, the appellant informed my associate that he had failed to get funding released to support the conduct of his appeal and asked that the matter be referred to conference.

[10] This conference was subsequently scheduled for 3 August 2017, however the appellant did not attend the conference. Later that day the regulator emailed the appellant, noted that he had failed to attend the conference, and put him on notice of an intention to make an application to dismiss his appeal.

[11] The appellant responded to the regulator's email on 7 August 2017, apologised for his inability to get to the conference and asked that the conference be rescheduled to a later date. The conference was subsequently scheduled for 24 August 2017, but little progress was made and the file was returned to me on the premise that the matter would proceed to trial. Consistent with this expectation, the matter was listed for mention on 21 September 2017 for the purpose of setting new or revised directions which would see the appeal brought to a timely conclusion.

[12] However, at the 21 September 2017 hearing, the appellant sought to adjourn the proceedings for a period of four months because of what can be described as some dire personal circumstances. Notwithstanding this, the committed to continuing with his trial and said that his funding issues would be addressed in November 2017 resulting from the sale of a family property. He also foreshadowed that he faced 90 days incarceration in the state's prison system for breaches of his parole conditions. In these circumstances he considered that he would be ready to go to trial in four months time.

[13] While the respondent opposed what would amount to a four month suspension in the appeal process, it argued that if the adjournment was allowed, and the appellant failed to deliver on his undertakings, the appeal should be struck out (T1-5):

> MR RASHLEIGH: Just listen. Let me finish, please. If there is a four month adjournment, then, in my respectful submission, it should be subject to a guillotine order that if there is no prospect of the matter proceeding to hearing then that it should be struck out. It should be – it's been – there's been all these adjournments and people not coming up to the mark. Now, if you're minded to give the four month adjournment, there should be a stop to it and a guillotine order made that if the matter doesn't – is not ready to proceed, then it should be struck out.

[14] In response to the regulator's submission, the appellant proposed that a directions hearing be set for the middle of November 2017 by which date he should have access to the necessary funding. In the end result, the Commission elected to grant the adjournment but in circumstances consistent with the regulator's submission (T1-6):

> COMMISSIONER: - - - we can consider doing that, but what I want to do is to make you familiar, if you like, with the very real prospect – so my inclination is to allow your adjournment, but what Mr Rashleigh said, I think, is probably inevitable.
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> MR KELLY: I understand.
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> COMMISSIONER: You'd still have a right to be heard, but - - -
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> MR KELLY: Yeah.
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> COMMISSIONER: - - - it would appear to me that, given the history of the matter, if there was a further complication - - -
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> MR KELLY: Yeah.
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> COMMISSIONER: - - - and you couldn't run the appeal by a date that we need to sort of discuss, then - - -
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> MR KELLY: Totally understandable.
>
> COMMISSIONER: - - - you should presume that the appeal would be struck out. So as long as you have understanding of that.
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> MR KELLY: Definitely do.

[15] The matter was adjourned on the basis that a further directions hearing would be scheduled for December 2017 in the expectation or hope that, by then, the appellant's funding issues would have been resolved and that he may have secured legal representation. However the directions hearing did not eventuate following advice from the appellant's father (Bryan Kelly) on 6 December 2017 to the effect that the appellant was unable to attend the proceedings:

> I wish to advise that my son Joseph James Kelly is currently in the Arthur Gorrie Centre and requests an extension for his Appeal until early February 2018. Please contact me if you require any additional information.

[16] While the regulator advised on 6 December 2017 that it did not oppose the appellant's request for an extension of time, I caused the following response to be sent to the appellant's father on 11 December 2017:

> A directions hearing was held in September 2017 in relation to this matter. At this directions hearing, Mr Kelly gave an undertaking that there would be certainty about securing funding in order to obtain legal representation by November and that another directions hearing would be scheduled for December.
>
> For your reference, I have attached a copy of the transcript of this directions hearing.
>
> Commissioner Black requests that you provide an explanation for why the undertakings given at the September directions hearing have not been met? Please respond by email at your earliest convenience.

