IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 140 **ACR 073/21**

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

Hearing: 15 July 2022
Held at: Hamilton/Kirikiriroa

Appearances: K Koloni for the Appellant
P McBride for the Accident Compensation Corporation

Judgment: 20 July 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for costs - s 148, Accident Compensation Act 2001]

Introduction

[1] These are appeals from:

(1) the decision of the Corporation on 28 October 2020 awarding costs following the resolution of a series of review applications; and

(2) the decision of a Reviewer dated 24 March 2021 dismissing a series of review applications and making a limited award of costs.

Background

[2] On 31 March 2020, the Corporation referred a Training for Independence ("TFI") programme for Ms Beauchamp to provider, Geneva Healthcare Ltd.

[3] On 24 April 2020, Social Worker, Ms Karen Maher, completed a TFI report to the Corporation, with extensive information provided by Ms Beauchamp.

[4] On 1 May 2020, the Corporation approved the TFI programme, as agreed between Ms Beauchamp and Ms Maher, and it was implemented.

[5] On 21 May 2020, the Corporation arranged for Occupational Therapist, Mr Greg Dodunski, to undertake a social rehabilitation needs assessment ("SRNA") of Ms Beauchamp. On 24 May 2020, the SRNA report recommended that the Corporation consider some equipment/aids and appliances, including an electric lift-out chair and an electric bed.

[6] On 1 October 2020, the Corporation received 12 separate review application from Ms Beauchamp's advocate, Ms Koloni. These comprised of complaints about the Corporation unreasonable delay providing the TFI programme and a number of entitlements (equipment items) identified in the SRNA report. The Corporation was asked to make decisions on the programme, and on the items and assessments referred to in the SRNA report.

[7] On 8 October 2020, the Corporation wrote to Ms Beauchamp advising that it had approved a number of the equipment items sought. However, the Corporation advised that it was unable, at that point, to approve the electric adjustable bed and the electric lift-out chair and was awaiting medical input about Ms Beauchamp's situation before completing an assessment regarding these items. Ms Koloni then withdrew nine of the delay review applications, leaving active applications about the alleged TFI programme delay (claim 185), electric chair delay (claim 188), and electric bed delay (claim 190).[1]

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[1] For ease of reference, only the last three digits of the claim numbers are recorded in the above text.

[8] On 16 October 2020, two further review applications were lodged, referring to the Corporation's letter of 8 October 2020 not approving the electric bed (claim 182) and the electric chair (claim 183).

[9] On 28 October 2020, the Corporation issued a letter awarding $136.35 as costs for lodgement of a review and $30 for disbursements (totalling $166.35). The Corporation considered that it was reasonable to lodge a review application for the Corporation's delay in providing equipment and arranging treatment suggested in the SRNA. However, the Corporation considered that it was not necessary to lodge 12 separate unreasonable delay reviews in respect of the single SRNA report. That only one review application was necessary. The Corporation also considered the claim for costs for hearing preparation was not justified given the (12) review applications were withdrawn only six working days after they were lodged.

[10] On 20 November 2020, the Corporation wrote to Ms Koloni noting:

(a) the delay reviews regarding the chair and the bed (claims 188 and 190) had been addressed, given the Corporation's decision of 8 October 2020 on those matters;

(b) as had now been advised to Ms Beauchamp, the Corporation had been provided with additional information that supported funding for the bed and the chair (claims 182 and 183), and Ms Beauchamp had been asked to provide recommendations about the specific models that would meet her needs; and

(c) the delay review (claim 185) regarding the TFI programme was not reasonably brought, as this programme was already been in place when the review was lodged.

[11] Accordingly, the Corporation suggested withdrawal of the five review applications, and invited Ms Koloni to send any invoice for costs to be considered. However, Ms Koloni did not withdraw the remaining review applications.

[12] On 22 December 2020, the Corporation wrote to Ms Beauchamp approving the provision of an electric bed and an electric recliner chair. These items were supplied to Ms Beauchamp in late January 2021.

