

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 102 ACR 283/21

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	SCOTT ANDERSON Appellant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent
AND	SILVER FERNS FARMS LIMITED Second Respondent

Judgment on the papers.

Submissions: M McCarthy for the Appellant
 J Maslin-Caradus for the First Respondent
 L Sugrue for the Second Respondent

Date of Judgment: 31 May 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 Anderson on 13 December 2021. The appeal is from the decision of a Reviewer dated 21 October 2021. The Reviewer dismissed an application for review of the decisions of Aon dated 10 July 2019 (declining cover for a work-related gradual process injury) and 21 February 2020 (declining cover for a series of events accident).

[2] On 14 December 2021, Judge McGuire issued an Initial Minute which directed, *inter alia*, that Mr Anderson apply formally for leave to appeal out of time and set out the reasons why.

[3] On 26 April 2021, Judge Spiller directed that:

- By 10 May 2022, Mr Anderson will lodge a formal application for leave to appeal out of time, with supporting reasons.
- By 24 May 2022, the Corporation and Silver Ferns Farm Ltd will lodge their statements in reply.
- By 31 May 2022, Mr Anderson will lodge his statement in response.

[4] On 9 May 2022, Ms McCarthy, for Mr Anderson, submitted that the appeal was filed late because, while Mr Anderson was seeking counsel to instruct for his appeal, there was a misunderstanding between counsel and instructing solicitor as to counsel's availability to accept instructions and act prior to the appeal period ending. Once counsel accepted instructions on 25 November 2021, an authority to act and notice of appeal was duly prepared for Mr Anderson to sign. However, while that document was prepared for, provided to, and signed by Mr Anderson without further delay, it was returned via post to his instructing solicitor, and not received until 13 December 2021, resulting in the further delay before filing.

[5] On 24 May 2022, Ms Maslin-Caradus, for the Corporation, submitted that it did not intend to oppose the application because, *inter alia*, the length of delay was not substantial and the prejudice to the Corporation was minimal. Also, on 24 May 2022, L Sugrue for the second respondent advised that it would rely on the Corporation's submissions.

[6] Counsel for Mr Anderson elected not to reply to the Corporation's submissions.

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:

[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

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

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, Mr Anderson 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 21 October 2021, which left a date of 18 November 2021 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 13 December 2021. 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 25 days, which is not a substantial period of time. It appears that the delay was caused by a slip-up of Mr Anderson's legal representatives and the appeal date was inadvertently missed. Once the mistake was discovered, it appears that a notice of appeal and authority to act were swiftly prepared and provided to Mr Anderson to sign, which he did without delay.

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 Anderson's counsel stated that the reason for the delay was that the time limit was missed as the result of a misunderstanding between Mr Anderson's counsel and instructing solicitor, and through no fault of Mr Anderson himself.

[14] This Court is satisfied that Mr Anderson's delay arose out of error or inadvertence of his legal representatives.

(c) *The conduct of the parties*

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

[16] This Court notes that, since his notice of appeal was filed, Mr Anderson has pursued his appeal without delay, and has complied with all directions set by the Court. Most recently, Mr Anderson's counsel complied with the Court's direction to lodge a formal application for leave to appeal out of time, with supporting reasons, by a certain date. The Court is not aware of any history of non-cooperation and/or delay by Mr Anderson.

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

[17] 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.

[18] This Court notes that the delay in this case is not substantial. The Corporation submitted that it did not intend to oppose the application because, *inter alia*, the length of delay was not substantial and the prejudice to the Corporation was minimal. The second respondent agreed to reply upon the Corporation's

submissions. This Court is not aware of prejudice or hardship to others with a legitimate interest in the outcome of this 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 Anderson. 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 Anderson has 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 granted.

[22] There are no issues as to costs.



P R Spiller
District Court Judge