IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 177 **ACR 212/20**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL UNDER SECTION 162(1) OF THE ACT
BETWEEN	VIOLETA CALZADILLA Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Submissions:	J Opie for Ms Calzadilla S Kinsler and E Watt for the Respondent
Hearing:	On the papers
Judgment:	19 September 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 McGuire, delivered on 20 January 2022.[1] At issue in the appeal was whether Ms Calzadilla was vocationally independent in respect of four work types. The Court dismissed the appeal, for the reasons outlined below.

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[1] *Calzadilla v Accident Compensation Corporation* [2022] NZACC 7.

Background

[2] On 21 October 2017, Ms Calzadilla, working as a chef, fell and injured her left ankle. She was able to weight bear on it, but it remained sore and swollen on presentation to the emergency department on 24 October 2017. The impression was of a sprain with swelling and bruising related to dabigatran, her medication. An ACC claim for a sprain was lodged by the Hutt DHB. Cover was approved on 25 October 2017.

[3] Ms Calzadilla continued to work as a chef, but she experienced significant pain and sought further treatment. On 14 December 2017, she was certified unfit for work due to pain, swelling and inability to stand for long periods.

[4] On 20 December 2017, an x-ray was taken of Ms Calzadilla's left ankle. The radiologist's impression was of a probable Webber type B fracture of the distal fibula, with evidence of posterior malleolar injury and incongruity of the ankle mortice.

[5] On 22 December 2017 a CT scan was performed. The radiologist identified advanced osteoarthritis of the ankle joint with instability including lateral tallar shift, and fracture through the distal fibula and of the syndesmosis suggesting an unstable fracture.

[6] On 31 December 2017, Ms Calzadilla was certified unfit due to her inability to weight bear on her left leg. On 5 January 2017, she was certified unfit until 5 March 2018.

[7] On 5 January 2018, Mr Leslie, Surgeon, completed an assessment report and treatment plan seeking funding for surgery to treat Ms Calzadilla's left ankle. He noted that her fall had resulted in injury, a fracture, that had been misdiagnosed. He advised that it was likely the fracture had healed in an abnormal way and that surgery was required to correct that condition.

[8] The Corporation approved funding for surgery which took place on 17 January 2018.

[9] On 12 January 2018, a social rehabilitation needs assessment was undertaken. Assistance was recommended with shopping delivery, bathroom equipment, and a mobility scooter. The Corporation provided a manual wheelchair for short-term use and funded taxis. Assistance with housework was also to be provided.

[10] On 27 February 2018, a fracture clinic confirmed that Ms Calzadilla's fibula was healing well. A moon boot and gradual increase to full weightbearing were recommended.

[11] A fracture clinic note dated 10 April 2018 recorded that Ms Calzadilla "could walk unaided for up to two blocks before she gets pain". Physiotherapy was recommended.

[12] In May 2018, Ms Calzadilla commenced physiotherapy.

[13] A fracture clinic note of 29 May 2018 recorded that Ms Calzadilla was struggling with walking and could walk only 100 metres or so and could not stand for long periods. A CT scan revealed ankle arthritis as well as the healed fracture. It was queried whether the ongoing symptoms could be related to the screw. Continued physiotherapy was recommended.

[14] On 7 June 2018, an Initial Occupational Assessment was undertaken. It noted that Ms Calzadilla's work history included importing and exporting jewellery and crafts and also owning a retail business, a café/restaurant as well as an outlet for crafts and jewellery. Following this, Ms Calzadilla had moved into the hospitality sector, operating businesses, commercial kitchens, restaurants and cafes. She also worked as an interpreter. She was the owner and operator of a food manufacturing company, although the business had not been operating since the injury. She had a diploma in art and creativity, a diploma in adult education, a certificate in business management, a certificate in computers, and an associate degree in communications.

[15] The assessor considered that fourteen work types were deemed suitable. However, in respect of seven of the roles, which were teaching roles, the assessor was of the opinion that Ms Calzadilla would benefit from refreshing her computer skills. Her pre-injury earnings were recorded at $75,000.

[16] In June 2018, the Corporation reminded Ms Calzadilla of her obligations in respect of attending physiotherapy appointments as part of her rehabilitation.

[17] On 12 June 2018, Ms Calzadilla commenced a back to work programme.

[18] On 26 June 2018, it was noted that Ms Calzadilla demonstrated near full range of motion of the ankle without pain. She requested a review regarding the removal of the metalware used by the surgeon to stabilise the fracture.

