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Presneill and Civil Aviation Safety Authority [2014] AATA 142 (14 March 2014)

Last Updated: 14 March 2014

[\[2014\] AATA 142](#)

Division **GENERAL ADMINISTRATIVE DIVISION**
File Number(s) **2014/0133**
Re **Gary Presneill**
 APPLICANT
And **Civil Aviation Safety Authority**
 RESPONDENT

DECISION

Tribunal **Mr S. Webb, Member**
Date **14 March 2014**
Place **Canberra**

Extension of time in which to lodge an application is refused.

.....[sgd].....

Mr S. Webb, Member

PRACTICE AND PROCEDURE – extension of time to lodge an application for review of a decision imposing restrictions under a medical certificate - original decision fixed in time – sequential decision making – restrictions lifted by subsequent decision – standing where interests not presently affected – determination of application for review can have no practical effect – proceedings futile – collateral purpose– meaning of ‘frivolous or vexatious’ - role of Tribunal when reviewing a decision – test of ‘reasonable in all the circumstances’ – extension not granted

[Administrative Appeals Tribunal Act 1975, s29, 42B](#)

[Civil Aviation Act 1988, s 31](#)

[Civil Aviation Safety Regulations 1998, r 67.155, 67.205](#)

Mulholland v Australian Electoral Commission [\[2014\] FCA 136](#)

Transurban City Link Ltd v Allan [\[1999\] FCA 1723](#); [\(1999\) 95 FCR 553](#)

REASONS FOR DECISION

Mr S. Webb, Member

14 March 2014

1. Gary Presneill is a pilot. Following some medical issues with his shoulder, the Civil Aviation Safety Authority (← CASA →) made a series of decisions in respect of a medical certificate that imposed restrictive conditions on his licence to fly, including decisions on 8 May and 13 June 2013. Mr Presneill commenced proceedings in the Tribunal for review of the 13 June 2013 decision (application 2013/3233). The proceedings were brought to an end by agreement and a fresh decision was made, lifting all medical certificate restrictions. Mr Presneill was issued with a new medical certificate without restrictions. That notwithstanding, Mr Presneill lodged an application for review of the earlier ← CASA → decision of 8 May 2013 in respect of previous medical certificate restrictions.
2. The application was lodged out of time, on 10 January 2014, well after the statutory 28-day period had elapsed.
3. Mr Presneill applied for an extension of time in which to lodge the application. This was opposed by ← CASA →. This issue of an extension of time came on for hearing before me on 7 February 2014.
4. The document Mr Presneill attached to his application for review is in the form of a letter. It contains the following text –

Thank you for providing a copy of your operational check. This report was satisfactory. Your medical certificate suspension has been lifted and you are cleared by ← CASA → to exercise the privileges of the following medical certificate.

Issue of Medical Certificate – Audit Requirement

A Class 1 & 2 medical certificate valid for 12 months from the date of your medical has been issued. This will be sent to you under separate cover. If there is any change in your condition or treatment, you are required to ground yourself until cleared by ◀ CASA ▶ or your DAME to return to flying.

Special Operational Restriction

Restricted to operating Fokker F100 aircraft.

The letter also set out “*Special Requirements*” of a procedural or administrative nature in respect of Mr Presneill’s “*NEXT certificate*”.