[17] In the appellant's absence, Byan Kelly responded to the effect that he was unaware of any undertakings given by his son and was unable to respond to the 11 December

2017 email. Bryan Kelly's email which took the following form was sent on Wednesday 13 December 2017:

> Please be advised that I was not aware of, nor party to, any undertakings given by Joseph. My recent email to you was to advise you, at Joseph's request, of his current status. Should you wish to contact Joseph, his mailing address is Locked Bag 1300 Archerfield Queensland 4108.

[18] Notwithstanding Bryan Kelly's advice that the appellant would be released from the Arthur Gorrie Centre in early February 2018, no further communication was received from either the appellant or Bryan Kelly in the period immediately after the appellant's expected release.

[19] As a consequence of the absence of any communication, on 20 June 2018, I caused an email to be sent to the parties stating that a review of the file had disclosed that no activity had been recorded in relation to the matter for some considerable time and that unless either of the parties persuaded me to the contrary on or before 29 June 2018, I would move to strike out the appeal.

[20] This email did not prompt any response from the appellant or his father. However before the Commission acted of its own motion, the regulator filed an application on 18 September 2018, seeking the dismissal of the appellant's appeal.

[21] On 24 September 2018, directions were emailed to the parties in response to the regulators application that the appeal be dismissed. The directions required the appellant to provide a written submission by 5 November 2018 outlining his reasons why the regulator's application to dismiss should not be accepted.

[22] The appellant did not file submissions by 5 November 2018, but he did, on the same day, send to my associate and the regulator a relatively lengthy email explaining his circumstances. His explanations or statements included the following:

- That he would deliver a signed affidavit to the registry the following morning;
- That he had been released on parole in April 2018;
- That it was a condition of his parole that he consult a psychologist and a psychiatrist;
- That he remained under supervision by Queensland Corrections until January 2019.
- That he was "now in a position to source legal representation and get the files and information together to mount this case"; and
- That if one month could be provided he would "get representation to provide what course of action they wish to pursue".

[23] The regulator's submissions in relation to the application to dismiss were due to be filed on 12 November 2018. In circumstances where the appellant had not filed his submissions by 5 November 2018, the regulator moved on 12 November 2018 to email the registry and the appellant in the following terms:

> We refer to the above matter and recent correspondence from Mr Kelly that an affidavit is to be filed in the Commission on 6 November 2018.
>
> Enquiries have been made with the registry today and it has been confirmed that no affidavit has been filed.

> We note Mr Kelly is seeking one month to source legal representation and the Regulator would propose that should Mr Kelly obtain this legal representation, that representative may seek to provide written submissions on his behalf.
>
> Would the Commission please advise whether it would agree to vacate the current Further Directions Order pending notification from Mr Kelly in regards to legal representation, with further appropriate directions to then be given.

[24] On Tuesday 13 November 2018, I caused an email to be sent to the appellant and the regulator in the following terms:

> Dear Ms. Shedden and Mr Kelly,
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> The commissioner advises that he is very reluctant to accommodate Mr Kelly further – he has consistently failed to demonstrate a capacity to prosecute his application on a timely basis.
>
> However given the regulator's view (refer email trail below), the commissioner provides Mr Kelly with one last opportunity to revive his appeal.
>
> If Mr Kelly fails to comply with directions, and fails to provide a written response to the regulator's application to strike out his appeal, his appeal will be struck out.
>
> In more specific terms, if Mr Kelly's submission in reply to the regulator's application to strike out is not received by **17 December 2018** – his appeal will be struck out.
>
> If Mr Kelly does provide a submission, the regulator will not be required to file a reply submission until 15 January 2019

[25] On Tuesday 13 November 2018, the appellant replied in the following terms:

> Thank you, I appreciate the flexibility offered in a world that is inflexible. Next correspondence should be from someone acting as my legal representation one way or another.

[26] On Wednesday 12 December 2018, Bryan Kelly emailed the registry and copied the appellant in the following terms:

> I am writing on behalf of my son Joseph James Kelly who requests an extension to his Appeal date until the end of January 2019.
>
> He has been incarcerated until mid January 2019, if not a little earlier, and has no way of contacting you directly. He has organised legal representation with Quinn & Scatini at Cleveland) to further his Appeal.
>
> Any relevant correspondence can be sent to my email address or postal address below until his release. Should you require any further information, please do not hesitate to contact me.

