

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 131 ACR 009/22

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

Judgment: On the papers.

Submissions: The Appellant is self-represented
 B Johns and R Mould for the Respondent

Date of Judgment: 8 July 2022

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

Introduction

[1] By decision dated 26 May 2021, the Corporation declined to reassess Ms Wilson’s whole person impairment, since it had last been assessed on 28 October 2020. Ms Wilson was advised that she would be able to reapply when the 12-month period had passed. Ms Wilson filed a review application against this decision.

[2] On 15 November 2021, at review, the Reviewer recorded that the parties agreed to dismiss the review by consent and that Ms Wilson qualified to have her impairment assessed again. The parties also agreed that all other matters related to

Ms Wilson's entitlements, and how she had been treated by the Corporation, would be referred for conciliation.

[3] On 12 January 2022, Ms Wilson lodged an appeal against the decision of the Reviewer dated 15 November 2021.

[4] On 13 June 2022, Ms Johns for the Corporation lodged a memorandum advising that Ms Wilson's whole person impairment assessment was underway, that Ms Wilson had provided the necessary forms, and that the Corporation would continue working with Ms Wilson on all matters. Ms John submitted that the subject of the Corporation's decision of 26 May 2021 was moot and therefore the Court did not have jurisdiction.

[5] On 14 June 2022, Ms Wilson filed a memorandum raising matters including those that related to employment issues and a criminal proceeding which did not form the basis of the Corporation's decision of 26 May 2021. The memorandum did not refer to the whole person impairment reassessment then underway, as agreed by the parties at review.

[6] On 16 June 2022, a telephone conference was convened. Ms Wilson was given notice of the conference but did not attend. Following the conference, the Registry (having contacted Ms Wilson) advised that she sent her apologies as she had another commitment. Judge Henare issued an Initial Minute which directed that Ms Wilson formally apply for leave to file the appeal out of time and set out the reasons why the appeal was filed late.

[7] On 24 June 2022, Ms Wilson submitted that the appeal was filed late because:

I confirm these matters are unresolved and the ACC conciliation meetings caused the late filing of initial application was [sic] on 11 Jan 2022.

Accordingly, the applicant seeks de-novo challenge of the whole of those determinations which these entire matters relate [sic].

[8] Ms Wilson, in her submission, also referred to employment relations matters, her seeking compensation, and issues relating to harassment, bullying and termination of her work.

[9] On 4 July 2022, Ms Johns for the Corporation submitted that the application should be declined because Ms Wilson’s reason for filing the appeal late had no bearing on the appeal itself. The Corporation also submitted that there was no merit in the proposed appeal, which was beyond the jurisdiction of the Court.

Relevant law

[10] 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.

[11] In *Avery v No 2 Public Service Appeal Board*,¹ Richmond J, for the Court of Appeal, stated:

When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of an indulgence by the Court. The onus rests on him to satisfy that in all the circumstances the justice of the case requires that he be given the opportunity to attack the judgment from which he wishes to appeal.

[12] In *Almond v Read*,² 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

¹ *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86, 91.

² *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801, (2017) 23 PRNZ 533.

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

[13] In terms of section 151(3)(a) of the Act, Ms Wilson 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 15 November 2021, which left a date of 13 December 2021 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 12 January 2022. 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*.³

(a) The length of the delay

[14] 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.

[15] This Court notes that the delay in this case is 30 days. There is no evidence as to how quickly Ms Wilson sought to rectify her mistake in filing her appeal late, after learning of the mistake.

(b) The reasons for the delay

[16] 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.

[17] Ms Wilson stated that the delay in filing her appeal was caused by “the ACC conciliation meetings” between her and the Corporation. Ms Wilson provided no explanation as to how or why this process caused the late filing of her appeal.

[18] This Court is not satisfied that Ms Wilson’s delay arose out of understandable error or inadvertence. Ms Wilson has not established that the conciliation process with the Corporation had any bearing on her late filing of the appeal.

(c) The conduct of the parties

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

³ Above, note 2.

[20] This Court observes that Ms Wilson was given notice by the Registry of the judicial telephone conference on 16 June 2022, but she did not attend or give notice that she could not attend. Following the conference, the Registry, having contacted Ms Wilson, advised that she sent her apologies as she had another commitment.

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

[21] 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.

[22] This Court notes that the delay in this case is 30 days. The Corporation has opposed the grant of leave to file the appeal late, on the basis that Ms Wilson seeks to litigate matters outside the Court's jurisdiction and/or which have now been resolved. The Corporation submits that, as a result, defending the proposed appeal will cause significant prejudice and financial costs to the Corporation. The Corporation notes that Ms Wilson has included her former employer in these proceedings, who will also incur prejudice and hardship.

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

[23] 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.

[24] It is not clear to this Court why Ms Wilson's proposed appeal is significant to her. The Corporation's decision of 26 May 2021 declined to reassess Ms Wilson's whole person impairment at that stage. This decision was the subject of the ensuing review proceeding. The decision was clearly superseded by the agreement recorded by the Reviewer on 15 November 2021. The Reviewer noted that the parties (Ms Wilson and the Corporation) agreed to dismiss the review by consent and that Ms Wilson qualified to have her impairment assessed again. On 13 June 2022, the Corporation confirmed that Ms Wilson's whole person impairment assessment was underway, that Ms Wilson had provided the necessary forms, and that the

Corporation would continue working with Ms Wilson on all matters. The subject-matter of Ms Wilson's proposed appeal is therefore moot, and this Court does not have jurisdiction in this appeal over other matters.


[25] The Court can discern no public interest in the issues in this appeal.

The Decision

[26] In light of the above considerations, this Court finds that Ms Wilson has not 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. Ms Wilson has not discharged the onus resting on her to satisfy the Court that the justice of her case requires that she be given the opportunity to attack the defunct Corporation's decision and the ensuing Reviewer's decision issued with her consent.

[27] The appeal is accordingly dismissed.

[28] 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