[13] On 3 March 2021, review proceedings were held. On 24 March 2021, the Reviewer addressed the five reviews brought, including the case law presented by Ms Koloni. The Reviewer dismissed all five reviews, and then addressed the question of whether costs should be awarded in relation to the reviews. The Reviewer made the following findings:

(a) The TFI programme delay review (claim 185) was unreasonably brought. This programme was already in place when the programme delay review was lodged, and Ms Beauchamp would have known about this from as early as April 2020 when she saw Ms Maher. Ms Beauchamp did not personally or by Ms Koloni engage in any effective communication with the Corporation about the programme prior to lodging the review. That approach resulted in unnecessary costs being incurred and unnecessary resources being engaged.

(b) There were potentially unreasonable delays by the Corporation in implementing the SRNA, regarding provision of the chair and the bed (claims 188 and 190). However, these delays ceased by 22 December 2020 when the Corporation issued decisions. From that point, there was no good reason to persist, and lodgement of multiple review applications (on near identical issues), rather than a single review application, was not reasonable. One set of costs totalling $204.53 was awarded, being for review lodgement ($136.35) and for attendance at a case management conference on 14 December 2020 ($68.18).

(c) The Corporation's letter of 8 October 2002, stating that it was unable at that time to approve an electric bed and an electric chair (claims 182 and 183), was not a decision amenable to review. This was because the Corporation's letter was advisory as it had not made up its mind. The application for review was dismissed as without jurisdiction and was also not reasonably brought.

(d) Disbursements claimed were $80 for each of the five review applications, said to be for office expenses, telephone, text and email expenses. Only one review application was reasonably brought, this should have been withdrawn approximately 11 weeks after it was lodged, and instead was not withdrawn in the 10 weeks before the review hearing. There is an increasingly paperless society when costs incurred for telephone usage, text messages and emails should be reducing. An amount of $40 was awarded.

[14] On 14 April 2021, a Notice of Appeal was lodged against the decision concerning costs and disbursements.

Relevant law

[15] Section 6 of the Accident Compensation Act 2001 ("the Act') provides:

> "decision"" or "Corporation's decision"" includes all or any of the following decisions by the Corporation:
>
> (a) a decision whether or not a claimant has cover: …
>
> (c) a decision whether or not the Corporation will provide any entitlements to a claimant:
>
> (d) a decision about which entitlements the Corporation will provide to a claimant: …

[16] Section 148 of the Act provides:

> (1) The Corporation is responsible for meeting all the costs incurred by a reviewer in conducting a review.
>
> (2) Whether or not there is a hearing, the reviewer—
>
> (a) must award the applicant costs and expenses, if the reviewer makes a review decision fully or partly in favour of the applicant:
>
> (b) may award the applicant costs and expenses, if the reviewer does not make a review decision in favour of the applicant but considers that the applicant acted reasonably in applying for the review:
>
> (c) may award any other person costs and expenses, if the reviewer makes a review decision in favour of the person.
>
> (3) If a review application is made and the Corporation revises its decision fully or partly in favour of the applicant for review before a review is heard, whether before or after a reviewer is appointed and whether or not a review hearing has been scheduled, the Corporation must award costs

> and expenses on the same basis as a reviewer would under subsection (2)(a).
>
> (4) The award of costs and expenses under this section must be in accordance with regulations made for the purpose.

[17] Schedule 1 of the Accident Compensation (Review Costs and Appeals) Regulations 2002 (as amended) provides a scale of costs and expenses on review. Costs can be awarded for preparing and lodging an application for review; relevant and necessary reports by registered specialists and persons with a recognised qualification to express a competent view on a matter in issue; and other expenses reasonably incurred associated with a hearing, such as transport to a hearing, time off work for an applicant, and disbursements such as photocopying.

[18] In *Cruickshank*,[2] Judge Beattie stated:

> [11] Section 6 sets out seven instances where decisions made by the Corporation are considered to be reviewable decisions, and although these definitions are not meant to be exhaustive, it is clear from the various definitions that it is only decisions which affect a claimant's entitlement or cover which come within the category or reviewable decisions.
>
> [12] In this present case the advice contained in the respondent's letter that it was contending that it had made an overpayment to the appellant and that it was intending to recover that overpayment, was clearly made within the context of the fraud prosecution which it had commenced and where it was giving particulars of the amount of fraud which was alleged had been committed. …
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> [15] The letter in question, I find, was simply advisory of the position which the respondent was taking in the context of the prosecution for fraudulent acts on the appellant's behalf in relation to his receipt of weekly compensation.

