

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2023] NZACC 009      ACR 229/22**

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

Judgment on the papers.

Submissions:      M Williams for the Appellant  
                         B Marten for the Respondent

Date of Judgment: 23 January 2023

---

**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 Cross on 15 December 2022. The appeal is from the decision of a Reviewer dated 17 August 2015. The Reviewer dismissed an application for review of the Corporation’s decision of 21 August 2012 declining cover for a head injury resulting from an accident on 23 May 1996.

[2] On 1 December 2022, Judge Henare issued a Minute in relation to appeal ACR 144/22 earlier lodged by Mr Cross. This appeal arose out of a Reviewer’s decision dismissing reviews of the decisions of the Corporation dated 5 and 6 January 2022,

declining cover for a traumatic brain injury and revoking cover for multiple skull fractures and substituting cover for a mandible fracture, both in respect of an accident which Mr Cross suffered on 3 March 2002. Judge Henare noted that a possible issue was whether Mr Cross was able to advance arguments for cover for the accident he suffered in 1996. The Reviewer had held that Mr Cross was estopped from doing so by virtue of the 2015 review decision which had not been appealed. The Corporation's position was that, if Mr Cross wished to argue his 1996 accident, he would need to lodge an appeal out of time against the 2015 review decision. Judge Henare accepted this position, and stated that otherwise the Court did not have jurisdiction to consider the 1996 accident.

[3] On 13 December 2022, Ms Williams submitted that the present appeal (ACR 229/22) was filed late because, at the time of the Reviewer's decision (in 2015), Mr Cross (who was unrepresented at the review hearing) was not skilled enough because of his brain injury to understand the need to lodge an appeal in the time frame required. Ms Williams noted that he had obtained a specialist's report as to his traumatic brain injury since the 2015 review decision, but has been told that he would have to lodge an out of time application for leave to appeal the 2015 review decision for this evidence to be presented.

[4] On 18 January 2023, Mr Marten for the Corporation noted that the present appeal is directly related to ACR 144/22, and submitted that, if the Court is called upon to consider cover for a traumatic brain injury in ACR 144/22, then, as a matter of pragmatism and fairness, any contribution from his 1996 accident should be open to argument as well. Mr Marten further accepted, that on the facts of this case, the prejudice to the Corporation in considering Mr Cross' 1996 accident is not significantly greater as between 2015 (when he ought to have exercised his right of appeal) and 2023. Mr Marten submitted that the Corporation did not oppose the application for leave to appeal out of time.

## 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
  - (b) ...
  - (c) within any longer time allowed by the District Court.

[6] The above provision is in line with the purpose of the Act. Section 3 of the Act provides that its purpose is to enhance the public good by providing for a fair and sustainable scheme for managing personal injury. Section 3 further states that one of the overriding goals of this scheme is minimising the economic, social and personal costs of the impact of injury on the community. Unnecessary delay in bringing an appeal to the ACC jurisdiction of the District Court carries potential costs for the appellant and also for the justice system and those involved in it.

[7] In *Avery v No 2 Public Service Appeal Board*,<sup>1</sup> Richmond J (for the Court of Appeal) stated:

When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of an indulgence by the Court. The onus rests on him to satisfy that in all the circumstances the justice of the case requires that he be given the opportunity to attack the judgment from which he wishes to appeal.

[8] In *Almond v Read*,<sup>2</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

<sup>1</sup> *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86, 91.

<sup>2</sup> *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801, (2017) 23 PRNZ 533.

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:

- (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**

[9] In terms of section 151(3)(a) of the Act, Mr Cross 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 17 August 2015, which left a date of 14 September 2015 for the filing of

the Notice of Appeal. In the event, the Notice of Appeal was filed on 15 December 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>3</sup> These authoritative principles have been repeatedly followed by the District Court and are in line with the purpose of the Act stated above.

**(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 seven years and three months, which is a very significant period.

**(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] Ms Williams for Mr Cross stated that the reasons for the delay were that at the time of the Reviewer's decision (in 2015), Mr Cross (who was unrepresented at the review hearing) was not skilled enough because of his brain injury to understand the need to lodge an appeal in the time frame required. The lodging of the appeal at this stage was because he had obtained a specialist's report as to his traumatic brain injury since the 2015 review decision, but has been told that he would have to lodge an out of time application for leave to appeal the 2015 review decision for this evidence to be presented.

---

<sup>3</sup> Above, note 2.

[14] This Court is satisfied that Mr Cross' delay arose out of understandable inadvertence rather than a change of mind or from indecision.

**(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 is not aware of any history of non-cooperation and/or delay by Mr Cross, apart from the extremely late lodging of the present appeal.

**(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 very significant. However, the Corporation has confirmed that the prejudice to the Corporation in considering Mr Cross' 1996 accident is not significantly greater as between 2015 (when he ought to have exercised his right of appeal) and 2023. The Corporation does not oppose the application for leave to appeal out of time. 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**

[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 Cross. Further, as the Corporation has noted, the present appeal is directly related to appeal ACR 144/22, and, if the Court is called upon to consider cover for a traumatic brain injury in ACR 144/22, then, as a matter of pragmatism and fairness, any contribution from his 1996 accident should be open to argument as well.

**The Decision**

[21] In light of the peculiar facts of this case, this Court finds, notwithstanding the extensive delay in filing this appeal, that Mr Cross 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] However, the Court draws Mr Cross' 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. Mr Cross is therefore required to comply promptly with deadlines and Court directions in the future processing of his appeal, failing which his appeal will be at further risk.

[23] There are no issues as to costs.

  
P R Spiller  
District Court Judge