[19] On 8 July 2018, an Initial Medical Assessment was undertaken by Dr Hartshorn. Under the heading "Examination", he noted:

> Ms Calzadilla mobilised with a reduced stance phase on the left side. She had difficulty with toe raise and heel walk. She had difficulty with a deep squat due to stiffness and pain. There was a decreased range of motion at the left ankle. Resisted movements were performed with normal power without exacerbating pain. There was some slight tenderness to palpation both medially and laterally to the left ankle. There was no well defined sensory change.

[20] Dr Hartshorn also noted that there was a significant delay in diagnosis which resulted in a fairly prolonged period of weightbearing through the incongruent ankle joint, "very likely resulting in a degree of articular cartilage disruption associated with the injury and subsequent diagnostic delay". He also noted that Ms Calzadilla continued to report functional limitation with respect to walking and weightbearing tolerance.

[21] As to rehabilitation, Dr Hartshorn considered it appropriate that Ms Calzadilla's exercise-based rehabilitation programme continue, hopefully to obtain some improvement in her range of motion and improvement in her lower limb strength. He also noted that there was a possibility that, with the nature of her injury, she might experience ongoing symptoms and functional limitation within the left

ankle, but that this would not be apparent until the rehabilitation programme had well progressed.

[22] Dr Hartshorn noted some issues in respect of heavy alcohol intake which might have a negative impact upon Ms Calzadilla's left ankle pain and advised that cessation of heavy alcohol intake would also be seen as a positive intervention with respect to her ankle rehabilitation. Dr Hartshorn also noted:

> Looking ahead Ms Calzadilla has a relatively high likelihood of some degree of ongoing functional limitation when considering walking and weightbearing and standing tolerance and some difficulties also with respect to mobilising over uneven surfaces. She may also have some ongoing limitation in respect of heavy lifting, heavy pulling, or heavy carrying activity.
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> Looking ahead Ms Calzadilla is best directed into work activity which has a non weightbearing component as well as avoiding requirements for heavy lifting or negotiation over rough or uneven surfaces.

[23] Ten work types were deemed to be sustainable, including the two teacher roles.

[24] On 31 July and 6 August 2018, the Corporation issued warnings about Ms Calzadilla's compliance with her physiotherapy, and advised that failure to attend appointments without reasonable explanation would result in the Corporation stopping weekly compensation.

[25] On 8 September 2018, Ms Calzadilla was reviewed again in the fracture clinic, and the potential for removal of the screw was discussed. It was felt conservative rehabilitation should continue instead, as removal might not relieve her symptoms.

[26] On 23 October 2018, a computer training needs assessment was undertaken, and computer training was completed on 20 December 2018. Eleven and a half hours of training was provided. Ms Calzadilla was deemed competent in the office and to have the skills needed to complete the work types identified in the Initial Medical Assessment.

[27] On 8 January 2019, an Individual Rehabilitation Plan was signed. On 25 January 2019, the back to work programme was completed, with an amended report dated 30 January 2019. The programme involved computer training, sales and

service training, pre-employment preparation, OT input and functional rehabilitation. Feedback on Ms Calzadilla's sales and service training noted that she was unable to focus on the training despite having a good understanding of the sales process. She appeared to be in pain during the training and it finished early without a completion certificate. Whether the training was to be repeated was to be determined. Ms Calzadilla reported functional improvements in her walking and exercise tolerance. She continued to struggle with stairs, and it was unclear if she had the capacity to drive. On testing, Ms Calzadilla was found to have a high risk of persistent pain, but it was not felt that she required further physiotherapy input. She was deemed vocationally ready for the work types identified in the Initial Medical Assessment as likely to be sustainable.

[28] On 3 May 2019, the Corporation determined that Ms Calzadilla was ready to commence the Vocational Independence process.

[29] On 31 May 2019, Ms Calzadilla completed the client questionnaire. She noted her ankle pain and that she was awaiting an x-ray.

[30] On 18 July 2019 a Vocational Independence Occupational Assessment was undertaken by Mr Ren Davies. Thirteen work types were deemed suitable with no vocational barriers.

[31] On 2 September 2019, the Vocational Independence Medical Assessment was undertaken by Dr Hartshorn. Under the heading "current situation", Dr Hartshorn noted Ms Calzadilla describing ongoing discomfort about her left ankle and foot. Ms Calzadilla described a tendency for swelling towards the end of the day and more difficulty if mobilising on uneven ground. She was uncertain of her standing tolerance. She did not take regular analgesic medication. Her current activities included normal household chores. She was not performing any regular exercise. She stated she had gained 16 kilograms.

[32] Dr Hartshorn concluded that she had current capacity at 30 hours per week in six work types: receptionist general; hotel or motel receptionist; programme or

project administrator; teacher – private tuition; private tutors and teachers; and small business owner and/or manager.

