

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 151 ACR 11/19

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

Judgment on the papers.

Submissions: M Darke for the Appellant
 F Becroft for the Respondent

Date of Judgment: 3 August 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 Ms Hopkins on 7 January 2019. The appeal is from the decision of a Reviewer dated 18 September 2018. The Reviewer dismissed an application for a review of WorkAon’s decision, dated 7 March 2018, suspending Ms Hopkins’ entitlements.

[2] In the Notice of Appeal, Mr Darke for Ms Hopkins stated:

This decision was issued on 18 September. Instructions were received in mid October and it was listed to prepare the appeal for filing. Unfortunately I was away on sick leave and on my return was unaware of this having been received.

It was not until a review of all cases in mid December that this was discovered and I then set about obtaining the authority and preparing the notice.

Given the usual allowance under the rules for the Christmas New Year period, the appeal is effectively only just over 2 months late.

Accordingly leave to extend time is sought on the grounds:

- (1) Delay was caused by a combination of illness and the volume of work.
- (2) The case is meritorious involving cessation of weekly compensation.
- (3) All the documentation is still available.
- (4) There is no prejudice to the respondent.

[3] On 23 January 2019, Judge Walker issued an Initial Minute which outlined the process to be followed for the appeal. However, no mention was made of the lateness of the filing of the appeal in the Minute. Likewise, in ensuing communications by the Court and the Registry with counsel, the issue of lateness was not addressed. Also, Counsel for the Corporation did not raise the issue. The matter proceeded through to the filing of submissions and the preparation of a Bundle of Authorities, and the matter was then set down for a hearing.

[4] On 1 August 2022, Judge Spiller, in preparing for the hearing, noted that the issue of lateness had not been addressed. Judge Spiller directed that Mr Darke be given the opportunity of adding anything further to the submissions in support of lateness, and that counsel for the Corporation then provide its views on the late filing.

[5] On 3 August 2022, Mr Darke noted that the substantial delay after filing was due the difficulty in obtaining a further joint opinion from an agreed specialist.

[6] Ms Becroft, for the Corporation, also on 3 August 2022, submitted that it took a neutral position in regard to the lateness.

Relevant law

[7] 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.

[8] 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.

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

- (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

[9] In terms of section 151(3)(a) of the Act, Ms Hopkins 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 18 September 2018, which left a date of 16 October 2018 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 7 January 2019. 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

[10] 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.

[11] This Court notes that the delay in this case is nearly 12 weeks, which is an appreciable period of time.

² Above, note 1.

(b) The reasons for the delay

[12] 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.

[13] Mr Darke for Ms Hopkins states that the reason for the delay was essentially his own absence from work for a period through illness and the pile-up of work. Mr Darke also alludes to the “the usual allowance under the rules for the Christmas New Year period”.

[14] This Court notes that section 161(3) of the Act requires that an appeal must be prosecuted with due diligence, and advocates who do not do on behalf of their clients place their interests at risk. This Court also notes that the clear wording of section 151(3) of the Act does not allow for extension of time for the Christmas/New Year period.

[15] However, the Court notes that as the responsibility for the delay lies with the advocate, and not with Ms Hopkins, she should not be penalised.

(c) The conduct of the parties

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

[17] This Court notes that the filing of the present appeal by Mr Darke was delayed for an appreciable period. There have been further delays since the appeal was lodged, but these have not been the responsibility of Ms Hopkins.

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

[18] 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.

[19] This Court notes that the delay in this case is nearly 12 weeks. The Corporation has confirmed it took a neutral position in regard to the lateness. 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


[20] 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.

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

The Decision

[22] In light of the above considerations, this Court finds that Ms Hopkins 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.

[23] 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