

CITATION: *Spinosa v Victim Assist Queensland* [2018] QCATa 3

PARTIES: Donato Spinosa
(Applicant)
v
Victim Assist Queensland
(Respondent)

APPLICATION NUMBER: APL346-16

MATTER TYPE: General administrative review matters

HEARING DATE: 15 December 2017

HEARD AT: Brisbane

DECISION OF: **Senior Member Brown**
Member Burke

DELIVERED ON: 4 January 2018

DELIVERED AT: Brisbane

ORDERS MADE: **1. Appeal dismissed**

CATCHWORDS: APPEAL AND NEW TRIAL – RIGHT OF APPEAL – WHEN APPEAL LIES – Where appellant denied assistance under the *Victims of Crime Assistance Act* 2009 (Qld) – where original decision to refuse the application for financial assistance was confirmed – where appellant claims two grounds of appeal – where the appellant claims he was denied an oral hearing – where the appellant claims that the decision was made prematurely and without waiting for the Queensland Police Service to complete its investigations – where appeal only raises questions of law – where the appeal dismissed

Criminal Code Act 1899 (Qld), s 663D
Criminal Offence Victims Act 1995 (Qld) (repealed), s 46, s 46(2)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 3(b), s 20, s 142(1), s 142(3)(b), s 147
Victims of Crime Assistance Act 2009 (Qld),

s 3(2), s 3(1)(c), s 159(1)(a)(i), s 54(2), s 149,
s 160(1), s 160(2), s 160(3)(a)(i), s 160(6),
Chapter 6

Cachia v Grech [2009] NSWCA 232
*Chandra v Queensland Building and
Construction Commission* [2014] QCA 335
*Ericson v Queensland Building Services
Authority* [2013] QCA 391
Glenwood Properties Pty Ltd v Delmoss Pty Ltd
[1986] 2 Qd R 388
House v The King (1936) 55 CLR 499
Kioa v West (1985) 159 CLR 550
*Mclver Bulk Liquid Haulage Pty Ltd v Fruehauf
Australia Pty Ltd* [1989] 2 Qd R 577
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R
41
R (West) v Parol Board [2005] 1 WLR 350
Spinosa v Victims Assist Queensland [2016]
QCAT 345
*Thomas v Attorney-General and Minister for
Justice and Minister for Training and Skills*
[2017] QSC 308

APPEARANCES:

APPLICANT: The Applicant represented himself.

RESPONDENT: Mr B James, Victim Assist Queensland.

REASONS FOR DECISION

[1] Mr Spinosa says that in 1995 he was the victim of an attack by a co-worker in the workplace. Some 13 years later, in 2008, Mr Spinosa reported the incident to the Queensland Police Service. Mr Spinosa applied for financial assistance from Victim Assist in 2015. Mr Spinosa's application was refused. He sought a review of that decision in the Tribunal. The review application was heard on the papers on 26 September 2016. The decision of the Tribunal was to confirm the original decision by Victim Assist.¹ Mr Spinosa has appealed the Tribunal's decision.

The incident in 1995

[2] In January or February 1995 Mr Spinosa was working as a labourer at a site in Brisbane.² A co-worker, referred to only as 'Fernando', suddenly and without warning picked up a steel bar and chased Mr Spinosa through

¹ *Spinosa v Victims Assist Queensland* [2016] QCAT 345.
² Statement of Witness of Donato Spinosa, 06.02.08.

the workplace. Fernando threw the steel bar at Mr Spinosa striking him in the lower back.³ Mr Spinosa did not seek medical treatment following the incident nor did he report the incident in writing to his employer.⁴ Most relevantly to this appeal, Mr Spinosa did not, at the time, report the incident to the Queensland Police. As events transpired, Mr Spinosa did not report the incident to police until some thirteen years after the incident.

