Clawing back a self-executing order

Jessup v TAC [2004] VCAT 1453

By Michael Lombard

Mrs Jessup was injured in a transport accident and entitled to a range of assistance, including medical benefits, under the *Victorian Transport Accident Act* 1986.

The Transport Accident Commission (TAC) made decisions reducing and then ceasing physiotherapy treatment, against which Mrs Jessup appealed to the Victorian Civil and Administrative Tribunal.

After a directions hearing, the Senior Member of VCAT vacated the hearing date and listed the matter for an 'administrative mention' on 8 December 2003. The important following order was that if the applicant wished to proceed with her application, she was to notify VCAT in writing before 8 December 2003 and, in default, her application would stand dismissed.

No notification was received by VCAT from Mrs Jessup and the application for review was dismissed, formalising the self-executing order.

Four months later, VCAT received a letter from Mrs Jessup's solicitors indicating that an earlier notification had been sent to the tribunal about the applicant's intention to pursue her application.

A new hearing was held to consider whether VCAT had power to entertain any application where Mrs Jessup's application stood dismissed.

CONTENTIONS

Counsel for Mrs Jessup submitted that VCAT had power to vary or revoke its order under s131 of the *Victorian Civil and Administrative Tribunal Act* 1998 (*VCAT*), as the order dismissing the application was a procedural order. The case had not been heard on its merits and so an interlocutory order could be varied. Alternatively, s119 of the same Act could be used for correcting a mistake. A further alternative submission was that under s126 of the *VCAT* Act, an extension or abridgement of time, even if it had expired, could be made.

The TAC contended that, as the order was a formal order dismissing the application for review, VCAT was functus officio and couldn't recall its own order dismissing the application. It was contended that it was significant that the application had been 'dismissed' and not struck out. The TAC did not, however, identify any prejudice should time be extended.

DECISION

The tribunal found two very pertinent decisions: *FAI General Insurance Company Ltd & Others v Southern Cross Exploration NL & Others*,1 and *Ng v Rockman*.2 The High Court, in *FAI v Southern Cross*, decided there was power to extend time for compliance despite the time for compliance having already expired.

The Victorian Supreme Court also found similar power providing that VCAT could set aside a self-executing order.

The senior member of VCAT used s126 of the *VCAT* Act to extend the time for compliance by the applicant, despite the previous order dismissing the application.

Time was therefore extended to the date that the tribunal first received correspondence from the solicitors, demonstrating the intention to proceed further with the application.

CONCLUSION

The clawing back of a self-executing order that has dismissed an application can sometimes be a vital tool in pursing an appeal against the TAC. This decision shows that time can be extended to allow it to occur, particularly as, in this case, the tribunal believed that the interests of justice favoured the extension of time for compliance. ■

Notes: **1** (1988) 165 CLR 268. **2** [1999] VSC 470.

Michael Lombard *is the partner in charge of the Transport Accident Division of Holding Redlich, Melbourne.*
PHONE *(03) 9321 9764*
EMAIL *Michael.Lombard@holdingredlich.com.au*