[33] By letter dated 13 September 2019, Ms Calzadilla was declared vocationally independent in the above six work types.

[34] Subsequent to Ms Calzadilla's unsuccessful review of the Corporation's decision, her counsel obtained a report from Robyn Bailey, registered career practitioner, regarding the suitability of the identified work types.

[35] Ms Bailey found that all proposed work types were excluded either because they involved a significant drop in remuneration or, additionally, Ms Calzadilla did not have the relevant skills or experience. In the case of small business owner, Ms Bailey found that Ms Calzadilla had insufficient finances.

[36] In a further report dated 27 May 2021, the Corporation's occupational assessor, Mr Davies, provided a response to Ms Bailey's report. Mr Davies stood by his Vocational Independence Occupational Assessment of 18 July 2019.

[37] On 10 August 2021, Ms Bailey provided a further report in which she stood by her earlier conclusions that the occupational suggestions were not suitable for Ms Calzadilla.

Relevant law

[38] 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.

[39] In *O'Neill*,[2] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:

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

(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 …;

(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 … .

[40] Section 3 of the Act provides that:

The purpose of this Act 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), through— …

(c) ensuring that, where injuries occur, the Corporation's primary focus should be on 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; …

[41] Section 6(1) of the Act provides that:

vocational independence, in relation to a claimant, means the claimant's capacity, as determined under section 107, to engage in work—

(a) for which he or she is suited by reason of experience, education, or training, or any combination of those things; and

(b) for 30 hours or more a week.

[42] Clause 25(1A) of the Act provides that:

> In considering the suitability of the types of work [that the assessor identifies as suitable for the claimant], the occupational assessor may take into account, among other things, the claimant's earnings before the claimant's incapacity.

[43] In *Gordon*,[3] Judge Powell considered work types which were approximately 51.5% and 57% respectively of pre-incapacity remuneration to be entirely unsuitable having regard to the appellant's education, training and experience.

The Court's judgment of 20 January 2022

[44] Judge McGuire noted that the Corporation accepted that Ms Calzadilla was not vocationally independent in relation to the two teaching work types noted above, as she did not have the required qualifications; and that the role of small business owner and/or manager was narrowed to that of small business manager, given the capital requirements of owning a small business. Judge McGuire addressed the four remaining work types.

[45] In relation to the position of small business manager, Judge McGuire noted that Ms Calzadilla was a person with proven managerial skills both with her own businesses and twice since 2005 as kitchen manager for other employers and as a retail manager in 1995. His Honour found Ms Calzadilla vocationally independent in respect of the role of small business manager.

[46] In relation to the position of programme or project administrator, Judge McGuire had noted earlier in his judgment that Ms Calzadilla's pre-accident remuneration was close to $70,000 per annum, bearing in mind that she was working an excess of 40 hours per week. His Honour had observed that prior earning was a matter appropriate to take into account, particularly where there was a gross disparity between prior injury earnings and post injury earnings. However, His Honour had noted that prior earning was but one of the factors to be considered, and, as would often be the case after injury, it would take time for the claimant to develop the experience and skills in what often was a new field of employment that would result in a remuneration level comparable with that prior to the accident. His Honour had

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[3] *Gordon v Accident Compensation Corporation* [2015] NZACC 25, at [21].

added that, in many cases, on account of the severity of the accident, achieving earnings comparable to those prior to the accident would not be possible.

[47] Judge McGuire found that, given his earlier comments regarding the appellant's earnings in her pre-injury role, the income level of a programme or project administrator of between $55,000 and $62,000 per year was at an acceptable level that for the purposes of the ACC scheme. His Honour observed that the social contract underpinning the ACC scheme emphasised rehabilitation and renewed participation as a functional member of society with emphasis on independence and participation. In the case of the salary range for a programme or project administrator, His Honour found that the salary was broadly at least at 80% if not more of Ms Calzadilla's pre-incapacity income. In these circumstances therefore His Honour did not find income disparity as a decisive factor in rejecting this work role. Accordingly, he found this work role suitable.

[48] In relation to the positions of Receptionist General and Hotel or Motel Receptionist, Judge McGuire stated that, given the breadth of Ms Calzadilla's work experience, which spoke volumes of her adaptability to new environments, he had no doubt that she could undertake either receptionist role and do it well.

[49] Judge McGuire acknowledged that the salary disparity (of 51% of Ms Calzadilla's pre-injury income) was significant. However, His Honour noted the somewhat narrowed parameters of the receptionist role as compared with the business manager role or the project/programme administrator's role. His Honour thought that, given the nature of Ms Calzadilla's injury that had limited her mobility, such a role as receptionist might be better suited to her post-injury presentation. His Honour further observed that, at aged 60, many in the workforce were looking at transitioning to less demanding roles than those they formerly undertook.