[19] In *Hawea*,[3] Justice Gendall stated:

> [18] To make a decision is to make up one's mind, to make a judgement, to come to a conclusion or resolution. Only when a decision has been made can there be a right of review and if no right of review exists then s133(5) has no application. …The substance has to be analysed.

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2 *Cruickshank v Accident Compensation Corporation* [2008] NZACC 271.
3 *Hawea v Accident Compensation Corporation* [2004] NZAR 673.

[20] In *McLeod*,[4] Judge Cadenhead stated:

> [44] The scale of costs and expenses on review specifically provides in respect of each item, a level of maximum award. There would be no purpose in providing for a maximum award if the intention of the legislature was to provide that the specified sum be awarded in any and every case. In other words, the existence of a maximum figure indicates that even where costs and expenses are found to have been reasonably necessary or reasonably incurred (as the case may be) that a reviewer or the Corporation is thereby bound to meet payment of them in full up to that maximum sum.
>
> [45] In addition, the fact that clause 4 of the 2002 regulations specifically records (at subparagraph 2(a)) that the amount of an award of costs and expenses must "not exceed the amount specified ..." reinforces the fact that the prescribed figure is merely a maximum, not a set figure which must in any case be awarded, thereby purporting the interpretation of the regulations to the affect that the extent of any award, up to the maximum level, is a matter for the discretion of a review officer or the Corporation as the case may be.
>
> [46] The provisions of s 148 are clear that such a claimant is entitled to costs and expenses in accordance with the regulations. Recognition for that principle does not, however, dictate that in any case the level of costs and expenses awarded by the respondent or a reviewer must inevitably be the maximum permissible sum.

[21] In *Russell v Taxation Review Authority*,[5] Fisher J stated:

> [27] In my view an expense will be separately recoverable as a disbursement under item 11 of the Third Schedule if: (i) it is not already subsumed within the compensation allowed for professional time; (ii) it was specific to the conduct of the particular proceedings; (iii) it was necessary in the sense that failure to incur the expense would have prejudiced the proper conduct of the proceedings; and (iv) the rate at which it was charged was reasonable.

[22] In *Kacem v Bashir*,[6] Tipping J stated in the Supreme Court:

> [32] … a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

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4 *McLeod v Accident Compensation Corporation* [2004] NZACC 388, followed in *Woolf v Accident Compensation Corporation* [2018] NZACC 55, at [32].

5 *Russell v Taxation Review Authority* (2000) 14 PRNZ 515, followed in *Campbell v Accident Compensation Corporation* [2013] NZACC 197 at [26].

6 *Kacem v Bashir* [2010] NZSC 112; [2011] 2 NZLR 1.

Discussion

The Corporation's decision of 28 October 2020

[23] On 1 October 2020, the Corporation received 12 separate review applications from Ms Beauchamp's advocate, Ms Koloni. The applications were made on the basis of "failure to issue decisions" following the SRNA report of 24 May 2020. On 8 October 2020, the Corporation's issued a substantive decision on Ms Beauchamp's matters. A week later, nine of the review applications were withdrawn. Ms Koloni requested costs in respect of 12 review applications lodged. On 28 October 2020, the Corporation awarded Ms Beauchamp costs totalling $166.35.

[24] The Corporation, in its costs decision, purported to act in terms of section 148(3) of the Act (see below). The Corporation considered that it was reasonable to lodge a review application for the Corporation's delay in providing equipment and arranging treatment referrals in the SRNA to Ms Beauchamp. However, the Corporation considered that it was necessary for only one review application to have been made in respect of the single SRNA report. The Corporation also noted that nine review applications were withdrawn only six working days after being lodged, and so costs for hearing preparation were not justified. The Corporation awarded costs for the lodgement of one review and disbursements.

[25] Ms Koloni submits the Corporation used flawed reasoning to disallow regulatory costs once decisions had been made in Ms Beauchamp's favour. This decision amounts to bad faith conduct, contrary to the partnership of utmost good faith and honesty in the rehabilitation process, and the costs involved are smaller sums than the time and cost now taken to argue over them. She submits there is a pattern of behaviour in relation to costs which is designed to punish claimants.

