

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 77

ACR 061/22

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	JAISON O'CONNOR Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Judgment on the papers.

Submissions: S O'Connor for the Appellant
S Hack for the Respondent

Judgment: 5 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 this matter is from the decision of a Reviewer dated 31 July 2018.

[2] The review hearing was held on 4 July 2018 by teleconference, with Mr O'Connor attending and giving evidence, and his representative Ms Brown and the Corporation's counsel Ms Choy also attending. The Reviewer dismissed an application for review of the Corporation's decision of 31 August 2016, on the basis that Mr O'Connor was vocationally independent. The Reviewer found:

- (a) Mr O'Connor was offered rehabilitation, but he declined it and did not require it;

- (b) Mr O'Connor was ready for vocational independence, according to the reports of Dr Ruttenberg, Mr O'Connor's doctor Dr Parsotam, the branch medical advisor, and Dr Prestage;
- (c) there was no opposing report about Mr O'Connor's fitness to sustain the eight work types identified (motor vehicle or caravan salesperson, stock clerk, purchasing officer, order clerk, sales clerk, general clerk, inquiry clerk, and sales representative);
- (d) no evidence was presented that Mr O'Connor had required any treatment since his vocational medical assessment.

[3] The review decision of 31 July 2018 was accompanied by a letter which provided information about the right of Mr O'Connor to appeal to the District Court, including the requirement to lodge the appeal within 28 days of receiving the decision.

[4] The appeal against the review decision was lodged by Mr O'Connor on 1 April 2022.

[5] On 4 April 2022, Judge McGuire issued an Initial Minute which directed that Mr O'Connor formally apply for leave to file the appeal out of time and set out the reasons why the appeal was filed late.

[6] On 26 April 2022, Mr O'Connor submitted that the appeal was filed late because of the complexity of his mental health and the ongoing battle to support his son born in December 2016 who has a terminal progressive disease, requiring extra health interventions by health professionals during the time required to file an appeal. Mr O'Connor provided documents, relating to himself and his son, which were dated January and March 2017, January, May, September and October 2018, October 2019, January and September 2020, March, April, July and August 2021, and April 2022.

[7] On 4 May 2022, for the Corporation submitted that it did not see a case justifying the Court exercising its discretion to allow late filing of the appeal.

Relevant law

[8] 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.

[9] 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 with significant prejudice, then it may well be appropriate to refuse leave even though the appeal appears to be strongly arguable.

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

- (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

[10] In terms of section 151(3)(a) of the Act, Mr O'Connor 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 31 July 2018, which left a date of around 29 August 2018 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 1 April 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

[11] 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.

[12] This Court notes that the delay in this case is three years and seven months, which a significant period of time. There is no evidence that the appeal date was inadvertently missed or as to how quickly the applicant sought to rectify the mistake after learning of it.

(b) The reasons for the delay

[13] 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.

[14] Mr O'Conner submitted that the appeal was filed late because of the complexity of his mental health and the ongoing battle to support his five-year-old son who has a terminal progressive disease, requiring extra health interventions by health professionals

during the time required to file an appeal. Mr O'Connor provided medical and other records dated between January 2017 and April 2022.

[15] The Court notes that Mr O'Connor was well enough to provide evidence at the review hearing in July 2018. The Reviewer found, on the basis of the medical and other reports filed, that Mr O'Connor had been offered rehabilitation, but he declined it and did not require it; he was ready for vocational independence; there was no opposing report about Mr O'Connor's fitness to sustain the eight work types identified; and no evidence was presented that Mr O'Connor had required any treatment since his vocational medical assessment. Mr O'Connor was assisted at the hearing by a representative. The decision which was issued to him gave clear notice that an appeal against the decision had to be lodged within 28 days. The medical reports now provided by Mr O'Connor do not cover the period of August 2018 when Mr O'Connor was required to lodge an appeal against the Reviewer's decision, and do not point to any inability to lodge the appeal in time.

[16] This Court is not satisfied that Mr O'Connor's delay arose out of understandable error or inadvertence.

(c) The conduct of the parties

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

[18] This Court is not aware of any history of non-cooperation and/or delay by Mr O'Connor, apart from the very late lodging of the appeal against the Reviewer's decision.

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

[19] 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.

[20] This Court notes that the delay in this case is significant, amounting to over three-and-a-half years. Counsel for the Corporation submits that there is likely to be prejudice to

² Above, note 7.

the Corporation caused by the delay itself, as well as by the fact that the Corporation decision which led to the appeal was made in August 2016, some two years before the review decision was issued in July 2018. Counsel correctly notes that the Corporation and the Court would be required to consider evidence that is now almost six years old in determining the matter.

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

[21] 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.

[22] This Court accepts that the proposed appeal is significant to Mr O'Connor personally. The Court is not in a position to assess fully the significance of the issues raised by the proposed appeal more generally. However, the Court notes that the Corporation's case at review was supported by extensive medical evidence, and that there was no opposing occupational or medical evidence presented by Mr O'Connor.

The Decision

[23] In light of the above considerations, this Court finds that Mr O'Connor 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.

[24] There are no issues as to costs.



P R Spiller
District Court Judge