5. At the hearing, Mr Presneill informed me that he would be satisfied if ◀ CASA ▶ varied the 8 May 2013 decision, such that the medical certificate restriction to Fokker 100 aircraft is lifted from that date. ◀ CASA ▶’s legal representative sought time to obtain instructions on this point. Noting that the decision on 8 May 2013 has no present or enduring effect (and that ◀ CASA ▶ agreed to lift the medical certificate restrictions from 13 June 2013 in application 2013/3233), I stood the matter over in order to allow time for ◀ CASA ▶ to consider this course of action.
6. ◀ CASA ▶ refused to vary the decision and the hearing resumed on 21 February 2014.
7. In the course of the resumed hearing, issues concerning Mr Presneill’s standing under s 27 of the [Administrative Appeals Tribunal Act 1975](#) (the AAT Act) and whether the application might be frivolous or vexatious under s 42B were raised. For reasons of fairness, I allowed each party time to consider their respective positions and to file written submissions, if any, addressing these matters. This was duly done.
8. I have had regard to the written submissions each party has filed.
9. The issue is whether or not Mr Presneill’s application for an extension of time in which to apply for review of the 8 May 2013 ◀ CASA ▶ decision should be granted in the particular circumstances. This requires consideration of whether it is reasonable to grant the extension of time sought in all of the circumstances, including whether Mr Presneill has standing to make such an application and whether the application, if allowed, may be frivolous or vexatious.

Reasonable in all the circumstances

10. When determining whether it is reasonable to grant an extension of time in all the circumstances, it is germane to bear in mind the exceptional nature of the discretion. Generally, where a statute prescribes a time limit, it is expected that the limit must be complied with. Of course, the general rule is underscored by exception, and exception requires consideration of the particular circumstances. In the present circumstances, there are several important considerations, namely –
 - (a) standing to make the application;
 - (b) explanation for the delay in meeting the time limit;
 - (c) notice of an intention to contest the decision;
 - (d) prejudice to the respondent;
 - (e) public interest issues, concerning disruption to established practices for example;
 - (f) merits of the application;
 - (g) issues of fairness to others who have adhered to the time limit; and
 - (h) whether the application may be frivolous or vexatious.

Standing

11. Mr Presneill asserts that his interests were affected by the decision of 8 May 2013. That is plainly correct. The decision restricted the medical certificate he required to fly. But it does not follow that his interests are presently affected by the decision, or that they were affected when he applied to the Tribunal for review.  CASA  says that Mr Presneill's interests ceased to be affected when the medical certificate restrictions were lifted by a subsequent decision of the Tribunal and a fresh unrestricted medical certificate was issued.
12. The issue of standing is to be determined under s 27 of the AAT Act, which is in the following relevant terms -

27(1) Where this Act or any other enactment (other than the [Australian Security Intelligence Organisation Act 1979](#)) provides that an application may be made to the Tribunal for a review of a decision, the application may be made by or on behalf of any person or persons (including the Commonwealth or an authority of the Commonwealth or Norfolk Island or an authority of Norfolk Island) whose interests are affected by the decision.

13. The manner in which or the extent to which a prospective applicant's interests may be affected should not be construed narrowly. The interest must be one that is sufficient to establish standing and it must be one that is capable of being legitimately or effectively pursued in the proceedings.
14. While there is some controversy whether determination of standing is confined to the date on which the application is made, it is quite clear that, if the circumstances of an applicant change such that his or her relevant interests are no longer affected by the decision under review, the application may be dismissed under s 42B as frivolous or vexatious^[1]. But that is not the case presently. Mr Presneill does not have proceedings on foot before the Tribunal, rather he is seeking an extension of time in which to lodge an application. It is in this context that the question concerning his standing under s 27 of the AAT Act must be considered – it would be futile and inappropriate to grant an extension of time to lodge an application to a person if the person does not meet the requirements of s 27.
15. There is no doubt that Mr Presneill's interests were affected by the 8 May 2013 decision when it was made, but by the time he lodged the application for review of that decision on 10 January 2014 it had been rendered without present effect by a consent decision of the Tribunal on 22 October 2013, which lifted restrictions from Mr Presneill's medical certificate as of 13 June 2013.
16. Mr Presneill asserts that his interests continue to be affected by the 8 May 2013 decision in a number of ways. In particular, he says that the restriction remains on his record for the period from 8 May to 13 June 2013 when this is wrong and it may affect his future employment prospects. His avowed interest in having the decision reviewed is to correct the record and to expose alleged maladministration, in the form of procedural failings, technical deficiencies, decision-making errors and legal wrongs, in the way in which  CASA  dealt with his case, especially in respect of the 8 May 2013 decision. He maintains that the alleged maladministration is systemic and that it affects all pilots under the [Civil Aviation Act 1988](#) (the [Civil Aviation Act](#)) and the [Civil Aviation Safety Regulations 1998](#) (the Regulations), including himself. Furthermore, he alleges that  CASA  has not behaved as a model litigant in its dealings with him, refusing to provide him with necessary information, and refusing to acknowledge and correct failings and errors.
17. As regards the specific interests Mr Presneill says are affected, firstly, he maintains that he was denied procedural fairness by  CASA , and that  CASA  did not properly adhere to the legislative requirements in respect of the 8 May 2013 decision. In his submission these failings invalidate the decision to impose a condition on his medical certificate at the time. Mr Presneill argues that  CASA 's decision to cancel his medical certificate is invalid for similar reasons.