[26] In terms of section 148(3) of the Act, if a review application is made and the Corporation revises its decision fully or partly in favour of an applicant before a review is heard, the Corporation must award costs and expenses on the same basis as a reviewer would where he or she makes a decision fully or partly in favour of the applicant. It follows that this provision operates only where the Corporation has previously made a decision which is then revised in favour of the applicant before a

review hearing. A "decision" has been defined in the High Court as "mak[ing] up one's mind, to make a judgement, to come to a conclusion or resolution".[7]

[27] In Ms Beauchamp's case, the basis on which her review applications were made was the *failure* to issue decisions, thus giving rise to the complaint of unreasonable *delay* in implementing a SRNA report issued over four months previously. The decision of the Corporation of 8 October 2020, in relation to matters arising from the SRNA report, was a new decision and not a revised one. It was only at this point that the Corporation made up its mind, made a judgement, and came to a conclusion or resolution. This Court therefore finds that the Corporation did not have jurisdiction to make the award of costs in terms of section 148(3) of the Act, and dismisses the appeal on this basis.[8]

[28] For completeness, the Court also notes that, even if the Corporation had jurisdiction to award costs, its decision as to the *amount* of costs which it awarded was a discretionary one. The criteria for a successful appeal regarding the exercise of discretion are stricter than in the case of a general appeal. The criteria are:

(1) error of law or principle;

(2) taking account of irrelevant considerations;

(3) failing to take account of a relevant consideration; or

(4) the decision is plainly wrong.[9]

[29] This Court, on assessment of the reasoning and decision of the Corporation as to quantum of costs, does not discern that any of these criteria have been met.

The Reviewer's decision of 24 March 2021

[30] On 24 March 2021, the Reviewer dismissed a series of review applications and made a limited award of costs.

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7 See *Hawea*, n3, at [18].

8 Note, section 161(1) of the Act provides that this Court must determine an appeal by dismissing the appeal, or by modifying or quashing the review decision. This section does not provide for the modification or quashing of the Corporation's decision.

9 See *Kacem v Bashir,* n6, at [32].

[31] Ms Koloni submits as follows. The Reviewer erred in fact and law by misapplying the plain interpretation of section 141(a) without regard to section 148(3) of the Act. The Reviewer had no jurisdiction to award costs once issues had resolved in favour of the claimant, and new decisions were issued just prior to the case conference in December 2020, well prior to the hearing on 3 March 2021. Even if the Reviewer did have jurisdiction to award costs, his calculations were unfair, unreasonable and illogical. The fact that entitlements outlined in the social rehabilitation needs assessment were all eventually provided to Ms Beauchamp is testimony to the fact that all the review applications were necessary and that there were unreasonable delays. Ms Beauchamp's case is a complex one, and she should not be disadvantaged when it comes to the award of costs, as per the principle of equity within a partnership of utmost good faith.

[32] This Court notes that, in terms of section 141(1) of the Act, a Reviewer must hold a hearing unless the applicant withdraws the review application, or unless the applicant, the Corporation, and all persons who would be entitled to be present and heard at the hearing, agree not to have a hearing. In terms of section 148(2)(b), the Reviewer may award the applicant costs and expenses if the Reviewer does not make a review decision in favour of the applicant but considers that the applicant acted reasonably in applying for the review. In this circumstance, the Reviewer's decision as to costs is a discretionary one. As noted above, the criteria for a successful appeal regarding the exercise of discretion are stricter than in the case of a general appeal. \

[33] The criteria for appeals regarding the exercise of discretion are:

(1) error of law or principle;

(2) taking account of irrelevant considerations;

(3) failing to take account of a relevant consideration; or

(4) the decision is plainly wrong

[34] In Ms Beauchamp's case, the Reviewer was required to hold a hearing because Ms Beauchamp had not withdrawn the remaining five review applications that she had lodged, and she and the Corporation had not agreed to not have a hearing. The Reviewer was required to make decisions regarding these review applications, and

the Reviewer dismissed each of them. The Reviewer then proceeded to exercise his discretion as to whether to award Ms Beauchamp costs and expenses if he considered that she had acted reasonably in applying for the reviews.

