

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2022] NZACC 211      ACR 164/22**

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| UNDER            | THE ACCIDENT COMPENSATION ACT<br>2001              |
| IN THE MATTER OF | AN APPEAL UNDER SECTION 149 OF<br>THE ACT          |
| BETWEEN          | AVENISH CHAND<br>Appellant                         |
| AND              | ACCIDENT COMPENSATION<br>CORPORATION<br>Respondent |

Judgment on the papers.

Submissions:    P Sara for the Appellant  
                      R Wanigasekera for the Respondent

Date of Judgment: 17 November 2022

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**JUDGMENT OF JUDGE P R SPILLER  
[Late filing of an appeal to the District Court –  
s 151, Accident Compensation Act 2001]**

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**Introduction**

[1]    The appeal in the above matter was lodged by Mr Chand on 7 September 2022. The appeal is from the decision of a Reviewer dated 22 October 2021. The Reviewer dismissed a review of the Corporation’s decision of 5 October 2020 revoking Mr Chand’s deemed cover for a cervical disc prolapse.

[2]    On 7 September 2022, Judge Henare issued an Initial Minute which directed that Mr Chand, by 28 September 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 28 September 2022, Mr Sara, for Mr Chand, advised that he was not in a position to provide detailed grounds/evidence in support of the late appeal application and asked for an extension of time.

[4] On 29 September 2022, Judge Henare granted an extension of time to Mr Chand to 17 October 2022. No application for leave was filed by this date. A follow-up to Mr Sara elicited no response.

[5] On 3 November 2022, the Court advised Mr Sara of its concern that, despite an extension of time allowed for the filing of an application for late lodging of the appeal, no application has been filed. The Court allowed a final extension of time to 7 November 2022, after which it would consider dismissal of the appeal for want of prosecution.

[6] On 4 November 2022, Mr Sara submitted an unsigned statement from Mr Chand which outlined the reasons which resulted in his late filing of an appeal:

- (a) On 12 November 2021 (21 days after the Reviewer's decision), Mr Sara wrote to Mr Chand and explained the process of appealing the decision and setting out the expected financial costs involved. At that time, he and his wife were encountering financial difficulty and so no appeal was lodged.
- (b) Towards the end of 2021, a group of friends encouraged him to challenge the review decision. He told his wife to let Mr Sara know that he wanted to appeal the decision and assumed that she had done so.
- (c) In May 2022, when Mr Sara made contact, it was discovered that Mr Chand's wife had not made contact with Mr Sara. At that point, Mr Sara was given instructions to proceed.
- (d) However, it took several months before engagement requirements were completed. His wife had to work long hours and he was without

work for several months and then started working at significantly less pay.

[7] No formal application, signed statement or submissions were presented by or on behalf of Mr Chand.

[8] On 16 November 2022, Mr Wanigasekera for the Corporation noted that the delay in filing the application was a significant period, there was a conscious decision not to appeal within the required appeal period, and it was unlikely that the issues raised in the case have significance generally. However, the Corporation did not oppose the Court exercising its jurisdiction to accept late filing of the appeal.

### **Relevant law**

[9] 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.

[10] In *Almond v Read*,<sup>1</sup> 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:

[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

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

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**

[11] In terms of section 151(3)(a) of the Act, Mr Chand 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 22 October 2021, which left a date of 19 November 2021 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 7 September 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*.<sup>2</sup>

***(a) The length of the delay***

[12] 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.

[13] This Court notes that the delay in this case is nine-and-a-half months, which is a significant period. Mr Chand was represented at the review hearing by an experienced lawyer. The Reviewer's decision was accompanied by the information that an appeal needed to be lodged with the District Court within 28 days. Three weeks after the Reviewer's decision, Mr Chand's lawyer explained the process of appealing the decision. Although a notice of appeal requires no filing fee and an appellant can be self-represented, Mr Chand decided not to pursue an appeal for financial reasons. In late 2021, Mr Chand then decided to pursue an appeal, but a further five months elapsed before he gave his lawyer instructions to proceed. Then ensued a further delay of around four months before the appeal was lodged. The Court concludes that this is not a case where there has been a slip-up, or the appeal date has been inadvertently missed, or the applicant has sought to rectify the mistake quickly after learning of it.

***(b) The reasons for the delay***

[14] 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.

[15] As noted above, Mr Chand stated that, three weeks after the Reviewer's decision (that is, within the appeal period), Mr Chand's lawyer explained the process of appealing the decision, and Mr Chand decided not to pursue an appeal. Mr Chand

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<sup>2</sup> Above, note 1.

notes that, about a month later, he changed his mind and decided to pursue an appeal, but nevertheless, gave instructions to his lawyer some five months later. Then ensued a further delay of around four months before the appeal was lodged. This Court is not satisfied that Mr Chand's delay arose out of understandable error or inadvertence.

***(c) The conduct of the parties***

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

[17] This Court notes that Mr Chand delayed filing his appeal by nine-and-a-half months after the due date. The Court also notes with concern the further delay of around two months in filing information in support of the late filing, despite Court Minutes and contact by the Registry. After the Court directed a final date for a formal application with reasons, an unsigned statement from Mr Chand was produced but no formal application.

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

[18] 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.

[19] This Court notes that the delay in this case is nine-and-a-half months, which is a significant period. The Corporation noted its reservations that noted that the delay in filing the application was a significant period, there was a conscious decision not to appeal within the required appeal period, and it was unlikely that the issues raised in the case have significance generally. However, the Corporation did not oppose the Court exercising its jurisdiction to accept 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 the present appeal.

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

[20] 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.

[21] This Court accepts that, on balance, despite the delays in pursuing the proposed appeal, this is significant to Mr Chand.

[22] The Corporation has stated that it is unlikely that the issues raised in the case have significance generally. The Court notes that the Reviewer's decision was directed towards whether the Corporation's decision of 5 October 2020, revoking Mr Chand's deemed cover for a cervical disc prolapse, was correct. The Reviewer dismissed the appeal on the basis that the medical evidence on file did not establish that Mr Chand suffered a disc prolapse as the result of his accident, which (the Court observes) dates as far back as 5 January 2015. The Reviewer also noted that the Corporation had indicated that it would look into cover for a cervical sprain. The appeal was made on the basis that the decision was wrong in fact and in law and that Mr Chand was entitled to cover for a cervical disc prolapse. The Court agrees with the Corporation's submission that it is unlikely that the issues raised in the case have significance generally.

**The Decision**

[23] In light of the above considerations, this Court finds that Mr Chand 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. In particular, the Court notes (in terms of the criteria of the Supreme Court) that Mr Chand's appeal was lodged significantly out of time; he did not inadvertently miss the appeal date; there is evidence of his change of mind and indecision; he did not seek to rectify the mistake quickly after learning of it; and it is unlikely that the issues raised in the case have significance generally. The Court also notes that the Corporation indicated at the review hearing that it would look into cover for a cervical sprain.

[24] There are no issues as to costs.

A handwritten signature in black ink, appearing to read "P R Spiller". The signature is written in a cursive style with a large initial "P" and "R".

P R Spiller  
District Court Judge