The original decision and the decision below

- [3] On 6 May 2015 Mr Spinosa applied for financial assistance under the *Victims of Crime Assistance Act 2009* (Qld) (VOCA Act). The application was refused. Upon application by Mr Spinosa for internal review of the decision, the original decision to refuse the application for financial assistance was confirmed.
- [4] Mr Spinosa's application for financial assistance was refused by Victim Assist on two bases. The first was that Mr Spinosa had not reported the incident to the police without delay.⁵ The second basis for refusing the application was that the alleged incident did not constitute an indictable offence.⁶ The result, according to the decision, was that s 663D of the repealed Criminal Code chapter was not engaged and Mr Spinosa had no entitlement to seek financial assistance under s 159 of the VOCA Act. Mr Spinosa then applied to the Tribunal to review the decision by Victim Assist.
- [5] At the risk of over simplifying Mr Spinosa's contentions in the proceeding below, the evidence and submissions upon which he relied were almost exclusively directed to what Mr Spinosa said was the failure by the Queensland Police Service to take appropriate action to locate Fernando. Indeed, this issue remains a principal focus of Mr Spinosa in the appeal.
- [6] Mr Spinosa did not, in the proceeding below, place before the Tribunal any evidence or submissions addressing why he delayed until 2008 in making the complaint to the police regarding the incident.
- [7] The review application by Mr Spinosa was heard and decided on the papers. The learned member found that there was a very considerable delay of some 13 years in Mr Spinosa reporting the incident to police.⁷ The learned member found that Mr Spinosa did not report the incident to police without delay.⁸
- [8] The learned member found that it appeared Mr Spinosa had reached a point in 2008 where he felt that Fernando should be brought to account. As we have observed, Mr Spinosa made no attempt to explain his delay in notifying the police about the incident.

³ Statement of Witness of Donato Spinosa, 06.02.08, [8].

⁴ Ibid [18].

⁵ Statement of reasons for decision, [8].

⁶ Ibid, [12].

⁷ Reasons [15].

⁸ Ibid.

- [9] The learned member considered the relevant statutory provisions relating to applications for financial assistance by victims of crime and found that as Mr Spinosa had not reported the incident to the police without delay, he had no right to apply for financial assistance. The learned member concluded that the decision of Victim Assist Queensland to refuse Mr Spinosa's application for financial assistance was correct.⁹

The grounds of appeal and the submissions by the parties

- [10] In his Application for leave to appeal and appeal Mr Spinosa raises two grounds of appeal:

- a) he was denied an oral hearing;
- b) the incident was not the subject of due enquiry and search by Queensland Police.¹⁰

- [11] The first ground of appeal raises a question of law. Mr Spinosa says that the application should not have been heard on the papers and that he should have been given the opportunity to have an oral hearing. Mr Spinosa does not point to any specific issue on which he should have been heard (and which was not otherwise addressed in his written submissions and evidence) nor does he articulate, had an oral hearing been conducted, how that issue was relevant to the decision by the learned member. Mr Spinosa makes a wide ranging array of assertions about the conduct of the Queensland Police in not adequately searching for the individual Mr Spinosa says assaulted him.

- [12] As to the second ground of appeal, the learned member did not address whether there had been due enquiry and search, finding that he was not required to address the issue as Mr Spinosa had not reported the incident to police without delay.¹¹ The second ground of appeal is, in actuality, a complaint about the actions of the Queensland Police Service.

- [13] In the course of the appeal hearing Mr Spinosa articulated a further ground of appeal: that the learned member made his decision prematurely and without waiting for the Queensland Police Service to complete its investigations into the incident. No objection was taken by the respondent at the hearing to the introduction of this further ground of appeal and we propose to deal with the additional ground in the disposition of this appeal.

- [14] The respondent says that Mr Spinosa has failed to establish any error on the part of the learned member and that the application for leave to appeal and appeal should be dismissed.

The legislative framework – appeals to the Appeal Tribunal

⁹ Reasons [18]-[19].

¹⁰ Applicant's submissions filed 9.12.16.

¹¹ Reasons [17].

- [15] An appeal on a question of law is as of right.¹² An appeal on a question of fact or mixed law and fact may only be made with the leave of the Appeal Tribunal.¹³
- [16] If an appeal is one against a decision on a question of fact only or a question of mixed law and fact, and subject to leave to appeal being granted, the appeal must be decided by way of rehearing with or without the hearing of additional evidence as decided by the Appeal Tribunal.¹⁴ In deciding the appeal, the Appeal Tribunal may confirm or amend the decision or set aside the decision and substitute its own decision.¹⁵
- [17] The relevant principles to be applied in determining whether to grant leave to appeal are well established: is there a reasonably arguable case of error in the primary decision;¹⁶ is there a reasonable prospect that the applicant will obtain substantive relief;¹⁷ is leave necessary to correct a substantial injustice to the applicant caused by some error;¹⁸ is there a question of general importance upon which further argument, and a decision of the appellate court or Tribunal, would be to the public advantage.¹⁹
- [18] If an appeal involves a question of law, unless the determination of the error of law decides the matter in its entirety in the appellant's favour, the proceeding must be sent back to the Tribunal for reconsideration.²⁰

The legislative framework – the *Victims of Crime Assistance Act 2009* (Qld)

- [19] The *Victims of Crime Assistance Act 2009* (Qld) (VOCA Act) commenced on 1 December 2009. Prior to the enactment of the VOCA Act, a victim of crime was entitled to, depending upon the relevant circumstances, compensation under either the *Criminal Offence Victims Act 1995* (Qld) (COV Act) or the *Criminal Code Act 1899* (Qld) (Code). The VOCA Act repealed the COV Act.²¹ The COV Act introduced a compensation scheme to replace the original compensation scheme under the Code which commenced in 1969. The COV Act commenced on 18 December 1995. By s 46 of the COV Act, Part 3 of the Act did not apply to injury suffered by anyone because of an act done before the commencement. Chapter 65A of the Code continued to apply to injury suffered by a person before the date of commencement of the COV Act.²² The COV Act provided that

¹² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("QCAT Act"), s 142(1).

