

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 104 ACR 263/21

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

Judgment on the papers.

Submissions: S Winter for the Appellant
 C Light for the Respondent

Date of Judgment: 2 June 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 Brown on 17 November 2021. The appeal was filed in respect of a decision of a Reviewer dated 14 October 2021. The Reviewer dismissed an application for review of the Corporation's decision of 19 January 2021, in which it declined Ms Brown cover and surgery for left ulnar neuritis and medial epicondylitis.

[2] On 27 April 2022, Judge Spiller issued an Initial Minute which directed that Ms Brown, by 11 May 2022, formally apply for leave to file the appeal out of time and set out the reasons why the appeal was filed late.

[3] On 11 May 2022, Mr Winter, for Ms Brown, submitted that the appeal was filed late because he erroneously entered the wrong date for filing the appeal in his diary. The memorandum further noted that Ms Brown wanted to pursue an appeal within the time period for filing an appeal, as evidenced by the email correspondence between her and Mr Winter on 29 October 2021.

[4] On 19 May 2022, Mr Light for the Corporation submitted that it did not oppose the granting of leave for Ms Brown to file her appeal out of time, and that it had not been prejudiced by the late filing of the appeal.

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:

[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

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

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, Ms Brown was required to file a Notice of Appeal against the Reviewer’s decision within 28 days of the date on which the Reviewer provided a copy of the review decision to her. The Reviewer’s decision was dated 14 October 2021, which left a date of 11 November 2021 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 17 November 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

² Above, note 1.

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 only six days, which is not a significant period of time.

(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 Winter, for Ms Brown, stated that the reason for the delay was that he erroneously entered the wrong date for filing the appeal in his diary. Mr Winter further noted that Ms Brown wanted to pursue an appeal within the time period for filing an appeal, as evidenced by the email correspondence between her and Mr Winter on 29 October 2021.

[12] This Court is satisfied that Ms Brown's delay arose out of her advocate's error, for which she was not responsible.

(c) *The conduct of the parties*

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

[14] This Court notes that the memorandum formally applying for leave to file the appeal out of time, and setting out the reasons why the appeal was filed late, was filed by Ms Brown's advocate by the due date. The Court is not aware of any history of non-cooperation and/or delay by Ms Brown.

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

[15] 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.

[16] This Court notes that the delay in this case is not significant. The Corporation has submitted that it did not oppose the granting of leave for Ms Brown to file her appeal out of time, and that it had not been prejudiced by the late filing of the appeal. The Court is not aware of any 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

[17] 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.

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

The Decision

[19] In light of the above considerations, this Court finds that Ms Brown 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.

[20] There are no issues as to costs.



P R Spiller
District Court Judge