[27] It is noted that Bryan Kelly's explanation about the appellant's circumstances is not consistent with the explanation provided by the appellant in his 5 November 2018 email.

[28] On Wednesday 12 December 2018, my associate emailed Bryan Kelly and informed him that any further extensions of time would not be approved, that current directions required a response to the regulator's application by 17 December 2018, and that if a response was not filed on or before 17 December 2018, the appeal would be struck out.

[29] A further email was sent to Bryan Kelly on 12 December 2018 in the following terms:

> The Commissioner has asked that I advise you that what is required is not an explanation for delay, but a response to the regulator's application to strike out your appeal.
>
> The Commissioner reiterates that if a response to the regulator's application is not provided by 17 December 2018, your appeal will be struck out.
>
> For your information, I **attach** the previous email trail wherein you were informed that a response must be provided by 17 December 2018 and stated that if you do not provide a response by that date, the appeal will be struck out.

[30] The email attached was the email sent by my associate to the appellant on Tuesday November 13, 2018.

[31] The appellant did not supply a submission in response to the application to dismiss on or before 17 December 2018, nor at any time subsequently and prior to the release of this decision.

Reasoning

[32] The regulator applies to dismiss the appeal pursuant to Rule 45 of the *Industrial Relations (Tribunals) Rules 2011* (the IR Rules). The Commission's power to dismiss the appeal is also available under s 451 and s 452 of the *Industrial Relations Act 2016* (the IR act). A power to dismiss the appeal may also reside under s 541(b) of the IR Act which allows the Commission to dismiss an industrial cause if the Commission considers that further proceedings are not necessary or desirable in the public interest.

[33] The IR Rules apply to proceedings before the Commission, which includes a proceeding started by way of a notice of appeal under the *Workers' Compensation and Rehabilitation Act 2003*.

[34] Rule 45 relevantly applies if a party to a proceeding fails to comply with a directions order or fails to attend a hearing or a conference. In the event of non-compliance, the Commission may dismiss the proceedings:

> **Failure to attend or to comply with directions order**
>
> (1) This rule applies if—
> (a) a party to a proceeding receives notice of a directions order made by the court, commission or registrar stating a time, date and place for a hearing or conference for the proceeding; and
> (b) the party fails to attend the hearing or conference.
>
> (2) This rule also applies if—
> (a) a party to a proceeding receives notice of a directions order made by the court, commission or registrar; and
> (b) the party fails to comply with the order.
>
> (3) The court, commission or registrar may—
> (a) dismiss the proceeding; or
> (b) make a further directions order; or
> (c) make another order dealing with the proceeding that the court, commission or registrar considers appropriate, including, for example, a final order; or
> (d) make orders under paragraphs (b) and (c).

Conclusion

[35] The appellant has failed to prosecute his proceedings in any meaningful way since 16 June 2017. His inaction and lack of diligence caused the abandonment of his trial scheduled for July 2017. Subsequently, he failed to attend a conference on 3 August 2017. He also failed to fulfil his earlier promise that funding would be secured in November 2017. Despite being granted a four months' extension on 21 September 2017, and again allowed extra time in December 2017, he did not attempt to explain why he did not take action on his appeal at the end of the four month extension. Nor did he respond to a notification from the Commission issued in June 2018 informing him of an imminent striking out of his appeal. Ultimately, no action was taken on his appeal between 13 December 2017 and 5 November 2018.

[36] Principles relevant to the exercise of a discretion relevant to an application to dismiss were canvassed by Wilcox and Gummow JJ in *Lenijamar Pty Ltd and Ors. v AGC (Advances) Ltd*[1] where the provisions of Order 10 rule 7 of the Federal Court Rules were under consideration. Relevantly, and at that time, Order 10 rule 7 provided that:

> 7 (1) Where a party fails to comply with an order of the Court directing that party to take a step in the proceeding, any other party may move the Court on notice -
>
> (a) if the party in default is an applicant - for an order that the proceeding be stayed or dismissed as to the whole or any part of the relief claimed by him in the proceeding.

