

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 166 ACR 103/22

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

Judgment on the papers.

Submissions: The Appellant is self-represented
S Hack for the Respondent

Date of Judgment: 24 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 Mr Trower on 13 June 2022. The appeal is from the decision of a Reviewer dated 28 October 2020. The Reviewer dismissed an application for review of the Corporation's decision of 9 October 2019 declining a further lump sum payment for his impairment. The Reviewer found that there was no cogent evidence that could displace the opinion of Dr Kanji, Occupational Specialist, about Mr Trower's level of impairment.

[2] On 15 June 2022, Judge Henare issued an Initial Minute which directed that:

- (1) Mr Trower will, by 6 July 2022, formally apply for leave to file the appeal out of time and set out the reasons why the appeal was filed late;
- (2) the Corporation will, by 27 July 2022, file a memorandum in response; and
- (3) the Registry will then refer the application and the Corporation's response to the Court for determination.

[3] On 6 July 2022, the Registry received Mr Trower's letter and supporting documents outlining the basis of his claim for reimbursement. In support of Mr Tower's appeal being late, he submitted that his new doctor filed an ACC55 form wrongly, he has decided to take the Permanent Impairment Team to Court because that team is taking too long to issue a decision, and COVID had caused delays.

[4] On 11 August 2022, Mr Hack for the Corporation submitted that Mr Trower's application be opposed.

Relevant law

[5] 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
 - ...
 - (c) within any longer time allowed by the District Court.

[6] 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:

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

[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 issues, the case for an extension is likely to be stronger than if there is no such interest.

Discussion

[7] In terms of section 151(3)(a) of the Act, Mr Trower 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 dated 28 October 2020, which left a date of 25 November 2020 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 13 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

[8] 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.

[9] This Court notes that the delay in this case is nearly 19 months, which is a significant period. There is no evidence of how quickly Mr Trower sought to rectify the mistake in late filing after learning of it.

(b) The reasons for the delay

[10] 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.

[11] Mr Trower stated that the reasons for the delay were that his new doctor filed an ACC55 form incorrectly, he has decided to take the Permanent Impairment Team to Court because that team is taking too long to issue a decision, and COVID had caused delays.

² Above, note 1.

[12] This Court notes that Mr Trower was represented at the review hearing by legal counsel, and that the decision of the Reviewer was sent with a notice that Mr Trower might appeal to the District Court, but that this had to be done within 28 days of the review decision being given to him. Mr Trower has not explained how the reasons he presented for late filing caused the delay of 19 months.

[13] This Court is not satisfied that Mr Trower's delay arose out of understandable error or inadvertence.

(c) The conduct of the parties

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

[15] This Court is not aware of any history of non-cooperation and/or delay by Mr Trower, apart from the late filing of his appeal.

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

[16] 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.

[17] This Court notes that the delay in this case is nearly 19 months, which is a significant period. The Corporation has stated its opposition to the late filing. The Corporation has concerns about the ability of either party to adduce reliable evidence now about the level of Mr Trower's impairment in 2019, and the Corporation considers it likely that it will be prejudiced in this respect. The Corporation notes that this is especially so in the face of the Reviewer's findings about the state of the evidence as it stood back in 2020, let alone almost two years before then.

[18] 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

[19] 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.

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

The Decision

[21] In light of the above considerations, this Court finds that Mr Trower has not 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 dismissed.

[22] There are no issues as to costs.

[23] This Court notes that the Corporation has advised that, despite Mr Trower's GP not yet having completed the appropriate documentation, the Corporation will accept a medical certificate received in April 2022 as an application for reassessment. The Corporation notes that this application will be allocated to a team member of the Permanent Injury Team. The Corporation encourages Mr Trower to liaise closely with his GP in this process. This Court endorses the Corporation's comments.



P R Spiller
District Court Judge