18. Furthermore, he asserts that the 8 May 2013 decision is “*internally inconsistent*”^[2] Addressing these matters, he says –

What I am seeking is to have the decision of 8 May 2013 recognised as legally invalid. Alternatively, at very least, I am asking for the legal requirement for the notification to be finally provided to me – specifying “the respect” of the medical standards which I allegedly failed. Neither of these outcomes are diminished by the fact that the medical certificate has since lapsed...

19. Secondly, Mr Presneill asserts that the 8 May 2013 decision continues to affect his interests as “*my medical history now has a (totally unnecessary) “blot” on it which, if it is allowed to remain, will have an adverse affect on my ability to gain employment as a commercial pilot back in Australia into the future.*”
20. I accept that Mr Presneill has an interest in overturning the 8 May 2013 decision, which imposed medical certificate restrictions on his pilot’s licence. But that is not the correct test. The test that must be applied under s 27 is whether Mr Presneill is a person whose interests are affected by the 8 May 2013 decision.
21. Mr Presneill’s claim to have standing is not strong. Even if he is correct in asserting that  CASA  denied him procedural fairness and acted in a manner that was contrary to legislation when making the 8 May 2013 decision (and I make no such finding), it does not follow that the decision he now seeks to impugn affected his interests on 10 January 2014, or that it continues to affect his interests. The 8 May 2013 decision has been overtaken by subsequent decisions, which have operative effect.
22. The assertion that his future employment prospects as a commercial pilot may be affected by the 8 May 2013 decision, and by the ‘blot’ on his record in particular, lies open as a possibility but, to my mind, it is not sufficiently made out on the present evidence to permit a finding that Mr Presneill’s interests are affected in this way. Nevertheless, even if I accepted that Mr Presneill’s interests are affected in this way, it would support his claim to have standing for the purposes of s 27, but that is only one factor I must considered in order to determine whether it is reasonable in all the circumstances to grant him the extension of time
23. It is not necessary for me to go further to conclusively determine the issue of Mr Presneill’s standing – it is but one of several factors that bear upon the discretion to grant an extension of time for him to lodge an application for review of the 8 May 2013 decision.
24. The likelihood that Mr Presneill may not have standing under s 27 to make application for review of the 8 May 2013 decision weighs against granting him extra time for that purpose.

Explanation

25. Mr Presneill informed me that the explanation for the delay in him lodging the application for review is that he wanted to challenge the  CASA  decisions of 8 May and 13 June 2013 in a serial manner. The delay in bringing the second application, seeking review of the 8 May 2013 decision, after resolution of the first is largely attributable, he maintains, to his employment as a pilot in New Guinea.
26. While an explanation is usually expected, the lack of an adequate explanation or any explanation at all does not mean that an application for an extension of time must necessarily be rejected.
27. Mr Presneill’s explanation is not strong or compelling. On the materials placed before me, it appears that he was offered the opportunity to address the 8 May 2013 decision by expanding the scope of the proceedings he commenced in respect of the 13 June 2013 decision. But he declined to do so.
28. This weighs against the grant of an extension of time.