¹³ *Ibid*, s 142(3)(b).

¹⁴ *Ibid*, s 147(1) and (2).

¹⁵ *Ibid*, s 147(3).

¹⁶ *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

¹⁷ *Cachia v Grech* [2009] NSWCA 232 at [13].

¹⁸ *Ibid*.

¹⁹ *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388 at 389; *Mclver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577 at 578, 580.

²⁰ *Ericson v Queensland Building Services Authority* [2013] QCA 391.

²¹ VOCA Act, s 149.

²² COV Act, s 46(2).

Chapter 65A of the Code continued to apply to offences which occurred prior to the introduction of COV Act.

[20] The VOCA Act contains transitional provisions that apply to acts of violence occurring before 1 December 2009.²³ Of specific relevance to Mr Spinosa's application is s 159(1)(a)(i) which provides that Chapter 6, Division 3, Subdivision 1 of the Act applies if a person could have applied, prior to the commencement of the VOCA Act, under s 663D of the Code for the payment of an amount for injury suffered. Any such application for financial assistance is made under the VOCA Act, not under s 663D of the Code.²⁴ An application for assistance, if the person is a Criminal Code applicant, where the relevant event happened 2 years or more before the commencement of the VOCA Act and where the applicant was an adult at the time of the event, must be made within 1 year after the commencement.²⁵ Mr Spinosa was a Criminal Code applicant.²⁶ The scheme manager may extend the time for making an application.²⁷

[21] Relevant to this appeal, the repealed s 663D of the Code provided:

663D Governor in Council may approve ex gratia payment in other cases.

(1) Any person who suffers injury –

....

(c) by reason of the commission of an indictable offence relating to the person of that person and –

- (i) the offence has been reported to a police officer without delay and after due inquiry and search the offender cannot be found; or
- (ii) the offender has not been dealt with summarily nor has an indictment been presented in relation to that offence; or
- (iii) the offender has not been convicted on an indictment presented in relation to that offence,

may make application in writing to the Minister for the approval of the Governor in Council for the payment ... of a sum ... by way of compensation for injury...

[22] Subject to relevant time limitations, Mr Spinosa was entitled to apply under the VOCA Act for financial assistance relating to the incident provided he could establish an entitlement to apply for the payment of an amount for injury suffered under s 663D of the Code.

²³ VOCA Act, Chapter 6.

²⁴ Ibid, s 160(1) and 160(2).

²⁵ Ibid, s 160(3)(a)(i).

²⁶ Ibid, s 160(6).

²⁷ Ibid, s 54(2).

Discussion

- [23] The learned member below was required to hear and decide Mr Spinosa's application by way of a fresh hearing on the merits and to produce the correct and preferable decision.²⁸
- [24] Mr Spinosa says that he was denied an oral hearing. At a directions hearing on 29 August 2016, the Tribunal directed that Mr Spinosa's Application to review a decision be determined on the papers. Mr Spinosa was given notice that the directions hearing would be held. Mr Spinosa advised the Tribunal in writing that he would be attending the directions hearing in person. Mr Spinosa did not in fact attend the directions hearing. The audio recording of the directions hearing reveals that, upon Mr Spinosa not appearing at the commencement of the directions hearing, the presiding Senior Member directed Mr Spinosa's name to be called and that after Mr Spinosa failed to appear, the directions hearing continued in his absence. The presiding Senior Member proceeded to direct that the Application to review a decision be determined on the papers on a date to be advised.
- [25] Subsequent to the directions hearing, on 30 August 2016, the Directions made on 29 August were forwarded to the parties by post and by email. Mr Spinosa conceded in the course of the appeal hearing that he had received the Tribunal directions of 29 August 2016 prior to the decision below being made. It is at this point that Mr Spinosa's submissions became somewhat confusing.
- [26] During the course of the appeal hearing attempts were made to have Mr Spinosa further clarify his grounds of appeal albeit without a great deal of success. In his written submissions, Mr Spinosa says:
- ... I would like an oral hearing. I was just a few minutes late when I attended the hearing and the security guard has asked me to wait in which I did for over two hours to find out later that they have left and I was told that they would adjourn the hearing for another time.²⁹
- [27] As best as we are able to discern from his oral submissions at the appeal hearing, Mr Spinosa says that he was advised by the Tribunal registry that the matter below had been listed for a decision on the papers on a particular date and that he attended at the Tribunal on that date, waiting for approximately two hours in order to be heard on the application. Mr Spinosa is unable to say who told him to attend at the Tribunal or when he was told to attend at the Tribunal. Mr Spinosa was unable, in the appeal hearing, to identify any written notice being given by the Tribunal registry of the determination of the application on the papers on a specific date and at a specific time.
- [28] The Tribunal was required to conduct the proceeding below in accordance with s 28 of the QCAT Act. By s 29(1)(a)(ii) of the QCAT Act, the Tribunal

