

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2024] NZACC 014      ACR 265/23**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	FONG, WILLIAM Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Judgment on the papers.

Submissions:      B Hinchcliff for the Appellant  
                         S Arnold for the Respondent

Date of Judgment: 30 January 2024

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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 Fong on 13 December 2023. The appeal is from the decision of a Reviewer dated 1 June 2023. The Reviewer dismissed an application for review of the Corporation’s decision of 20 March 2023 suspending Mr Fong’s entitlement to weekly compensation.

[2] On 13 December 2023, Mr Hinchcliff, for Mr Fong, submitted that the appeal was filed late because:

- (a) Mr Fong was overseas at the time of the review hearing, which was held on the papers, and when the review decision was released.
- (b) Mr Fong was not represented at the hearing and was not aware that he could file evidence or a statement in support of his application.
- (c) Mr Fong could not previously afford to engage a lawyer and was not able to find legal counsel when he returned to New Zealand.

[3] On 29 January 2024, Ms Arnold for the Corporation submitted that the Corporation was not prejudiced by the delay in filing the appeal and the Corporation did not oppose leave being granted.

### **Relevant law**

[4] 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.

[5] 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.

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

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

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.

[7] 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 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

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

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

[8] In terms of section 151(3)(a) of the Act, Mr Fong 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 appeal is from the decision of a Reviewer dated 1 June 2023, which left a date of 29 June 2023 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 13 December 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*.<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

[9] 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.

[10] This Court notes that the delay in this case is five-and-a-half months, which is a significant period of time. It is not clear how quickly Mr Fong sought to rectify the mistake after learning of it.

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

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

[11] 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.

[12] Mr Hinchcliff, for Mr Fong, stated that the reasons for the delay were that Mr Fong was overseas at the time of the review hearing, which was held on the papers, and when the review decision was released; Mr Fong was not represented at the hearing and was not aware that he could file evidence or a statement in support of his application; and Mr Fong could not previously afford to engage a lawyer and was not able to find legal counsel when he returned to New Zealand.

[13] This Court refers to the procedural note in the decision of the Reviewer. The Reviewer noted that: the review proceeded on the papers at Mr Fong's request; the Corporation provided written submissions on 18 May 2023; the Reviewer asked Mr Fong to provide any comments he would like to make in support of his application by 26 May 2023; the Reviewer advised Mr Fong that the decision would be issued by 2 June 2023; no further comments were received by Mr Fong; and attempts to telephone him were unsuccessful.

[14] This Court is satisfied that the Reviewer proceeded in accordance with natural justice and gave Mr Fong the opportunity of presenting submissions, and that Mr Fong ought reasonably to have been aware that he could file evidence or a statement in support of his application. This Court finds that Mr Fong's delay arose out of error or inadvertence, but he has not provided satisfactory reasons as to why his error or inadvertence is understandable.

**(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 notes that the delay in Mr Fong filing the current appeal is significant. However, the Court is not aware of any history of non-cooperation and/or delay by Mr Fong.

**(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 five-and-a-half months. However, the Corporation has confirmed that it is not prejudiced by the delay in filing the appeal and the Corporation does not oppose leave being granted. Further, 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, relating to suspension of entitlements, is significant to Mr Fong. 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, by a narrow margin, that Mr Fong 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. In making this decision, the Court takes particular account of the submission by the Corporation that it is not prejudiced by the late filing of the appeal and does not oppose leave being granted.

[22] However, the delay in Mr Fong in filing his appeal is significant. The Court therefore draws his 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 Fong 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