Notice

29. I accept that Mr Presneill placed  CASA  on notice that he intended to seek review of the 8 May 2013 decision, and that this matter was raised and considered in the context of proceedings in application 2013/3233. But Mr Presneill did not act to apply for review of the 8 May 2013 decision before the Tribunal at the time, and he did not act to do so in a timely manner following resolution of the proceedings in application 2013/3233, and there the matter rested until he applied for review on 10 January 2014.
30. This notwithstanding, the present evidence indicates and I accept that Mr Presneill placed  CASA  on notice of his unhappiness with the 8 May 2013 decision soon after the decision was made and in the context of the subsequent proceedings in the Tribunal. Mr Presneill has communicated with  CASA  at length about related matters over an extended period.
31. Whether or not Mr Presneill might be said to have rested on his rights from the date of the consent decision of the Tribunal in the 2013/3233 application on 22 October 2013 to 10 January 2014, when he applied for review of the 8 May 2013 decision, the period is not long. It is difficult to accept that  CASA  considered the matter to be closed.
32. This weighs in favour of the grant of an extension of time.

Prejudice

33.  CASA  informed me that it did not assert prejudice in consequence of the delay.
34. The delay in Mr Presneill seeking review of the 8 May 2013 decision is measured in months and not years. Nevertheless, if the extension of time is granted and the application proceeds, there will be costs to  CASA  in meeting its obligations under the AAT Act that it would not otherwise bear. Whether this represents prejudice may be debatable. But I accept  CASA 's submission that no prejudice will arise if the extension of time is granted.
35. This weighs in favour of the grant of additional time.

Public interest

36. Aside from the public interest in ensuring safety in civil aviation and that decisions about medical certificates (and restrictions) for pilots are made in a timely manner, no prejudice to established procedures will result if the extension of time is granted.
37. That said, the public interest in administration of justice is not served by permitting the commencement of proceedings in the Tribunal where no legitimate purpose can be achieved, and the proceedings lack utility. The parties will be put to costs, as will the taxpayer. While Mr Presneill may represent himself,  CASA  is an organ of the Commonwealth, drawing monies from the public purse.
38. Even if Mr Presneill is correct in alleging that  CASA  did not properly adhere to the legislation governing its operations and decision making in respect of medical certification of pilots, or that there were flaws in the way in which it dealt with his case when making the 8 May 2013 decision, changing that decision now will have no legal or practical effect. The Tribunal does not exercise power at large, and it is confined to exercising jurisdiction that is conferred upon it by legislation. The stated object of Mr Presneill's application is, at least in substantial part, to effect change in  CASA 's administrative procedures and decision making processes. This object is a collateral purpose that cannot legitimately be achieved by his application to the Tribunal for review of the 8 May 2013 decision.
39. This weighs against the grant of an extension of time.

Merits

40. I am not in a position to test the substantial merits of Mr Presneill's application. For present purposes it is sufficient to ascertain whether the application has any merit or reasonable prospect if the grant of extra time is made.
41. Mr Presneill says that the 8 May 2013 decision was based on incorrect medical evidence (an error in a medical report), which was subsequently corrected. He maintains that from April 2013 he was medically fit and he suffered no restriction of movement in his shoulder or upper limbs that affected his fitness as a pilot. It is not disputed that Mr Presneill is an ex-employee of ← CASA → and that he informed ← CASA → that a medical report provided to ← CASA → concerning his shoulder contained an error. Nor is it controversial that the 8 May 2013 decision was made without regard to an amending report, and that the decision-maker discounted Mr Presneill's assertion that his shoulder condition no longer caused any loss of motion or fitness impediment.
42. If the application proceeds, the Tribunal will be required to make a fresh decision on all materials placed before it that are relevant to determination of the medical certificate issues that were before the original decision maker. This would include evidence correcting the flawed medical report on which the original decision maker apparently relied.
43. If that is correct, Mr Presneill's application may have merit, and he may succeed in overturning the 8 May 2013 decision. This would weigh in favour of granting the extension of time he seeks.
44. But assessing the relative merits of an application is not an abstract exercise. The grounds and likely evidence on which the application is raised must be considered in relation to the applicable legislation. In this exercise, the legitimate purpose of the application, its utility and any legal or practical effect of the Tribunal's determination of the application, if allowed, must also be considered.
45. Thus, the prospects of Mr Presneill succeeding in overturning the 8 May 2013 decision, on the one hand, must be weighed against the lack of utility in such a favourable determination by the Tribunal, on the other. This is a matter to which I will return.

