

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 61

ACR 025/22

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

Judgment on the papers.

Submissions: K Koloni for the Appellant
R Wanigasekera for the Respondent

Date of Judgment: 13 April 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 Foster on 4 February 2022. This appeal is from the decision of a Reviewer dated 6 January 2022. The Reviewer dismissed applications for review of the Corporation’s decisions of 4 June 2021 and 30 September 2021, for lack of jurisdiction.

[2] On 17 February 2022, Ms Koloni asked that her email of that date be accepted as a request for leave to file the Notice of Appeal out of time, as she had misunderstood how the 28 days after the date of the review decision were calculated.

[3] On 25 February 2022, Judge McGuire issued an Initial Minute which directed that Ms Foster formally apply for leave to file the appeal out of time and set out the reasons why the appeal was filed late.

[4] Ms Koloni did not provide any further information.

[5] On 5 April 2022, Mr Wanigasekera for the Corporation submitted that, given the delay of one day, the Corporation did not oppose the late filing of the appeal.

Relevant law

[6] 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.

[7] 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:

[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

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

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

[8] In terms of section 151(3)(a) of the Act, Ms Foster 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 6 January 2022, which left a date of 3 February 2022 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 4 February 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

[9] 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

² Above, note 7.

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.

[10] This Court notes that the delay in this case is only one day, and that the Notice of Appeal was lodged the day after it was due.

(b) The reasons for the delay

[11] 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.

[12] Ms Koloni (for Ms Foster) stated that the reason for the delay was that she (Ms Koloni) had misunderstood how the 28 days after the date of the review decision were calculated.

[13] This Court is satisfied that Ms Foster's delay arose out of 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 a history of non-cooperation and/or delay by Ms Foster in relation to this 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 not significant and is not aware of prejudice or hardship to the Corporation or to others with a legitimate interest in the

outcome. The Corporation has submitted that, given the delay of one day, the Corporation does not oppose the late filing of the appeal.

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

[18] 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.

[19] The issue in Ms Foster's case is whether the Reviewer correctly dismissed applications for review of the Corporation's decisions of 4 June 2021 and 30 September 2021, for lack of jurisdiction.

[20] This Court accepts that the issues in this appeal are significant to Ms Foster. The Court is not in a position to assess the significance of the issues, raised by the proposed appeal, to the Corporation and more generally.

The Decision

[21] In light of the above considerations, this Court finds that Ms Foster 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.

[22] There are no issues as to costs.



P R Spiller
District Court Judge