

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 146 ACR 104/22

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

Judgment on the papers.

Submissions: The Appellant is self-represented
J Castle for the Respondent

Date of Judgment: 26 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] This appeal was lodged by the appellant on 21 June 2022. The appeal is from the decision of a Reviewer dated 29 October 2019. The Reviewer dismissed an application for review of the Corporation’s decision of 5 June 2019 declining cover for tuberculosis as a work-related gradual process injury. The Reviewer noted the absence of evidence of a physical injury for which cover could be granted.

[2] On 21 June 2022, Judge Henare issued an Initial Minute which directed that the appellant, by 12 July 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 18 June 2022, the appellant had submitted that the appeal was filed late because she had had serious physical and mental injuries known to the Corporation; and the Corporation. never informed her at any time that she should appeal the decision. In support, the appellant provided medical and other reports covering the years leading up to September 2019.

[4] On 5 July 2022, Mr Castle for the Corporation submitted that, considering the reasons for the delay outlined in the appellant's notice of appeal and the unlikely prejudice to the Corporation caused by the delay, the Corporation did not oppose the late filing of the appeal.

[5] On 6 July 2022, the Court raised the following issues concerning the appellant's application for leave to appeal out of time:

- (a) The considerable delay in lodging the appeal: out of time by 2 years and 7 months;
- (b) The absence of any explanation as to why the appellant's claimed physical and mental injuries prevented her from lodging an appeal in time;
- (c) The absence of any supportive documentary evidence covering the period from the Reviewer's decision of 29 October 2019 to the lodging of the appeal on 21 June 2022.

[6] The appellant was directed to provide further submissions and evidence, and the Corporation was directed to provide a response.

[7] On 11-14 July 2022, the appellant filed further medical records, including:

- (a) A report by Ms Bethany Price, Psychologist, dated 16 December 2019, following nine psychological sessions (in July-December 2019) with the appellant for depression and anxiety. Ms Price noted that psychometric and narrative indicators suggested that the appellant continued to experience symptomology akin to anxiety and depression

and required further psychological and/or psychiatric treatment in the future.

- (b) A report by Mr Thuya Sithu, Psychologist, dated 9 November 2021, following four counselling/therapeutic sessions with the appellant. The report noted that the appellant suffered PTSD, depression, and physical pain such as neck strain/sprain and tension headaches. She reported that she had had to leave her work and home in New Zealand under duress due to these events. As a result, she reported that she suffered homelessness, unemployment, financial losses, social isolation, relationship losses and specialisation obstructions, which affected her significantly.

[8] On 20 July 2022, Mr Castle filed a submission confirming that, on 4 May 2022, the Corporation granted cover for PTSD and major depressive disorder for a sensitive claim with a date of injury as 8 March 2014. Mr Castle advised that the delay in filing the appeal had not caused any real prejudice to the Corporation's position or affected its ability to obtain evidence. Mr Castle accepted that the appellant's mental injuries appeared to have had a profound impact on her life, and the Corporation, accordingly, did not oppose the late lodgement in the particular circumstances of the case.

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.
- (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

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

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, the appellant 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 29 October 2019, which left a date of 26 November 2019 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 21 June 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*.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.

[13] This Court notes that the delay in this case is two years and seven months, which is a significant period of time. There is no evidence of how quickly the appellant sought to rectify the mistake of not filing on time, after learning of the mistake.

(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.

² Above, note 1.

[15] The appellant stated that the reasons for the delay were that she had had serious physical and mental injuries known to the Corporation; and the Corporation never informed her at any time that she should appeal the decision.

[16] This Court notes that the review decision that the appellant received clearly outlined her rights of appeal and the time period required to lodge the appeal. There was no onus on the Corporation to inform the appellant that she should appeal the decision of the Reviewer.

[17] However, the appellant has now provided reports from two psychologists who conducted sessions with her during the period of the delay in lodging the appeal. The reports indicate that she suffered from symptomology akin to anxiety and depression, PTSD, and physical pain such as neck strain/sprain and tension headaches, and that these conditions had a significant impact on her life (outlined in paragraph [7] above).

[18] This Court is satisfied that the appellant's delay arose out of her significant mental health problems, with resultant negative consequences, causing understandable error or inadvertence.

(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.

[20] This Court notes that the appellant's delay in lodging her appeal is significant. However, the Court is not aware of any history of non-cooperation or other delay by her.

(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 significant. However, the Corporation has advised that:

- (1) the delay in filing the appeal had not caused any real prejudice to the Corporation's position or affected its ability to obtain evidence; and
- (2) The appellant's mental injuries appeared to have a profound impact on her life, and the Corporation, accordingly, did not oppose the late lodgement in the particular circumstances of the case. 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

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

The Decision

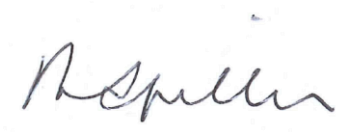
[25] In the particular circumstances of this case, this Court finds that the appellant has established that the interests of justice require the exercise of the Court's discretion to sustain her application for leave to file her appeal out of time, which is accordingly granted.

[26] However, the Court notes with concern the significant delay in filing this appeal. Section 161(3) of the Accident Compensation Act 2001 provides that, if an appeal is not prosecuted with due diligence, the Court may dismiss the appeal on the application of any party. In terms of the Guidelines to Practice and Procedure for Accident Compensation Appeals in the District Court, 5.3(j), a Judge may direct that an appeal be dismissed if, by a certain date, a Court direction is not complied with by the appellant. Thus, any future failure by the appellant to prosecute her appeal with

due diligence, and to comply with Court directions, will place her appeal at considerable risk.

[27] The appellant and the Corporation are directed now to take steps to advance the progress of this appeal as soon as possible.

[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, rectangular stamp.

P R Spiller
District Court Judge