Fairness

46. There is some force to the proposition that the grant of an extension of time to Mr Presneill in the present circumstances may cause unfairness to others in similar circumstances who have not been granted additional time, or who have struggled to comply with the statutory time limits. As I have said, the general rule is that statutory time limits should be adhered to.
47. These matters weigh against the grant of additional time.
48. I accept that Mr Presneill was informed of and well understood the 28 day limit on lodging an application in the Tribunal. He says, nonetheless, that he understood that, having commenced proceedings in respect of the 13 June 2013 decision, he could subsequently commence proceedings in respect of the 8 May 2013 decision, at a time of his choosing. This is plainly not correct, and the basis for Mr Presneill's understanding is not clear. He alleges that his understanding was based on what he was told in the context of proceedings in application 2013/3233. No direct evidence of this has been produced. Even so, if he was given the information he alleges, the information was wrong and his understanding is not correct.
49. Mr Presneill asserts that ← CASA → has simply "*stone-walled*" in response to him seeking due process and a proper explanation of the decision of 8 May 2013. Precisely what he means by this is not entirely clear. If he is asserting an issue of unfairness in respect of the time limit on making an application, I would reject this. It was open at the appropriate time for Mr Presneill to apply for review of the 8 May decision, but he did not do so.
50. Mr Presneill's frustration and sense of grievance in his dealings with ← CASA → is quite apparent from the communications he has filed in these proceedings. But complaints of this kind are properly matters for others and they do not expose an issue of unfairness to Mr Presneill in respect of

the application he seeks approval to make outside the statutory time limit.

Frivolous or vexatious

51. Mr Presneill's strong belief that  CASA  did not deal properly with his case is largely a matter of law. I would not consider a case involving disputed facts to be vexatious unless there was some other ground for making that determination – allowance should be made for proper testing of disputed facts.
52. As a matter of law, Mr Presneill has not hitherto exercised his right to seek review of the 8 May 2013 decision. But he did successfully pursue his rights of review of the 13 June 2013 decision that imposed the same level of restriction, albeit some 5 weeks later. The proceedings that followed in the Tribunal resulted in a consent decision to vary the medical certificate such that all medical restrictions were lifted from 13 June 2013. The Tribunal's decision was the operative decision from that date, not the earlier  CASA  decision on 8 May 2013 that Mr Presneill now seeks to overturn.
53. I am mindful of the principles Murphy J discussed in *Mulholland v Australian Electoral Commission*^[3]. While *Mulholland* arose under different legislation and in different circumstances, and the 8 May 2013 decision has not yet been the subject of review, such that Mr Presneill's rights of review continue (subject to the time limit on pursuing those rights in the Tribunal), the general principle that it would be futile to allow review of a decision that is no longer operative stands against the grant of an extension of time in which to commence proceedings against that decision.
54. Having regard to [s 31](#) of the [Civil Aviation Act](#) and [Part 67](#) of the Regulations, with reference to regulation 201.004, if Mr Presneill's application is allowed to proceed I am not persuaded that the Tribunal could make any operative decision in place of the 8 May 2013 decision - the Tribunal's determination could have no legal or practical effect as it relates to a decision long past that is locked in time and that has been overtaken by subsequent decisions and events.
55. While Mr Presneill may obtain some vindication if additional time is granted and he succeeds in upsetting the 8 May 2013 decision on review, no sweet fruits of victory would flow from such an outcome – his victory would be entirely pyrrhic and without legal or practical effect.
56. If no legitimate purpose can be achieved, and there is no utility in the application if allowed, it would not be appropriate to grant Mr Presneill an extension of time to make an application for review of the 8 May 2013 decision.
57. Furthermore, if the matter is allowed to proceed, the Tribunal will be required to affirm, vary or set aside and make a fresh decision in place of the 8 May 2013 decision. Even though, hypothetically at least, the Tribunal may reach a different conclusion on the evidence placed before it than the original decision maker, it does not follow, and it should not be assumed, that the Tribunal will identify or comment upon flaws or failings of  CASA  in the administrative procedures and decision making processes it adopted in the lead up to the 8 May 2013 decision, or subsequently.   CASA 's procedures and processes are not the focus of the Tribunal's review which, as a matter of law, is squarely directed to making the correct or preferable decision on the relevant materials that are placed before it.
58. The Tribunal is not a court. In order to make the correct or preferable decision when exercising the jurisdiction conferred by [s 31](#) of the [Civil Aviation Act](#), it is not necessary for the Tribunal to closely examine or dissect the decision under review for error, or to generally inquire into ancillary processes  CASA  undertook, in order to identify deficiencies in and suggest changes to  CASA 's administrative procedures, decision-making processes, employee competencies and training, or the extent to which legislative and regulatory requirements have been adhered to.
59. Even though the objective of improving government administrative procedures and decision-making processes may be worthy, and on occasion the

