

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 232

ACR 197/22

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

Judgment on the papers.

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

Date of Judgment: 5 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 Jukes on 2 November 2022. The appeal is from the decision of a Reviewer dated 11 March 2019. The Reviewer dismissed an application for review of the Corporation's decisions of 28 March 2018 declining cover for a cervical disc, weekly compensation payments and elective surgery funding, and suspending entitlements for physiotherapy treatment.

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

[3] On 3 November 2022, Mr Jukes submitted that the appeal was filed late because of personal, health and legal issues in his life. Reference was made to the fact that Mr Jukes' former counsel had a stroke in November 2021 and was no longer able to act for Mr Jukes, and new counsel were first instructed in March 2022. Mr Jukes' counsel noted that present counsel was engaged in March 2022, but then followed an extended process to clarify that an appeal needed to be lodged regarding the present matter.

[4] On 24 November 2022, Mr Hack for the Corporation noted that it and the Court would be required to consider evidence that is now almost four-and-a-half years old in determining the matter. Mr Hack submits that here there is significant delay coupled with prejudice, and the Corporation does not see a case for justifying the Court exercising its discretion to allow late filing of this appeal.

[5] On 1 December 2022, Mr Sara, for Mr Jukes, notes that Mr Jukes was confused as to who was doing what and what was required in prosecuting his appeal. His confusion arose from his belief that a previous advocate, Mr Cadenhead, had lodged an appeal. His confusion was exacerbated by the apparent misunderstanding by his subsequent advocate, Mr Grove, that a dispute about cover and surgery funding in relation to a hip condition (which was the subject of a different appeal) could be merged with a discrete dispute about cover and surgery funding in respect of a neck injury (the subject of the present appeal). Only recently has counsel been engaged. Mr Jukes now has cover for multiple chemical sensitivity and brucellosis health issues and other circumstances.

Relevant law

[6] 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

...

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

[7] 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.

[8] 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.

[9] 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:

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.

- (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

[10] In terms of section 151(3)(a) of the Act, Mr Jukes 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 11 March 2019, which left a date of 8 April 2019 for the filing of the Notice of Appeal. In the event, the Notice of Appeal was filed on 2 November 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

[11] 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.

[12] This Court notes that the delay in this case is over three-and-a-half years, which is a significant period of time.

(b) The reasons for the delay

[13] 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.

[14] Mr Jukes and his counsel note that Mr Jukes was confused as to who was doing what and what was required in prosecuting his appeal. His confusion arose from his belief that a previous advocate, Mr Cadenhead, had lodged an appeal. His confusion was exacerbated by the apparent misunderstanding by his subsequent advocate, the late Mr Grove, that a dispute about cover and surgery funding in relation to a hip condition (which was the subject of a different appeal) could be merged with a discrete dispute about cover and surgery funding in respect of a neck injury (the subject of the present appeal). Mr Jukes' former counsel had a stroke in November 2021 and was then no longer able to act for Mr Jukes. Present counsel was engaged in March 2022, but then followed an extended process to clarify that an appeal needed to be lodged regarding the present matter. Mr Jukes now has cover for multiple chemical sensitivity and brucellosis health issues and other circumstances.

[15] This Court accepts that the delay in lodging Mr Jukes' appeal has been caused by confusion and misunderstanding, compounded by changes in his counsel for reasons beyond his control. The Court also accepts that Mr Jukes has suffered from

³ Above, note 7.

ongoing health and personal issues, again beyond his control. Overall, the Court is satisfied that Mr Jukes' significant delay in lodging his appeal arose out of understandable error.

(c) The conduct of the parties

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

[17] This Court notes that it is not aware of any history of non-cooperation and/or delay by Mr Jukes, apart from the significant delay in filing the present appeal.

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

[18] 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.

[19] This Court reiterates that the delay in this case is significant. The Corporation submits that here there is significant delay coupled with prejudice, and the Corporation does not see a case for justifying the Court exercising its discretion to allow late filing of this appeal. The Court is not aware of prejudice or hardship to others with a legitimate interest in the outcome

(e) The significance of the issues raised by the proposed appeal, both to the parties and more generally

[20] 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.

[21] This Court accepts that the proposed appeal is significant to Mr Jukes. The Court considers it unlikely that the issues raised by the proposed appeal are of significance to others more generally.

The Decision

[22] In light of the above considerations, this Court finds, by a narrow margin, that Mr Jukes 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 significantly out of time. The primary reason for this finding is that Mr Jukes' delay in lodging his appeal arose out of understandable error, for reasons substantially beyond his control.

[23] Mr Jukes' application for leave to file his appeal is accordingly granted. There are no issues as to costs.

[24] As Mr Sara for Mr Jukes has noted in submissions, this much-delayed appeal must now be prosecuted with diligence, as is required by section 161(3)(b) of the Act. If further evidence is required, this must be obtained as soon as possible. If the matter is not settled by the parties, it must then be expeditiously advanced through to a hearing. *Iustitiam morari iniustitia est.*⁴



P R Spiller
District Court Judge

⁴ To delay justice is injustice.