

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 209

ACR 151/22

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 Waginasekera for the Respondent

Date of Judgment: 17 November 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 (without an Authority to Act in favour of Ms Koloni) on 17 August 2022. The appeal is from the decision of a Reviewer dated 1 July 2022.

[2] On 19 August 2021, Judge Spiller 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. The Minute was sent to Ms Foster (there

being no Authority to Act in favour of anyone else) and the Corporation. The deadline for her submissions was 9 September 2022, but submissions were not received by this date.

[3] On 12 September 2022, the Corporation sent the Registry and Ms Koloni a query about whether any further information had been filed by Ms Foster, as per the Minute of 19 August 2021. Also, on 12 September 2022, the Registry sent Ms Koloni an email noting that filing submissions were due on 9 September 2022, and that an Authority to Act needed to be filed. There was no response.

[4] On 19 September 2022, the Corporation again sent the Registry and Ms Koloni a query about whether a memorandum had been filed by Ms Foster. Also on 19 September 2022, the Registry sent Ms Koloni an email noting that filing submissions were overdue. There was no response.

[5] On 29 September 2022, the Corporation again sent the Registry and Ms Koloni a query about whether a response had been received. Also, on 29 September 2022, the Registry sent Ms Koloni an email noting that the late application had not been filed. There was no response.

[6] On 4 October 2022, the Registry referred the matter to Judge Spiller, who directed that, unless the appellant's application was filed by Monday 10 October 2022, the application for leave to appeal out of time would stand dismissed. When the application was not filed by the due date, the appeal was dismissed.

[7] On 14 November 2022, Ms Koloni (notwithstanding the repeated reminders sent to her) advised that she had no record of receiving the Minute of 19 August 2021. The Registry replied that the application for leave to appeal was filed without an Authority to Act and so the correspondence was initially sent to Ms Foster.

[8] On 15 November 2022, Judge Spiller issued a direction that Ms Foster's appeal was reinstated only on condition that her application for leave to appeal out of time was filed by noon Friday 18 November 2022. Failing this condition would mean that the appeal remained dismissed.

[9] On 15 November 2021, Ms Koloni submitted that the appeal was filed late because of her own work-related limitations (injuries, influenza and chronic fatigue), not contributed to by Ms Foster.

[10] On 16 November 2022, Mr Wanigasekera for the Corporation submitted that the Corporation did not oppose the application to file the appeal out of time.

Relevant law

[11] 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.

[12] 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:

[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 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:

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

- (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

[13] 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 1 July 2022, which left a date of 29 July 2022 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 17 August 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

² Above, note 1.

(a) The length of the delay

[14] 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.

[15] This Court notes that the delay in this case is 19 days. There is no evidence as to how quickly Ms Foster sought to rectify the mistake after learning of the appeal date.

(b) The reasons for the delay

[16] 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.

[17] Ms Koloni stated that the appeal was filed late because of her own work-related limitations (injuries, influenza and chronic fatigue), not contributed to by Ms Foster.

[18] This Court notes that the reason for Ms Foster's delay lay with her advocate, Ms Koloni, for which Ms Foster was not responsible.

(c) The conduct of the parties

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

[20] This Court notes that Ms Foster's appeal was lodged 19 days late. Further, Ms Foster received the directions issued by Judge Spiller on 19 August 2022, as to the procedure for late filing, and so was well aware of the deadline contained therein and therefore that this was not met. However, Ms Koloni has stated that the delays are ultimately attributable to her rather than Ms Foster.

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

[21] 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.

[22] This Court notes that the delay in this case is 19 days. The Corporation has confirmed that it does not oppose 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 the present appeal.

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

[23] 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.

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

The Decision

[25] In light of the above considerations, this Court finds that 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.

[26] However, leave is granted on the basis that the delays in the lodging and processing of her appeal do not lie with her, and instead are the responsibility of her advocate Ms Koloni. The Court draws Ms Foster's attention to section 161(3) of the Accident Compensation Act 2001 which provides that, if an appeal is not prosecuted with due diligence, the Court may dismiss the appeal on the application of any party. Ms Foster is therefore required to comply promptly with deadlines and Court directions in the future processing of her appeal, failing which her appeal will be at further risk. To safeguard her interests, a copy of this decision will also be sent to Ms Foster.

[27] There are no issues as to costs.

A handwritten signature in cursive script, appearing to read "P R Spiller".

P R Spiller
District Court Judge