[35] This Court has analysed the decisions as to costs and disbursements made in relation to the five review applications before the Reviewer (see above paragraph [13]). The Court finds that the strict criteria for a successful appeal (noted above) have not been established in relation to the Reviewer's decisions as to the alleged TFI programme delay review (claim 185), the delayed provision of the chair and the bed (claims 188 and 190), and the disbursements claimed. The Reviewer was entitled to conclude, on the evidence and for the reasons provided, that the TFI programme delay review was unreasonably brought, that only limited costs were merited in relation to one review application regarding provision of the chair and the bed, and that only limited disbursements should be awarded.

[36] In relation to the Reviewer's decision regarding the Corporation's letter of 8 October 2020, stating that it was unable at that time to approve an electric bed and an electric chair (claims 182 and 183), this Court concurs with the Reviewer that these applications for review were not reasonably brought, but the Court makes this finding for different reasons. The Reviewer found that the Corporation's letter was not a decision amenable to review as it was advisory, and the Corporation had not made up its mind.

[37] Section 6 of the Act provides that a "decision" includes a decision (as in Ms Beauchamp's case) about which entitlements the Corporation will provide to a claimant. As noted above (paragraph [26]), "decision" has been defined as making up one's mind, making a judgement, coming to a conclusion or resolution. In its letter of 8 October 2020, the Corporation expressly referred to its communication as a decision. The letter stated that the Corporation was unable to approve an electric adjustable bed and an electric life-out chair at that time, and proceeded to explain why this outcome had been reached. Both the form and the substance of the letter showed that the Corporation had, at that stage, made up its mind, formed a judgment and come to a conclusion about the two entitlements in question.

[38] However, this Court notes the following:

- The Corporation advised in its decision of 8 October 2020 that Ms Beauchamp would soon be referred for a pain management assessment and programme, and would also be attending a medical case review once the Corporation had received all of her relevant medical records from her GP and the district health board. The Corporation noted that these assessments would provide up-to-date clinical information about her situation. The Corporation advised that, once this up-to-date information had been received, it would complete an assessment in respect to the items requested. Despite this advice, on 16 October 2020, that is, only eight days after the Corporation's letter of 8 October 2022, Ms Beauchamp lodged two reviews (claims 182 and 183) against the Corporation's decision of that date.

- On 20 November 2020, that is, six weeks after the Corporation's letter of 8 October 2020, the Corporation advised Ms Beauchamp that it had received the required clinical information, approved the equipment requested, and sought clarification from a suitably qualified assessor of what specific models of equipment would meet Ms Beauchamp's injury-related needs. The Corporation suggested that the review claims 182 and 183 be withdrawn as the disputed equipment would be provided once the assessor had advised the specific models needed. However, the review applications were not withdrawn.

- On 22 December 2020, the Corporation wrote to Ms Beauchamp advising that it had approved the provision of an electric bed and an electric recliner chair. These items were supplied to Ms Beauchamp in late January 2021. Nevertheless, the review applications were not withdrawn through to the review hearing on 3 March 2021.

[39] This Court finds that, in view of the Corporation's statutory responsibilities, it was entitled to adopt the course of action which it outlined in its letter of 8 October 2020. The ensuing early lodging of the review applications 182 and 183 appears premature, and the continuance of the applications beyond the Corporation's advice

of 20 November 2020 is highly questionable. There was certainly no good reason for Ms Beauchamp and her advocate not to withdraw the review applications after the Corporation's advice of 22 December 2020, through to the review hearing on 3 March 2021. Further, the Court concurs in the view of the Reviewer that the lodgement of multiple reviews (on near identical issues), rather than a single review application, was not reasonable.

Conclusion

[40] In light of the above considerations, the Court finds that Ms Beauchamp has not established that she is entitled to further costs than those awarded in the decision of the Corporation on 28 October 2020, and in the decision of the Reviewer dated 24 March 2021.

[41] This appeal is therefore dismissed.

[42] I make no order as to costs relating to this appeal.

P R Spiller
District Court Judge

Solicitors for the Respondent: McBride Davenport James