

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 118 ACR 248/21

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

Judgment on the papers.

Submissions: K Koloni for the Appellant
 M Clarke-Parker for the Respondent

Date of Judgment: 27 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 registered as lodged by Ms Cullen on 2 November 2021. The appeal was filed in respect of a decision of a Reviewer dated 28 September 2021. The Reviewer dismissed an application for review of the Corporation's decision of 15 June 2021 relating to Ms Cullen's weekly compensation.

[2] On 27 April 2022, Judge Spiller issued a Minute which directed that Ms Cullen, by 11 May 2022, formally apply for leave to file the appeal out of time and set out the reasons why the appeal was filed late.

[3] On 12 May 2022, Ms Koloni, for Ms Cullen, submitted that the appeal was filed late because she (Ms Koloni) had allowed extra days in her calculations due to the Labour Day weekend, and had since learned that public holidays were counted if they fell within the 28-day timeframe.

[4] On 25 May 2022, Mr M Clarke-Parker for the Corporation submitted that, given that the appeal was filed only a few days late, the Corporation did not oppose the application as it was not prejudicial to the Corporation's position.

[5] On 17 June 2022, the Court issued a judgment in this matter in light of the above submissions. Ms Koloni then responded, submitting that: (1) the decision of the Reviewer (of 28 September 2021) was provided to Ms Cullen only on 1 October 2021; (2) in accordance with section 307(6) of the Act, the date of receipt is determined to be the day after (in this case, 2 October 2021); and (3) the appeal was filed on 29 October 2021. In light of these submissions, the judgment was recalled and is now reissued.

Relevant law

[6] 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.

[7] 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

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

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.
- (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

[8] In terms of section 151(3)(a) of the Act, Ms Cullen 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 her. The Reviewer’s

decision was dated 28 September 2021. The Court has established, in light of Ms Koloni's further submissions, that the Reviewer's decision was sent by email but this bounced back, and was then resent by further email which was received on 1 October 2021. This left a date of 29 October 2021 for the filing of the Notice of Appeal.

[9] A Notice of Appeal in the name of Ms Cullen was signed, not by her, but by Ms Koloni, and was filed on 29 October 2021. On receipt, the Registry required the lodging of an Authority to Act signed by Ms Cullen in favour of Ms Koloni. This Authority to Act was filed on 2 November 2021, and the appeal was duly registered on that date. In light of the fact that the Notice of Appeal was not signed by Ms Cullen, the appellant, this Court finds (for reasons elaborated below) that the filing of the appeal was completed only on receipt of the Authority to Act, which was 2 November 2021.

[10] 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

[11] 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.

[12] This Court notes that the delay in this case is four days, which is not a significant delay.

² Above, note 1.

(b) The reasons for the delay

[13] 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.

[14] Ms Koloni, for Ms Cullen, submitted in the application for leave to appeal that the appeal was filed late because she (Ms Koloni) allowed extra days in her calculations due to the Labour Day weekend, and has since learned that public holidays are counted if they fall in the 28-day timeframe.

[15] Ms Koloni, in her email after the release of the original judgment of this Court, submitted that that: (1) the decision of the Reviewer (of 28 September 2021) was provided to Ms Cullen only on 1 October 2021; (2) in accordance with section 307(6) of the Act, the date of receipt is determined to be the day after (in this case, 2 October 2021); and (3) the appeal was filed on 29 October 2021.

[16] This Court responds to Ms Koloni's submissions as follows.

[17] First, section 151(3)(a) of the Act requires that the Notice of Appeal must be received by the specified registry within 28 days after the date on which the Reviewer gives a copy of the review decision to the appellant. The term "days" is not qualified so as to exclude non-working days, and so weekends and holidays are included in the period required for lodging an appeal.

[18] Second, while it could be said that the first (returned) email of 28 September 2021 sending the Reviewer's decision could constitute "giv[ing] a copy of the review decision to the appellant", in fairness to Ms Cullen, this Court accepts that she did not actually receive the decision on that date. The Court accepts, as submitted by Ms Koloni, that the decision was provided and received only on 1 October 2021, with the resent email.

[19] Third, the submission that, in terms of section 307(6) of the Act, time for lodging Ms Cullen's appeal should be calculated from 2 October 2021, being the day

after the email receipt of delivery of the review decision, is incorrect, for the following reasons:

- (a) Section 307(1) provides that this section applies when the Act requires a document to be given to a person, or requires a person to be notified of any information. The Registry of the District Court is not a person. In *Guy*,³ Judge Beattie stated that the whole tenor of section 307 was such that it placed an onus on the *Corporation* to prove the sufficiency of the giving of notice or advice of any matter to an *appellant*.
- (b) Neither section 151(3)(a) (specifying the 28-day period within which a Notice of Appeal must be lodged) nor section 307(6) are cross-referenced so as to make the former provision subject to the latter.
- (c) Section 307(6) of the Act 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, stated that the review decision was received on 1 October 2021. This Court therefore observes that there is proof that the review decision was delivered no later than 1 October 2021, and therefore the receipt of the decision is not deemed to be the day after.

[20] Fourth, as noted above, the Notice of Appeal filed on 29 October 2021 by Ms Koloni was signed by her, and not by Ms Cullen. The Registry then requested that Ms Koloni and Ms Cullen fill out an Authority to Act form, and this was returned on 2 November 2021 when the appeal was then registered as being received. Section 151 of the Act requires that “an appellant” is required to send a notice of appeal to a specified registry. Paragraph 3.1 of the *Guidelines to Practice and Procedure for Accident Compensation Appeals in the District Court* provides that it is only once an Authority to Act has been filed can a representative act on behalf of an appellant in all matters relating to the case. The action of the Registry in

³ *Guy v Accident Compensation Corporation* [2007] NZACC 4, at [22].

registering the appeal on 2 November 2021, when the Authority to Act was filed, was therefore correct.

[21] This Court finds that the delay of four days in filing Ms Cullen's appeal was due to the error/inadvertence of her advocate. However, it appears that Ms Cullen herself was not responsible for the delay.

(c) The conduct of the parties

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

[23] This Court notes that Ms Cullen's advocate filed this appeal late; and that the advocate also filed the application for leave to appeal beyond the deadline set by the Court. However, the Court is not aware of any history of non-cooperation and/or delay by Ms Cullen herself.

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

[24] 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.

[25] This Court notes that the delay in this case is four days, which is not a significant delay. Counsel for the Corporation has confirmed that it did not oppose the application as the delay was not prejudicial to the Corporation's position. 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

[26] 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.

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

The Decision

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

[29] This Court notes, however, that an advocate's failure to comply with required deadlines places her client's interests at risk. Future deadlines which are set for Ms Cullen need to be complied with promptly. In the interests of protecting Ms Cullen's rights, a copy of this judgment will also be sent to Ms Cullen herself.

[30] 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