IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 159 ACR 276/21

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

Hearing: 27 July 2022

Heard at: Auckland/Tāmaki Makaurau

Appearances: Appellant in person via AVL
Mr I Hunt for the respondent

Judgment: 16 August 2022

RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Section 6 – full time employment; Clause 42 of Schedule 1 Accident Compensation Act 2001]

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[1] This is an appeal against the decision of the respondent dated 10 April 2015 in which the respondent determined that the appellant was entitled to weekly compensation of $466.90 per week in the short term and $450.50 per week in the long term.

Background

[2] In September 2014, the appellant, a single mother of two children, was employed full time as a childcare worker by G Williams Day Care Centre Limited. At the time she was 34 years old.

[3] On 5 September 2014, she entered Dunedin Hospital and underwent elective surgery to correct her left foot.

[4] Regrettably, the surgery did not go as planned and she suffered a digital nerve injury to her left foot and secondary pain syndrome. She experienced pain, swelling and altered sensation of the toes of her left foot. She sought and received treatment for this injury on 18 September 2014.

[5] The claim form at the time noted "pain and swelling affecting her ability to wear shoes and mobilise and that caused significant time off work."

[6] ACC cover was eventually granted for complex regional pain syndrome. Very sadly her left leg had to be amputated below the knee.

[7] Before going to hospital for elective surgery, by agreement with her employer, she ceased employment on the weekend of 1 September 2014 with the understanding she would return to work after 8 to 10 weeks, depending on the length of her recovery from surgery. This was in part based on advice from her surgeon that he did not consider she would be fit for work for 12 weeks post-surgery.

[8] In the treatment injury claim form completed by orthopaedic surgeon Mr Burks at Dunedin hospital, the date on which the appellant first sought or received treatment for her injury is shown as 18 September 2014. The evidence from the appellant is that was the date she presented to hospital "with my foot so swollen inside my cast that the skin had been rubbed off my surgical wounds".

[9] She also says:

> Discovery of further issues such as my metatarsals not being aligned correctly and requiring further surgery would not occur until late, even though that is a

> clear indication of the surgery in itself creating further injury. The resulting nerve damage to my leg was to the extent that the affected limb was amputated in October 2018.

[10] By way of further background, the appellant told the Court:

> …Prior to my treatment injury, I was a full-time teacher. I worked hard to gain my bachelors degree by studying with an extramural tertiary provider whilst I was a single mother and working full time. I did this to provide a good future for my children and myself. I scheduled the surgery for after I received my degree so I could focus on recovery prior to returning to work and beginning my registration process. The treatment injury was obviously not part of my plan, as I understand injuries and accidents are not planned by anyone. The most difficult part regarding some of the repercussions of my injury is the behaviour of ACC. My future plans were torn away and I was suddenly placed in a situation where I cannot find an escape and appropriate support I needed to support the recovery that I desperately want. The situation ACC has pushed me into is one that is of enormous impact to my pride and creates so much unnecessary stress that pushing forward has begun to feel like an impossible task. Simple things such as having a heater going in the cold are not viable as I cannot afford it, this is even with the difficulties with temperature regulation from the nerve damage and increase in pain from temperature changes. This is a situation where I have lost control over my own life and the decisions I make as affording basic essentials is a struggle and the situation compounds with late fees, fines and penalties for not being able to afford standard living costs. Not extravagant living costs but basic costs. I was previously independent and would desperately like to return to an independent life where I am in control, however this is not a situation where I can decide I don't like disability so I will not be disabled any more.

[11] Ms Broderick said that prior to her injury, while a full-time teacher, she studied hard to get her bachelors' degree and scheduled the surgery for after her degree was completed.

[12] Her injury has resulted in multiple surgeries. As well, she has had to deal with the disability and the sudden shift in financial status. Prior to this she said:

> We were comfortable with no concerns about power being disconnected.

[13] She says that, for instance, her medical appointments are not fully covered by ACC and she has had to pay a surcharge at her doctor's surgery.

[14] She says that she now has to request assistance from charities.

[15] She spoke of the inability to return to a purposeful, functional life which has forced her into dependence. This has had a demoralising effect on her and affected

her physical state. She said she is unable to obtain a winter energy supplement from the social development ministry as they sent her back to ACC.

[16] She said she would like to return to work and she has requested assistance from ACC for retraining but has been denied.

[17] She explains that being now an amputee she can no longer work as a pre-schoolteacher. She has requested funding for transport to Palmerston North where she wished to study to upgrade her degree to be able to teach older students. She produced her correspondence with ACC in this regard which sets out that she was seeking social rehabilitation to regain vocational independence as provided for in s 80 of the Act. This too was turned down by ACC.

[18] The appellant wept frequently throughout her submissions.

Respondent's submissions

[19] Mr Hunt acknowledged that it would be a hard hearted person not to be moved by what Ms Broderick had said.

[20] However, in his written submissions Mr Hunt says this:

> [42] In terms of the full time minimum rate, this had to be determined in terms of the application of clause 42. To qualify under this clause, the appellant needed to have been in full-time employment immediately before her incapacity, that term being defined in s 6 as
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> …in relation to an earner, means employment in the four weeks immediately before his or her incapacity commence, for either –
>
> - An average of at least 30 hours per week;

[21] Mr Hunt refers to *Verma*[1] where Judge Beattie said:

> The practical effect of those decisions is that the claimant must have been in employment at the time of becoming incapacitated. This would mean that if a claimant was "between jobs" when he/she had the misfortune to become incapacitated, then the fact that the claimant had every expectation of obtaining further employment would not assist in giving eligibility.

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1 *Verma v Accident Compensation Corporation* [2004] NZACC 208, at [9].