²⁸ QCAT Act, s 20.

²⁹ Applicant submissions filed 09.12.16.

is required to take all reasonable steps to ensure each party to a proceeding understands the nature of the assertions made in the proceedings. By s 95(1) of the QCAT Act, the Tribunal is required to allow a party to a proceeding to call or give evidence, examine and cross examine witnesses and make submissions. By s 32(2) of the QCAT Act the Tribunal can, if appropriate, conduct all or part of the proceeding on the basis of documents without the parties or witnesses appearing at a hearing.

[29] In *Chandra v Queensland Building and Construction Commission*³⁰ the Court of Appeal considered the requirement for an oral hearing in the Tribunal. The Court referred to the decision in *R (West) v Parol Board*³¹ noting that the decision identified considerations relevant to determining whether or not a failure to accord an oral hearing amounts to a breach of the requirements of natural justice.³² Those considerations include: whether there are issues of fact; whether explanations are required of actions taken by a party; and whether the exercise of the discretion requires further probing.³³

[30] The Court of Appeal noted that, in *West*, Lord Slynn of Hadley had found that the content of the obligation to afford procedural fairness was to be determined by a consideration of the statutory requirements, the interests of the individual concerned, and the interests and purposes which the relevant statute seeks to advance or protect or which it permits to be taken into account as legitimate considerations.³⁴

[31] The statutory context in the present case is the VOCA Act and the QCAT Act. The purposes of the VOCA Act include providing a scheme to give financial assistance to certain victims of acts of violence.³⁵ The objectives of the scheme include helping victims of crime to recover by providing financial assistance and to give victims of crime amounts representing a symbolic expression by the State of the community's recognition of the injuries suffered by them.³⁶ The VOCA Act permits those persons who have suffered injury as a result of a criminal offence to apply for financial assistance notwithstanding that the offence occurred decades previously. In respect of applicants who would have been entitled to seek compensation under the repealed s 663D of the Code, the VOCA Act requires such persons to satisfy the requirements of the repealed s 663D in order to be entitled to apply for financial assistance under the VOCA Act.

[32] As we have observed, in its review jurisdiction the Tribunal must conduct a fresh hearing on the merits and produce the correct and preferable decision. In conducting the fresh hearing on the merits the Tribunal must

³⁰ [2014] QCA 335.

³¹ [2005] 1 WLR 350.

³² *Chandra v Queensland Building and Construction Commission* [2014] QCA 335, [64].

³³ *R (West) v Parol Board* [2005] 1 WLR 350, [50].

³⁴ *Chandra v Queensland Building and Construction Commission* [2014] QCA 335, [65].

³⁵ VOCA Act, s 3(1)(c).

³⁶ *Ibid*, s 3(2).

ensure that it discharges the obligations imposed by s 28 and s 29 of the QCAT Act. Whilst the Tribunal is required to deal with matters in a way that is accessible, fair, just, economical, informal and quick,³⁷ the requirements of a fair hearing are not to be sacrificed to achieve economy, informality and speed.³⁸

[33] Turning then to the present case, in our view it should have been readily apparent to Mr Spinosa that one of the matters of central importance in the review proceeding below was that he explain his delay in reporting the incident to police. In the Statement of Reasons provided by the respondent when the decision under review was made, there is extensive reference to the application of the repealed s 663D of the Code in the specific circumstances of Mr Spinosa's application for financial assistance.³⁹ In our view it should have been obvious to Mr Spinosa that, in applying for a review of the decision to refuse his application for financial assistance, he was required to address the specific requirements of the repealed s 663D. Mr Spinosa's failure to report the incident to police without delay was the first basis upon which his original application for financial assistance was refused.