[37] After considering Order 10 rule 7, the judgment proceeded:

> 33. It is to be noted that the power given by this rule is conditioned on one circumstance only: the failure of a party to comply with an order of the Court directing that party to take a step in the proceeding. There is no requirement of intentional default or contumelious conduct, although the attitude of the applicant to the default and the Court's judgment as to whether or not the applicant genuinely wishes the matter to go to trial within a reasonable period will usually be important factors in weighing the proper exercise of the discretion conferred by the rule. There is no requirement of "inordinate and inexcusable delay" on the part of the applicant or the applicant's lawyers, although any such delay is likely to be a significant matter. There is no requirement of prejudice to the respondent, although the existence of prejudice is also likely to be significant. And it must be remembered that, in almost every case, delay adversely affects the quality of the trial and is an additional burden upon the parties.
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> …
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> 35. The observations which we have just made about the scope of Order 10 rule 7 are not intended to convey the impression that any failure to comply with a procedural direction will appropriately result in the dismissal of the proceeding. On the contrary, the rules must be administered sensibly and with an appreciation both of the fact that some delays are unavoidable, and unpredictable, by even the most conscientious parties and their lawyers, and of the likely serious consequences to an applicant of staying or dismissing a claim; compare the approach taken to non-compliance with time limitations in respect of appeals in Van Reesema v Giameos (1979) 27 ALR 525. We would not wish our observations to cause respondents to apply for dismissal of proceedings simply because there has been a non-compliance with a direction by the applicant, even though it does not cause or indicate a continuing problem in preparing the matter for an early trial.
>
> 36. The discretion conferred by Order 10 rule 7 is unconfined, except for the condition of non-compliance with a direction. As it is impossible to foresee all of the circumstances under which

[1] *Lenijamar Pty Ltd and Ors. V AGC (Advances) Ltd* (1990) FCR 388.

> the rule might be sought to be used, it is undesirable to make any exhaustive statement of the circumstances under which the power granted by the rule will appropriately be exercised. We will not attempt to do so. But two situations are obvious candidates for the exercise of the power: cases in which the history of non-compliance by an applicant is such as to indicate an inability or unwillingness to co-operate with the Court and the other party or parties in having the matter ready for trial within an acceptable period and cases - whatever the applicant's state of mind or resources - in which the non-compliance is continuing and occasioning unnecessary delay, expense or other prejudice to the respondent. Although the history of the matter will always be relevant, it is more likely to be decisive in the first of these two situations. Even though the most recent non-compliance may be minor, the cumulative effect of an applicant's defaults may be such as to satisfy the Judge that the applicant is either subjectively unwilling to co-operate or, for some reason, is unable to do so. Such a conclusion would not readily be reached; but, where it was, fairness to the respondent would normally require the summary dismissal of the proceeding.
>
> 37. In the second of the two situations we postulate, a significant continuing default, it does not really matter whether there have been earlier omissions to comply with the Court's directions. Ex hypothesi the default is continuing and is imposing an unacceptable burden on the respondent. But the continuance of the non-compliance is of the essence of this situation. If, when the Court looks at the matter, the direction has already been complied with, the defaulting applicant may be ordered to pay any wasted costs; but it would be difficult to justify the dismissal of the proceeding solely because of that default.[2]

Decision

[38] In my considered view, I would be acting consistent with the principles enunciated above if I were to accede to the regulator's application and dismiss the appeal brought by the appellant.

[39] I have formed the view on the chronology outlined that there is little prospect of the appellant prosecuting his appeal. His promises that funding would be secured have never been fulfilled and despite constant warnings about the need for expedition, he has consistently sought that directions be suspended or amended.

[40] Having regard to the appellant's failure to comply with directions and his failure to make good on his undertakings, his failure to demonstrate any significant capacity to prosecute his appeal, and his failure to satisfy me that he is committed to the expeditious resolution of his appeal, I have decided to dismiss the proceedings pursuant to rule 45 of the IR Rules.

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[2] *Lenijamar Pty Ltd and Ors. V AGC (Advances) Ltd* (1990) FCR 388.