

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 010 ACR 02/23

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

Judgment on the papers.

Submissions: Carrigan for the Appellant
 F Becroft for the Respondent

Date of Judgment: 25 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 Ms Variath on 2 January 2023. The appeal is from the decision of a Reviewer dated 7 October 2022. The Reviewer dismissed an application for review of the Corporation's decision of 4 July 2022 declining Ms Variath's request for 22 hours per week of childcare for her daughter.

[2] On 17 January 2023, Judge Spiller issued an Initial Minute which directed that Ms Variath formally apply for leave to file the appeal out of time and set out the reasons why the appeal was filed late.

[3] On 18 January 2023, Ms Carrigan, advocate for Ms Variath, submitted that the late filing occurred because she (Ms Carrigan) felt that it caused less stress and anxiety to Ms Variath if her appealable matters were heard together (Ms Variath has also lodged appeal ACR 03/23). Ms Variath sought to have appeals ACR 02/23 and ACR 03/23 joined to be heard together.

[4] On 19 January 2023, Ms Becroft for the Corporation submitted that it does not oppose the Court exercising its discretion to allow a longer time for filing the Notice of Appeal. The Corporation, however, does not accept that the appeal is meritorious and notes that the reasons provided for the lateness relate to an intentional decision by Ms Carrigan not to file the application on time. Ms Becroft noted that that decision was perhaps not in the best interests of Ms Variath, but that was no fault of hers. Ms Becroft submitted further that, if leave is granted for Ms Variath to appeal out of time, the Corporation agrees that it would be expeditious for Ms Variath's two appeals to track and be heard together.

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.
- (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.

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.

- (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, Ms Variath 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 7 October 2022, which left a date of 4 November 2022 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 2 January 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 In deciding whether to exercise its discretion, this Court will follow the guidelines provided by the Supreme Court in *Almond v Read*.⁴ 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.

³ Above, note 7.

⁴ Above, note 7.

[11] This Court notes that the delay in this case is nearly two months.

(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 Carrigan, advocate for Ms Variath, submitted that the late filing occurred because she (Ms Carrigan) felt that it caused less stress and anxiety to Ms Variath if her appealable matters were heard together (Ms Variath has also lodged appeal ACR 03/23).

[14] This Court notes that Ms Variath's delay arose out of the error of her advocate, and Ms Variath does not appear to be responsible for this error.

(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 Ms Variath.

(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 nearly two months. However, the Corporation has confirmed that it does not oppose the application for late filing of the appeal being granted. 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 Ms Variath. The Court is not in a position to assess the significance of the issues raised by the proposed appeal more generally.

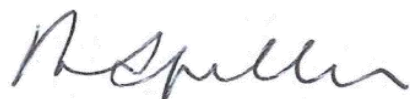
The Decision

[21] In light of the above considerations, this Court finds that Ms Variath 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.

[22] The Court directs that the present appeal, ACR 02/23, and appeal ACR 03/23, be consolidated, processed and heard together.

[23] The Court draws the attention of Ms Variath and her advocate 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 Variath and her advocate are therefore required to comply promptly with deadlines and Court directions in the future processing of his appeal, failing which her appeals will be at further risk.

[24] There are no issues as to costs.



P R Spiller
District Court Judge