IN THE DISTRICT COURT
AT WELLINGTON

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

[2021] NZACC 123 ACR 118/20

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION UNDER SECTION 162 OF THE ACT FOR LEAVE TO APPEAL TO THE HIGH COURT
BETWEEN	ANDRE SOULSBY Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Decision: On the papers

Submissions: J Robinson for the applicant
F Becroft for the respondent

Judgment: 28 June 2022

JUDGMENT OF JUDGE P R SPILLER
[Leave to appeal]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour, Judge C J McGuire, delivered on 11 March 2022.[1] The issue in this judgment concerns costs following an earlier substantive judgment. In the substantive judgment, Judge McGuire allowed Mr Soulsby's appeal and quashed the review decision upholding the Corporation's decision to decline weekly compensation.[2]

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1 *Soulsby v Accident Compensation Corporation (Costs)* [2022] NZACC 36.
2 *Soulsby v Accident Compensation Corporation (Incapacity)* [2021] NZACC 169.

[2] This Court notes that Mr Soulsby's advocate, Mr Robinson, wished to make oral argument in support of his written submissions lodged for this appeal. However, paragraph 8(1)(d) of the Guidelines to Practice and Procedure for Accident Compensation Appeals in the District Court states that: "once submissions are filed the application for leave to appeal will be determined by a judge on the papers". This Court sees no reason to depart from this provision in this case, in view of the discussion below.

Judge McGuire's judgment of 5 November 2021

[3] Judge McGuire noted that the Court was bound by the High Court decision in *Carey*,[3] where the Court stated:

> [91] Non lawyer advocates will vary in their expertise and experience. The Judge should not have to go into detail in each case analysing expertise and experience and then move on to consider the assistance, which has or has not been provided. Instead a Judge should be entitled to start with a percentage of the scale costs, if the Judge has been assisted by the non lawyer representative in a straightforward case it would, as a guideline, generally be appropriate to set a daily rate at 50% of the daily lawyer rate based on category 1. Under the District Court Rules category 1 relates to proceedings of a straightforward nature able to be conducted by counsel considered junior.

[4] Judge McGuire noted that the issue in Mr Soulsby's case was his incapacity, or not, prior to his last day of being an earner, he being in jail at that time. Judge McGuire found (in the substantive decision) that Mr Soulsby's incapacity caused by injury was present on 14 April 2018, that is, 28 days after he ceased work due to his incarceration. Judge McGuire observed that he was persuaded that this was so, for reasons other than those put forward by Mr Soulsby's advocate.

[5] Judge McGuire concluded that the High Court's guideline, set in *Carey*, of 50% of the daily lawyer rate based on category 1 was appropriate. Judge McGuire added that, if anything, the issues decided in *Carey* were more complex than the sole issue determined in the present case.

[6] Judge McGuire noted that Ms Becroft's submissions had quantified reasonable costs in line with *Carey*. Judge McGuire agreed with her quantification, which

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3 *Accident Compensation Corporation v Carey* [2021] NZHC 748.

resulted in a cost award to Mr Soulsby of $3,048. Judge McGuire acknowledged Ms Becroft's submission relating to obtaining further evidence by way of an affidavit from Mr Soulsby's accountant and a report from occupational specialist Dr Burgess. Judge McGuire found that the allocation of one day to enable these steps to be taken was reasonable.

[7] Judge McGuire also noted that the difficulties that Mr Robinson had raised, in terms of the post-decision phase regarding the Corporation's implementation of the decision, were outside the parameters of costs provided for under the District Court Act and Rules. Accordingly, Judge McGuire noted that he had no jurisdiction in regard to them.

Relevant law

[8] Section 162(1) of the Accident Compensation Act 2001 (the Act) provides:

> A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with leave of the District Court, appeal to the High Court.

[9] In *O'Neill*,[4] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:
>
> (i) The issue must arise squarely from "the decision" challenged: ... Leave cannot for instance properly be granted in respect of *obiter* comment in a judgment …;
>
> (ii) The contended point of law must be *"capable of bona fide and serious argument"* to qualify for the grant of leave …;
>
> (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed …;
>
> (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law …;
>
> (v) A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision …;

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4 *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

> (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law … .
>
> [25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law … .

Submissions for Mr Soulsby

[10] Mr Robinson submits that *Carey* failed to address properly and/or decide issues of law with regard to section 3 of the Accident Compensation Act 2001. Mr Robinson argues that to leave a claimant out of pocket at the conclusion of the appeal process would be antithetical to the purpose of the Act, set out in section 3, which is "to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs) …".

[11] Mr Robinson submits that Judge McGuire's decision sets a precedent that all non-lawyer advocates will ever receive is 50 % of the base rate, and be held to have the same level of experience and understanding in this area of the law as a one-off lay person with no previous knowledge of the law in this area.

[12] Mr Robinson submits that costs awards need to reduce the financial benefit gained by the Corporation in making errant decisions, and balance the scales of justice that to date have been heavily weighted in the Corporation's direction with its unlimited access to funds and specialised lawyers.

Discussion

[13] This Court acknowledges the above submissions of Mr Robinson. However, the Court notes the following relevant considerations.

[14] First, the Accident Compensation Act 2001 does not make provision for the method of calculation of costs on appeal. Section 3 of the Act, as quoted by Mr Robinson, is devoid of any reference to the issue of costs. In the absence of

legislative provision, the Court is not in a position to implement a costs regime along the lines suggested by Mr Robinson. In *Dickson-Johansen*,[5] Judge Powell stated:

> [15] … the Court is not only ill suited to determining what might be reasonable costs in a particular instance having regard to the economics of private legal practice, but any such attempt would impose a significant burden on judicial resources should every decision on costs require the careful consideration of this Court.

[15] Second, the judgment of the High Court in *Carey* is binding on the District Court, since the High Court is a superior court in New Zealand's judicial hierarchy. Judge McGuire therefore appropriately framed his judgment on costs in terms of the High Court judgment.

[16] Third, Judge McGuire indicated in his judgment that he was alive to the exercise of discretion allowed by *Carey*. However, Judge McGuire determined that there was no justification in the present case for allowing greater costs than the general guideline in *Carey* of 50% of the daily lawyer rate based on category 1 of the District Court Rules. Judge McGuire noted that he had found in favour of Mr Soulsby in the substantive decision for reasons other than those submitted by Mr Soulsby's advocate. His Honour added that the issues decided in *Carey* were in fact more complex than the sole issue determined in Mr Soulsby's case. As the Judge who decided on the substantive case, Judge McGuire was ideally placed to make this assessment on costs, and it was open for him to come to the conclusion that he did.

The Decision

[17] In light of the above considerations, the Court finds that Mr Soulsby has not established sufficient grounds, as a matter of law, to sustain his application for leave to appeal, which is accordingly dismissed. Mr Soulsby has not established that Judge McGuire made an error of law capable of *bona fide* and serious argument. Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources. This Court is not satisfied as to the wider importance of any contended point of law.

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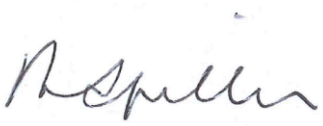
5 *Dickson-Johansen v Accident Compensation Corporation* [2018] NZACC 36.

[18] There is no issue as to costs.



Judge P R Spiller,
District Court Judge

Solicitors: Medico Law for the Respondent