

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 164 ACR 216/23

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

Judgment on the papers.

Submissions: The Appellant is self-represented
C Thorburn for the Respondent

Date of Judgment: 18 October 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 Ferguson on 5 October 2023. The appeal is from the decision of a Reviewer dated 23 August 2021. The Reviewer dismissed an application for review of the Corporation’s decision of 29 April 2020 declining Mr Ferguson cover for tenosynovitis as a work-related gradual process condition.

[2] Mr Ferguson accompanied his appeal with the following submissions, to support leave being granted for his appeal to be accepted late. On 8 September

2021 (16 days after the Review decision), Mr Ferguson instructed his advocate, Mr Ian Duncan, to lodge an appeal. Mr Ferguson received no communication from Mr Duncan and attempted to follow up with him without success. In February 2023, Mr Ferguson contacted Mr Scott Paul, ACC Resolution Specialist, who advised that Mr Duncan had not made any contact for about 18 months. Mr Ferguson then dismissed Mr Duncan as advocate. Mr Ferguson still did not realise that no appeal had been lodged. He later received advice from a review specialist that he should lodge a late appeal.

[3] On 5 October 2023, Judge Henare issued an Initial Minute which directed that the Corporation file a memorandum in response to the application for leave to appeal out of time, by 19 October 2023.

[4] On 17 October 2023, Ms Thorburn for the Corporation submitted that it did not oppose leave being granted, given that the responsibility for the very late filing does not lie with Mr Ferguson. Ms Thorburn confirms that Mr Ferguson contacted Mr Paul in February 2023, and forwarded him an email sent to Mr Duncan on 16 February 2023 dismissing him and reiterating that he had been instructed to lodge an appeal. The Corporation has not identified any prejudice caused by the late filing of this 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
 - (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*,¹ 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*,² 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:

- (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.

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

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

- (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 Ferguson 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 23 August 2021, which left a date of 20 September 2021 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 5 October 2023. 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*.³ 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

³ Above, note 2.

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 over two years, which is a very long delay. However, it appears that the appeal date was inadvertently missed by Mr Ferguson's advocate, and Mr Ferguson fairly quickly sought to rectify the mistake after learning of it.

(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] Mr Ferguson stated that the reasons for the delay were that his instructions to his advocate to lodge an appeal, given 16 days after the review decision, were not implemented. Mr Ferguson received no communication from his advocate and attempted to follow up with him without success. When Mr Ferguson was advised by the Corporation that his advocate had not communicated with the Corporation for some 18 months, Mr Ferguson dismissed his advocate but still did not realise that an appeal had not been lodged. Only after recently receiving advice from a review specialist did Mr Ferguson lodge an appeal.

[14] The Supreme Court has recognised that regard can be had to the circumstance where a litigant takes steps to exercise the right of appeal within the required timeframe, but misses the specified time limit as a result of an error by a legal adviser and applies for an extension of time promptly on learning of the error.⁴ This Court is satisfied that Mr Ferguson's delay arose out of this circumstance.

(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.

⁴ *Almond*, above, note 2, at [37].

[16] This Court is not aware of any history of non-cooperation and/or delay by Mr Ferguson.

(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 over two years. However, the Corporation has confirmed that it does not oppose leave being granted, given that the responsibility for the very late filing does not lie with Mr Ferguson, and it has not identified any prejudice caused by the late filing of this 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

[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 Ferguson. The Court is not in a position to assess the significance of the issues raised by the proposed appeal more generally.

The Decision

[21] In light of the above considerations, this Court finds that, notwithstanding the very long delay in filing this appeal, Mr Ferguson 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. The Court has reached this view primarily because the responsibility for the late filing of the appeal lies with Mr Ferguson's former advocate.

[22] However, the Court forcefully draws Mr Ferguson'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. Mr Ferguson 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.

A handwritten signature in dark ink, appearing to read 'P R Spiller', written in a cursive style.

P R Spiller
District Court Judge