[22] Mr Hunt acknowledges that it was certainly the case that the appellant had been working 30 hours a week when she was in regular employment up to 1 September 2014 when she commenced her leave to undergo her operation.

[23] However, because the deemed date of her injury is 18 September 2014, she was not at that stage working 30 hours per week and thus is not entitled to qualify for an upgrade to the full-time minimum rate provided for by operation of clause 42.

[24] Mr Hunt acknowledged that the outcome may appear unfair or harsh however he submits that the law as it stands has to be applied.

Appellant's reply

[25] Ms Broderick said that she cannot wait for Parliament to change the rate of compensation to make it fair. She has her cross to bear now. She reiterated that all she is seeking is a fair and reasonable determination. She asked the question again why her compensation is considerably lower than someone receiving the unemployment benefit. She said:

> I literally just want to get by. I just want to financially survive without unnecessary difficulties. I just want to afford basic standard of living and not to be dependent.
>
> …
>
> If there is an area of legislation that said if you are on medical leave you don't qualify, I would understand.

[26] She said she hoped that fairness would prevail so she can retain her independence and rebuild her life.

[27] Given the distress of the appellant, Mr Hunt reiterated that she should be able to access multiple entitlements and that any adverse decisions in respect of these would be reviewable.

[28] The appellant responded that day to day living was all she could cope with and that is why she has not taken things any further in respect of her retaining. The complaints process and the review process took a lot of energy.

[29] She said her goal remained to rebuild her life and to take care of her rehabilitation.

Decision

[30] This appeal falls to be decided on the correct interpretation of clause 42 of schedule 1 of the Accident Compensation Act.

[31] Clause 42(2) deals with the period after an initial five week period (following the injury) has lapsed. Clause 42(2) provides:

> For the purpose of calculating weekly compensation for loss of earnings payable to the claimant for any period after the 5-week period, the claimant is deemed to have had, immediately before his or her incapacity commenced, the minimum weekly earnings as determined under subclause (3).

[32] Subclause (3) provides for the calculation of minimum weekly earning to be the greater of the minimum weekly adult rate prescribed under s 4 of the Minimum Wage Act 1983 or by reference to the Social Security Act 1964 (the latter not being applicable in this case).

[33] Subsection 7 goes on to provide that the applicable formula for calculating the minimum weekly adult rate will not apply unless the Corporation is satisfied that but for the incapacity, the claimant would have been an earner in full time employment during that period.

[34] As noted by Judge Beattie *Verma* (see para [21] above) "the claimant must have been in employment at the time of becoming incapacitated".

[35] The fact situation before Judge Beattie in *Verma*, was that the appellant had her last day of work at her employment on 22 January 2003. She and her husband were then relocating to live in Hamilton where her husband had obtained better employment.

[36] On 28 January 2003, the appellant injured her hip while walking and was certified unfit for work for 31 days. She sought the payment of weekly compensation during this period.

[37] As at the date of accident, she was not in employment but had made contact with the YMCA and that organisation had given her an expectation that she might obtain some child care employment on a casual basis and that she would be placed on a list of people similarly so inclined for such work if and when it became available.

[38] Her situation therefore is fundamentally different from that of Ms Broderick in that unpaid leave accepted she was employed by her employer G Williams Day Care Centre Limited at the time of her incapacity deemed to be 18 September 2014.

[39] To say she was not in permanent employment immediately before her incapacity commenced is factually and legally incorrect and offends common sense. She was employed in the month leading up to her operation and like any permanent employee her intention and that of her employer was for her to continue to be employed in the same employment after her operation. So to reach the opposite conclusion because she sensibly gave herself the best chance of full recovery by taking extra time off to recover, not only is contrary to common sense but it is also contrary to the primary focus of the legislation set out in s 6 namely:

> Rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence and participation.

[40] Here, the outcome thus far achieved is the absolute antithesis of s 6 with the Court being told, in addition, that the appellant currently receives less weekly compensation from ACC than she would if she was receiving an unemployment benefit.

[41] In written submissions filed and served prior to the hearing, Ms Broderick said:

> As advised by MSD, a beneficiary would receive $441 (net) in my situation and I receive $416 (net) via compensation.

[42] The respondent has not challenged this statement. I accept it as correct.

[43] The respondent's position invites the rhetorical question:

> How can it be said that the appellant was not permanent employment immediately before the accident when both employer and employee agreed to the time off that the appellant would take for the purpose of her medical procedure, with the undisputed position being that the appellant would then resume her employment?

[44] My finding that she was in permanent employment follows the requirements of sections 10 and 11 of the Legislation Act 2019 which provide:

> **10 How to ascertain the meaning of legislation**
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> (1) The meaning of legislation must be ascertained from its text and in the light of its purpose and its context.
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> (2) Subsection (1) applies whether or not the legislation's purpose is stated in the legislation.
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> (3) The text of legislation includes the indications provided in this legislation.
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> **11 Legislation applies to circumstances as they arise**
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> Legislation applies to circumstances as they arise.

[45] It therefore follows that the appeal is allowed and the appellant's weekly compensation from the time of her treatment injury in September 2014 is to be reassessed and she is to be fully compensated for the shortfall.

[46] Although outside the parameters of this appeal, it would be my hope that the respondent looks again at the issue of her entitlements to assist her to achieve vocation independence, again a fundamental plank of the purpose of the legislation. This would allow her to obtain the qualification she needs to teach children older than pre-schoolers, in other words, it would allow her to engage in work not ruled out by her injury. Such would be the step that in the case of the appellant would mean that a fundamental goal of the legislation of vocational independence would be achieved.

Judge C J McGuire
District Court Judge

Solicitors: Young Hunter, Christchurch