

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

[2022] NZACC 115 ACR 282/21

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	VANCE FULTON Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Judgment on the papers.

Submissions: K Koloni for the Appellant
 T Gee for the Respondent

Date of Judgment: 15 June 2022

**JUDGMENT OF JUDGE P R SPILLER
[Late filing of an appeal to the District Court –
s 151, Accident Compensation Act 2001]**

Introduction

[1] The appeal in the above matter was lodged by Mr Fulton on 13 December 2021. The appeal is from the decision of a Reviewer dated 18 October 2021, received on 19 October 2021. The Reviewer dismissed an application for review of the Corporation’s decision of 8 March 2021 declining cover for umbilical hernia.

[2] On 13 December 2021, Judge McGuire issued an Initial Minute which directed that Mr Fulton formally apply for leave to file the appeal out of time and set out the reasons why the appeal was filed late. Judge McGuire directed that the application needed to be filed at the same time as Mr Fulton’s submissions were filed.

[3] On 22 April 2022, Ms Koloni, advocate for Mr Fulton, filed submissions. However, despite Judge McGuire's direction, she did not make an application for leave to file the appeal out of time.

[4] On 9 May 2022, the Registry advised the parties that the Court had not lost sight of the fact that the appeal had been lodged late and that leave of the Court was required. There was no response from Ms Koloni to the Court's notification.

[5] On 27 May 2022, Mr Gee, for the Corporation, advised that it would not object to a short extension of time for Mr Fulton to apply for leave to appeal out of time, subject to conditions or other directions set by the Court.

[6] On 27 May 2022, Ms Koloni emailed, apologising for not filing a submission for leave to appeal out of time.

[7] On 2 June 2022, Ms Koloni, in her submission, stated that the review decision was received on 18 October at 5.44 pm. She submitted that the appeal was filed late because she was unaware that statutory holidays were included in the 28-day calculation, and the 28-day period included a statutory holiday. Ms Koloni also submitted that time should begin the day after day after the email receipt of delivery of the review decision, in accordance with s307(6) of the Act. Ms Koloni noted that the lateness was due to her misunderstanding and shortcomings, and she submitted that it would be unjust and prejudicial to Mr Fulton if his appeal did not proceed due to her oversight.

[8] On 10 June 2022, Mr Gee for the Corporation noted that the review decision was sent to Ms Koloni and Mr Fulton on 19 October 2021. Mr Gee observed that Mr Fulton's appeal had been filed out of time, and there were also failures to provide an application for leave to appeal in breach of the Court's directions and to respond to the Court's reminder of the need to file an application. Mr Gee further noted that Ms Koloni's submission explained only one day's delay, and, if leave to appeal out of time were not granted, Mr Fulton would appear to have a claim against Ms Koloni, which would mitigate any prejudice to him. However, Mr Gee noted

that the delay in filing the appeal was short and it did not cause any prejudice to the Corporation, and so it would abide the Court's decision.

Relevant law

[9] Section 151 of the Accident Compensation Act 2001 (the Act) provides:

- (1) An appellant brings an appeal by sending a notice of appeal to, or filing a notice of appeal in, a specified registry.
- ...
- (3) The notice must be received by the specified registry—
 - (a) within 28 days after the date on which the reviewer gives a copy of the review decision to the appellant; or
 - (b) ...
 - (c) within any longer time allowed by the District Court.

[10] In *Almond v Read*,¹ Arnold J (for the Supreme Court) outlined the following principles to guide the exercise of the discretion to grant or deny an extension of time to lodge an appeal:

[37] Accordingly, where a litigant takes steps to exercise the right of appeal within the required timeframe (including advising the other party), but misses the specified time limit by a day or so as a result of an error or miscalculation (especially by a legal adviser) and applies for an extension of time promptly on learning of the error, we do not think it is appropriate to characterise the giving of an extension of time as the granting of an indulgence which necessarily entitles the court to look closely at the merits of the proposed appeal. In reality, there has simply been a minor slip-up in the exercise of a right. An application for an extension of time in such a case should generally be dealt with on that basis, with the result that an extension of time should generally be granted, desirably without opposition from the respondent.

[38] The ultimate question when considering the exercise of the discretion to extend time under r 29A is what the interests of justice require. That necessitates an assessment of the particular circumstances of the case. Factors which are likely to require consideration include:

- (a) *The length of the delay.* Clearly, the time period between the expiry of the appeal date and the filing of the application to extend time is relevant. But in a case where there has been a slip-up and the appeal date has been inadvertently missed, how quickly the applicant sought to rectify the mistake after learning of it will also be relevant. Obviously, the longer the delay, the more the applicant will be seeking an “indulgence” from the court and the stronger the case for an extension will need to be.

¹ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801, (2017) 23 PRNZ 533.

- (b) *The reasons for the delay.* It will be particularly relevant to know whether the delay resulted from a deliberate decision not to proceed followed by a change of mind, from indecision, or from error or inadvertence. If from a change of mind or from indecision, there is less justification for an extension than where the delay results from error or inadvertence, particularly if understandable.
- (c) *The conduct of the parties, particularly of the applicant.* For example, a history of non-cooperation and/or delay by an applicant may be relevant.
- (d) *Any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome.* Again, the greater the prejudice, the stronger the case will have to be to justify the grant of an extension of time. Where there is significant delay coupled with significant prejudice, then it may well be appropriate to refuse leave even though the appeal appears to be strongly arguable.
- (e) *The significance of the issues raised by the proposed appeal, both to the parties and more generally.* If there is a public interest in the issues, the case for an extension is likely to be stronger than if there is no such interest.