[34] At no stage of the proceeding below did Mr Spinosa attempt to explain the delay in reporting the incident to the Queensland Police Service. Rather, Mr Spinosa focussed, and continues to focus, on what he perceives is the failure by the police, after he reported the incident in 2008, to properly investigate the matter and locate Fernando. The only reference to the issue of delay in reporting the incident contained in the material before the Tribunal below is an entry in the Queensland Police Service records:

The victim has been contacted regarding this matter and was asked why he had waited for 13 years to make this complaint, to which he replied justice has to be served.⁴⁰

[35] This is not a case where Mr Spinosa has proffered at least some explanation for the delay in reporting the incident to police and in relation to which an oral hearing would have given the Tribunal an opportunity to hear further from Mr Spinosa to clarify that explanation. Nor is this a case where there are disputed issues of fact. It is not in dispute that the alleged assault occurred in 1995 and that Mr Spinosa did not report the incident to police until 2008.

[36] Mr Spinosa was given the opportunity to file all material upon which he sought to rely in the review application. He was given the opportunity to appear at the Tribunal directions hearing on 29 August 2016. Had he appeared, he could have requested an oral hearing of his review application. Whether such an order was made would have been within the discretion of the presiding Senior Member. Mr Spinosa concedes that he

³⁷ QCAT Act, s 3(b).

³⁸ *Chandra v Queensland Building and Construction Commission* [2014] QCA 335, [69].

³⁹ Statement of Reasons at [7] and [8].

⁴⁰ Documents filed by the respondent in accordance with s 21(2) of the QCAT Act, page 31.

received the directions made on 29 August 2016 listing the matter for a hearing on the papers. Mr Spinosa had the opportunity, after receiving the directions of 29 August, to apply for an oral hearing and he did not do so. It appears that it was only after he received the decision under appeal that the concern was raised by Mr Spinosa that he had not been afforded an oral hearing.

- [37] During the course of the appeal hearing, Mr Spinosa was given the opportunity to make submissions addressing whether the learned member erred in finding that Mr Spinosa had delayed in reporting the 1995 incident to police. Mr Spinosa declined to make any submissions. Instead, he remained focussed upon the perceived failure by the Queensland Police to take adequate steps locate Fernando.
- [38] The notion of procedural fairness is one that conveys, as the High Court has observed, a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.⁴¹ In the present case, and as the learned member correctly found, in circumstances where an applicant for financial assistance under the VOCA Act is a criminal code applicant, and where an offender cannot be located after due enquiry and search, the applicant's entitlement to financial assistance is lost where the offence is not reported without delay. Mr Spinosa was such an applicant.
- [39] In our view Mr Spinosa was given every opportunity to place before the Tribunal below all evidence and submissions upon which he sought to rely in the review application. That he did not, at any stage, including in the appeal hearing, address the delay of 13 years in reporting the incident to the police, leads us to conclude that not only has Mr Spinosa never explained the delay, he has never intended to explain his delay in reporting the incident to police. There was no failure to afford Mr Spinosa procedural fairness in not according him an oral hearing.
- [40] Turning to Mr Spinosa's further ground of appeal as articulated at the appeal hearing, that the learned member decided the matter prematurely and without the relevant evidence, what Mr Spinosa appears to be saying is that the learned member's discretion miscarried.
- [41] To establish that the discretion exercised by the learned member miscarried Mr Spinosa must show that the learned member acted upon a wrong principle or gave weight to irrelevant matters or failed to give weight or sufficient weight to a relevant consideration or made a mistake as to the facts or that the decision by the learned member is so unreasonable or unjust that, in this appeal, it can be inferred that there has been a failure to properly exercise the discretion.⁴²
- [42] As we have observed, the learned member was required to determine whether Mr Spinosa was a person who could have applied for the

⁴¹ *Kioa v West* (1985) 159 CLR 550.

⁴² *House v The King* (1936) 55 CLR 499.

payment of an amount, for injury suffered, under s 663D of the repealed Code chapter. That required, as the learned member noted, a consideration of whether the offence had been reported to a police officer without delay. The learned member concluded that the requirement to report the offence without delay had not been satisfied. In our view that conclusion was not illogical or irrational or attended by legal unreasonableness. We agree that a delay of 13 years in reporting the incident was, as the learned member observed, a very considerable one. There is an evident, transparent and intelligible justification for the learned member's decision, which falls within the area of decisional freedom of the decision-maker.⁴³

- [43] Mr Spinosa has failed to establish any error by the Tribunal below. As the grounds of appeal raise only questions of law, the appropriate order is that the appeal be dismissed.

⁴³ *Thomas v Attorney-General and Minister for Justice and Minister for Training and Skills* [2017] QSC 308.