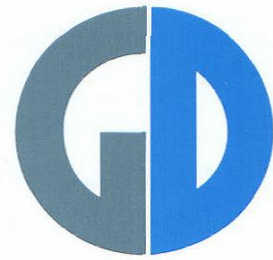


Gun & Davey

Covered



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COVERED CASES

SANTOS LIMITED -v- WORKERS REHABILITATION & COMPENSATION CORPORATION

Decision of the Full Court of the Supreme Court of South Australia

(unreported, dated 11/09/98)

Catchwords:

Extension of Time – Principles.

Facts:

The worker, an employee of Supervising Services Holding Pty Ltd (“SES”), suffered a compensable disability during the course of his employment when he slipped and fell at a work site owned and controlled by Santos Limited (“Santos”). SES had contracted with Santos to provide the worker’s labour to the latter. The worker sought and obtained compensation from WorkCover and then settled an action for damages at common law against Santos.

WorkCover subsequently but belatedly instituted proceedings in the Industrial Court against both the worker and Santos pursuant to Section 54(7) of the Act. It sought to recover from Santos all compensation paid and payable to the worker over and above the settlement sum accepted by the worker.

The recovery proceedings were commenced some two years and seven months after the expiry of the statutory time limit of three years stipulated by Section 54(7)(g) of the Act. The Corporation sought an extension of time within which to institute proceedings pursuant to Section 48(1) of the Limitation of Actions Act, 1936.

Deputy President Cawthorne granted the extension of time sought by the Corporation and entered judgment against Santos. Santos appealed to the Full Bench of the Tribunal against that decision.

The Full Bench made a formal order stating a case to the Supreme Court on the issue of extension of time.

Issues:

The questions of law posed by the case stated were formulated in the following terms:-

In the Tribunal's consideration of the respondent's application for an extension pursuant to Section 48(1) of the Limitation of Actions Act, 1936 of the time fixed by Section 54(7)(g)(ii) for the institution of the proceedings against Santos:-

1. Did the respondent have the onus of persuading the Tribunal to exercise its discretion to grant the extension of time? (Yes)
2. Was there an evidential onus on the appellant to adduce any evidence of prejudice to it and if so, what was that onus? (Yes)
3. Was the respondent required to establish that the appellant would not be prejudiced by the grant of the extension of time? (No)
4. Can prejudice to the appellant be presumed by reason of the elapse of the 3 year limitation period? (Yes)

Held:

1. Yes the plaintiff (at first instance) does bear the onus.
2. Yes. If the defendant (at first instance) wished to rely upon actual or specific prejudice resulting from the delay that had occurred, it was incumbent upon the defendant to adduce evidence of the facts that would support such a conclusion. If it did not do so, it was open to the Court to infer that actual or specific prejudice did not arise. It would not follow that the Court should infer that no prejudice at all would be occasioned by the grant of an extension of time. The ultimate onus would remain upon the plaintiff to persuade the Court that an extension of time should be granted.
3. No. The plaintiff had to satisfy the Tribunal that the justice of the case required that an extension of time be granted. Prejudice to the defendant, especially actual or specific prejudice proved by evidence, was an important matter to be considered. Prejudice in the form of an interference with the defendant's ability to have a fair trial, attributable to the delay, was a matter of particular importance. The Tribunal was required to exercise its discretion taking into account any prejudice to the defendant attributable to the delay. The Tribunal could grant an extension of time even though satisfied that the defendant would be prejudiced. But it could do so only if, considering all the circumstances, the justice of the case so required, notwithstanding the relevant prejudice to the defendant.
4. Yes. The Tribunal was entitled to infer that the defendant would or might suffer prejudice from the delay if an extension of time were granted. However the Tribunal should identify and assess the particular prejudice that might result. The Tribunal was then required to consider what conclusion should be reached about the prejudice issue on all the material before it. In so doing it should consider the significance of the failure of the defendant to adduce evidence of any actual or specific prejudice, if the defendant so failed.

Commentary:

This decision is a reminder to litigants that the party seeking the extension of time carries the onus.

However, there has been no radical change in the principles to be applied by a Court or Tribunal required to decide whether or not to grant an extension of time. Each case will be determined on its own facts, with prejudice to a defendant / respondent representing only one relevant consideration.

The further relevant considerations remain:-

- (a) length of delay (and compared to limitation period)

- (b) reason for the delay
- (c) hardship to the applicant if extension is not granted
- (d) conduct of the defendant / respondent

The above principles apply with respect to a worker seeking an extension of time within which to lodge a Notice of Dispute in accordance with Section 90A and to those seeking to lodge an Application for Judicial Determination or Appeal to the Full Bench of the Tribunal outside of the prescribed time limits.

Thought is required in determining whether or not to contest an application made by a worker. If unsure legal advice should generally be sought.

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