Discussion

[11] In terms of section 151(3)(a) of the Act, Mr Fulton was required to file a Notice of Appeal against the Reviewer's decision within 28 days after the date on which the Reviewer provided a copy of the review decision to him. The Reviewer's decision was received on 19 October 2021, which left a date of 16 November 2021 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was formally filed on 13 December 2021. This Court is now being asked to exercise its discretion to allow a longer time for filing the Notice of Appeal (in terms of section 151(3)(c)). In deciding whether to exercise its discretion, this Court will follow the guidelines provided by the Supreme Court in *Almond v Read*.²

(a) *The length of the delay*

[12] The Supreme Court noted that the longer the delay, the more the applicant will be seeking an indulgence from the Court and the stronger the case for an extension would need to be; and that, in a case where there had been a slip-up and the appeal date had been inadvertently missed, how quickly the applicant sought to rectify the mistake after learning of it would also be relevant.

² Above, note 1.

[13] This Court notes that the delay in this case before the formal filing of the appeal is 27 days. The Court notes that Ms Koloni filed a Notice of Appeal with the Registry on 19 November 2021 (three days out of time), but that this did not have a completed Authority to Act in respect of this appeal. The Authority to Act was filed only on 13 December 2021, at which point the appeal was accepted and registered by the Registry.

(b) *The reasons for the delay*

[14] The Supreme Court noted that, if the delay arose from a change of mind or from indecision, there was less justification for an extension than where the delay resulted from error or inadvertence, particularly if understandable.

[15] Ms Koloni stated that the reason for the delay was that she was unaware that statutory holidays were included in the 28-day calculation, and the 28-day period included a statutory holiday. As noted by Mr Gee, this explanation does not account for the two further days of delay before the attempt to lodge a Notice of Appeal. This Court notes that there was then a further delay of 24 days before the required Authority to Act was filed and the appeal could then be registered.

[16] This Court also notes that Ms Koloni incorrectly submitted that time for lodging the appeal should be calculated from 20 October, being the day after the email receipt of delivery of the review decision, in accordance with section 307(6) of the Act. This section provides that a document sent by electronic means is presumed, *in the absence of proof to the contrary* (my italics), to be delivered on the day after the day on which it is sent. In this case Ms Koloni, in her submission, acknowledged that the review decision was received on 18 October at 5.44 pm. Mr Gee stated that the review decision was emailed to Ms Koloni and Mr Fulton on 19 October 2021. This Court therefore observes that there is proof that the review decision, sent by electronic means, was delivered no later than 19 October 2021, and not the day after.

[17] This Court finds that the delay arose out of the error and inadvertence of Mr Fulton's advocate, Ms Koloni.

(c) *The conduct of the parties*

[18] The Supreme Court observed that a history of non-cooperation and/or delay by an applicant might be relevant.

[19] This Court notes that Mr Fulton's appeal was filed out of time, and that there were also failures by Ms Koloni to provide an application for leave to appeal in breach of the Court's directions and to respond to the Court's reminder of the need to file an application. As this Court has previously expressed,³ it is increasingly concerned as to the repeated late filings of appeals by Ms Koloni and her non-compliance with dates set by Court Minutes and with Registry reminders, resulting in delays which are not in her clients' interests. However, the Court is not aware of any history of non-cooperation and/or delay by Mr Fulton himself.

(d) *Prejudice or hardship to the respondent or to others with a legitimate interest in the outcome*

[20] The Supreme Court noted that, where there is significant delay coupled with significant prejudice, then it might well be appropriate to refuse leave even though the appeal appeared to be strongly arguable.

[21] This Court notes that the delay in this case is not overly significant. The Corporation has confirmed that the delay did not cause any prejudice to the Corporation. The Court is not aware of any prejudice or hardship to others with a legitimate interest in the outcome of the present appeal.

(e) *The significance of the issues raised by the proposed appeal, both to the parties and more generally*

[22] The Supreme Court observed that, if there is a public interest in the issues, the case for an extension is likely to be stronger than if there is no such interest.

[23] This Court accepts that the proposed appeal is significant to Mr Fulton. The Court is not in a position to assess the significance of the issues raised by the proposed appeal more generally.

The Decision

[24] In light of the above considerations, this Court finds that Mr Fulton has established that the interests of justice require the exercise of the Court's discretion to sustain his application for leave to file his appeal out of time, which is accordingly granted.

[25] This Court does, however, reiterate its concern about the repeated late filings of appeals by Ms Koloni and her non-compliance with Court Minutes and directions. Non-compliance by advocates with Court deadlines, in the processing of appeals, places the interests of appellants at risk. Future deadlines provided in Mr Fulton's appeal will need to be complied with promptly, without further delays. In the interests of protecting Mr Fulton's rights, a copy of this judgment will also be sent to Mr Fulton himself.

[26] There are no issues as to costs.

A handwritten signature in dark ink, appearing to read 'P R Spiller', is written over a faint, circular official stamp.

P R Spiller
District Court Judge

³ See *Stewart v Accident Compensation Corporation* [2022] NZACC 101.