Tribunal may identify failings, flaws or deficiencies in the procedures of government agencies about which it may be appropriate to make comment when determining an application for review, the primary purpose of the Tribunal in fulfilling its statutory functions is to hear and determine each application for review of a decision on the merits, and to make a fresh decision, standing in the shoes of the person who made the decision under review, and exercising the powers conferred upon that person.

60. It may be that Mr Presneill is correct in some of the assertions he makes about flaws and deficiencies in  CASA  processes leading to the 8 May 2013 decision. Those are matters for  CASA  to address and for Mr Presneill to pursue with appropriate authorities. Attempting to commence proceedings in the Tribunal for the collateral purpose of finding fault with  CASA  processes, when such proceedings would, otherwise, lack utility and a more legitimate purpose, may be considered frivolous or vexatious for the purposes of s 42B of the AAT Act.
61. It would be futile, and wrong, to grant an extension of time to make an application, if the particular characteristics of the application are likely to render it frivolous or vexatious, such that it may be dismissed under s 42B.
62. Presently, I am satisfied, and it is sufficient to conclude, that these considerations, and the lack of utility in proceeding in particular, weigh against the grant of an extension of time for Mr Presneill to apply for review of the 8 May 2013 decision.

Conclusion

63. Considering all of these matters separately and as a whole, and weighing the relevant and competing factors, I am satisfied that it is not reasonable in all of the circumstances to grant Mr Presneill additional time in which to lodge an application for review of  CASA 's 8 May 2013 decision.
64. The application for extension of time is refused.

I certify that the preceding 64 (sixty-four) paragraphs are a true copy of the reasons for the decision herein of Mr S. Webb, Member

.....[sgd].....

Associate

Dated 14 March 2014

Dates of hearing	7 and 21 February 2014
Date final submissions received	7 March 2014
Applicant	In person
Advocates for the Respondent	Joe Rule and Anthony Carter
Solicitors for the Respondent	Legal Services Division, Civil Aviation Safety Authority

[\[1\]](#) *Transurban City Link Ltd v Allan* [\[1999\] FCA 1723](#); [\(1999\) 95 FCR 553](#) at 567-569: paragraphs [59] to [69].

[\[2\]](#) Applicant's written submissions, 7 March 2014, page 2.

[\[3\]](#) [\[2014\] FCA 136](#) at [\[33\]](#) to [\[44\]](#).

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