

appeals. The Court directed Ms Wilson to apply for leave to file the appeal out of time with reasons in support of the application.

[3] In exercise of the Court's discretion, the application to file the appeal out of time was dismissed.

Background

[4] 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.

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

[6] 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 the subject of the Corporation's decision of 26 May 2021 was moot and therefore the Court did not have jurisdiction.

[7] 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.

[8] On 16 June 2022, a case conference was convened by telephone. Ms Wilson was given notice of the case conference, but she did not attend. Following the conference, the Registry (having contacted Ms Wilson) advised that she sent her apologies as she had another commitment. This Court then directed a timetable that

Ms Wilson apply for leave to file the appeal out of time and set out the reasons why the appeal was filed late.

[9] On 24 June 2022, Ms Wilson submitted 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].

[10] In her submission, Ms Wilson referred to employment issues leading to termination of her employment, including matters relating to harassment and bullying.

[11] On 4 July 2022, Ms Johns for the Corporation submitted the application should be declined because Ms Wilson's reasons for late filing of the appeal had no bearing on the appeal itself. Ms Johns repeated her earlier submission that there was no merit in the substantive appeal because the Corporation's decision was moot. For this reason, the Court did not have jurisdiction.

Relevant law

[12] Section 162(1) of the Accident Compensation Act 2001 (the Act) provides:

A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with leave of the District Court, appeal to the High Court.

[13] In *YZ*² Judge Kelly summarised the key principles relevant to an application for leave to appeal in this jurisdiction as follows:

- (a) The issue must arise squarely from “the decision” challenged ...;
- (b) Leave cannot for instance properly be granted in respect of obiter comment in a judgment ...;
- (c) The contended point of law must be “capable of bona fide and serious argument” to qualify for the grant of leave ...;

² *YZ v Accident Compensation Corporation* [2020] NZACC 160 at [19].

- (d) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed ...;
- (e) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law ...;
- (f) A decision-maker's treatment of facts can amount to an error of law - there will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory to, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision ...;
- (g) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law

[14] These principles reflect the position of the Supreme Court in *Bryson v Three Foot Six Ltd*,³ and particularly at [25] that:

[a]n appeal cannot however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case.⁴

[15] Further, even if a question of law is identified, the Court has a discretion as to whether leave should be granted, and leave is not to be granted as a matter of course.⁵

Judge Spiller's judgment of 11 July 2022

[16] Judge Spiller analysed the submissions and facts presented in light of the discretion provided by s 151 of the Act that relevantly provides:

151 Manner of bringing appeal

...

- (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

³ *Bryson v Three Foot Six Ltd* [2005] NZSC 34.

⁴ This approach has been applied in the ACC jurisdiction. See, *Gilmore v ACC* [2016] NZHC 15494.

⁵ See *Cullen v ACC* [2014] NZCA 94 at [5].

- (b) in the case of a deemed review decision under section 146, within 28 days of the date specified in section 146(2): or
- (c) within any longer time allowed by the District Court.

[17] His Honour noted Ms Wilson was required to file the Notice of Appeal in the District Court 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 filing the Notice of Appeal. The appeal was filed on 12 January 2022.

[18] In deciding whether to exercise the discretion under s151(3) (c) of the Act, His Honour applied the guiding principles set down by the Supreme Court in *Almond v Read*⁶ as follows:

(a) *The length of the delay*

[19] 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.

[20] His Honour noted the delay in filing was 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*

[21] 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.

[22] His Honour noted Ms Wilson stated the delay in filing her appeal was caused by "the ACC conciliation meetings" between her and the Corporation. However,

⁶ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801, (2017) 23 PRNZ 533, Supreme Court of New Zealand, 30/5/2017, SC98/2016.

Ms Wilson provided no explanation as to how or why this process caused the late filing of her appeal.

[23] His Honour was not satisfied that Ms Wilson's delay arose out of understandable error or inadvertence. Ms Wilson had 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

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

[25] His Honour observed that Ms Wilson was given notice by the Registry of the judicial case conference by telephone 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

[26] 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.

[27] His Honour noted the delay in filing this appeal is 30 days. The Corporation opposed the grant of leave to file the appeal late, on the basis Ms Wilson seeks to litigate matters outside the Court's jurisdiction and/or which have now been resolved. His Honour noted the Corporation's submissions that, as a result, defending the proposed appeal will cause significant prejudice and financial costs to the Corporation. Further, Ms Wilson had sought to include her former employer in the 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

[28] 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.

[29] His Honour noted at [24] of the judgment:

[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.

The applicant's position

[30] Ms Wilson was directed by this Court on 13 July 2022 to file her submissions in support of her application by 24 August 2022.

[31] By email dated 2 September 2022, Ms Wilson informed counsel for the Corporation and the Registry that she would not be filing any submissions in support of the leave to appeal application.

Decision

[32] This Court finds it is obvious from the judgment that Judge Spiller was conscious of and applied the correct legal test, and properly discussed and analysed the facts before him.

[33] Ms Wilson has not identified any alleged error of law in the judgment or provided submissions in support of her application.

[34] In the absence of any error of law being identified, the Court finds the application for leave to appeal cannot succeed.

[35] Accordingly, the application for leave to appeal the judgment of Judge Spiller to the High Court is dismissed.

[36] There is no issue as to costs.

A handwritten signature in blue ink, appearing to read "Denise L Henare". The signature is written in a cursive, flowing style.

D L Henare
District Court Judge

Solicitors for the respondent: Claro Law, Wellington