

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 245 ACR 177/22

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

Judgment on the papers.

Submissions: P Sara for the Appellant
 S Arnold for the Respondent

Date of Judgment: 9 December 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 Mr Madoc on 29 September 2022. The appeal is from the decision of a Reviewer dated 30 August 2022. The Reviewer dismissed an application for review of the Corporation’s decision of 12 November 2021 revoking cover for a pain in the lower back.

[2] On 3 October 2022, Judge McGuire issued an Initial Minute which directed that Mr Madoc, by 24 October 2022, formally apply for leave to file the appeal out of time and set out the reasons why the appeal was filed late.

[3] On 22 November 2022, Mr Sara, for Mr Madoc, submitted that the appeal was filed late because he (Mr Sara) had difficulty in engaging the services of counsel. One counsel accepted the assignment to provide an opinion on the merits of an appeal. Mr Sara drafted the notice and sent it for typing on 23 September 2022, but this was not returned to him until 28 September 2022. The notice was filed the following day.

[4] On 8 December 2022, Ms Arnold for the Corporation submitted that it did not oppose the late filing of the 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] 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.

[7] 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:

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

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

[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 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 Madoc 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 30 August 2022, which left a date of 27 September 2022 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 29 September 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*.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

[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 only two days, which is not a significant delay.

(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 Madoc's lawyer, Mr Sara, explained the reasons for the delay, which were clearly not the responsibility of Mr Madoc.

³ Above, note 2.

[13] This Court is satisfied that Mr Madoc's delay arose out of the error or inadvertence of his legal representative.

(c) The conduct of the parties

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

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

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

[16] 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.

[17] This Court notes that the delay in this case is only two days. The Corporation has confirmed that it does not oppose the application to file the appeal late. 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

[18] 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.

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

The Decision

[20] In light of the above considerations, this Court finds that Mr Madoc 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.

[21] There are no issues as to costs.

A handwritten signature in black ink, appearing to read "P R Spiller". The signature is written in a cursive, flowing style.

P R Spiller
District Court Judge