[50] Judge McGuire stated that, while the role of receptionist would plainly not be the most preferred role on account of the reduced remuneration level, he was not persuaded that the roles should be excluded, effectively on account of salary level alone. His Honour considered that it may well be that, with Ms Calzadilla's post-injury presentation, such a role might be suitable although less than ideal. In this

regard His Honour noted to section 3 of the Act, which referred to restoring a claimant's health, independence and participation.

Ms Calzadilla's submissions

[51] Counsel for Ms Calzadilla submits that leave to appeal should be granted on the following questions of law:

(a) Having found that there was a significant disparity between Ms Calzadilla's pre-incapacity earnings and the salary range for the receptionist general and hotel or motel receptionist work types, did Judge McGuire err in law in deciding that these work types were suitable for Ms Calzadilla in terms of section 107 of the Act?

(b) In finding that the receptionist general and hotel or motel receptionist work types were suitable for Ms Calzadilla in terms of section 107 of the Act, did Judge McGuire err in law by taking into account that, according to His Honour: "at age 60 many in the workforce are looking at transitioning to less demanding roles than those they formerly undertook"?

(c) In finding that Ms Calzadilla was capable in terms of section 107 of the Act of engaging in the programme or project administrator work type, did Judge McGuire err in law because:

    (i) the finding was based on a flawed medical assessment?

    (ii) His Honour failed to take into account that the work detail sheet for this work type recorded that the work type required frequent standing and walking which Ms Calzadilla was not capable of doing?

(d) Did Judge McGuire err in law in finding that the programme or project administrator work type was suitable for Ms Calzadilla in terms of section 107 of the Act based on His Honour's finding that the work type had a salary range of $55,000-$62,000 per annum?

(e) In finding that the programme or project administrator work type was suitable for Ms Calzadilla in terms of section 107 of the Act, did Judge McGuire err in law by failing to take into account the occupational assessor's conclusion that Ms Calzadilla was suited for entry-level work in this work type?

(f) Did Judge McGuire err in law in finding that Ms Calzadilla was vocationally independent in terms of section 107 of the Act in the small business manager work type because:

(i) there was no evidence reasonably supporting the finding?

(ii) the finding was based on a flawed occupational assessment and/or a flawed medical assessment?

(iii) the finding was contrary to the medical evidence before the learned Judge?

(iv) the finding amounts to a finding that Ms Calzadilla was vocationally independent in a subset of the small business manager work type?

Discussion

[52] This Court finds as follows in relation to each of the work types assessed in Judge McGuire's judgment.

Receptionist General and Hotel or Motel Receptionist work types

[53] Judge McGuire's finding that the receptionist general and hotel or motel receptionist work types were suitable for Ms Calzadilla, bearing in mind that there was a significant disparity between her pre-incapacity earnings and the salary range for these work types, was a finding of fact and one reasonably made on the evidence. As noted above, disparity in relation to pre-incapacity earnings is one factor which, among other things, may be taken into account in the assessment. This Court notes the finding in the case of *Gordon*, cited above, but stresses that assessment of the significance of disparity in earnings is a finding of fact made in the context of each specific case. Judge McGuire took into account that, given the nature of

Ms Calzadilla's injury that had limited her mobility, a role as receptionist might be better suited to her post-injury presentation. His Honour also noted the reference in the Act to the importance of restoring a claimant's health, independence and participation.

[54] Judge McGuire's comment that "at age 60 many in the workforce are looking at transitioning to less demanding roles than those they formerly undertook" was a reasonable and relevant consideration, and does not amount to an error of law.

Programme or project administrator work type

[55] Judge McGuire's finding that the programme or project administrator work type was suitable for Ms Calzadilla bearing in mind that the work type had a salary range of $55,000-$62,000 per annum, was a finding of fact and one reasonably made on the evidence. Judge McGuire correctly noted that prior earning is but one of the factors to be considered, that the Act emphasises independence and participation of claimants, that the work type salary was broadly at least at 80% of Ms Calzadilla's pre-incapacity income, and therefore that income disparity was not a decisive factor in rejecting this work role.

[56] Judge McGuire's finding was not based on a flawed medical assessment, and the alleged failure to take certain matters into account (as noted above in paragraph [50]) does not amount to an error of law. Judge McGuire was entitled to adopt the salary range of $55,000-$62,000 per annum originally stated by the occupational assessor for the Programme or Project Administrator work type, based on information in the Careers NZ website.

Small business manager work type

[57] Judge McGuire's finding that Ms Calzadilla was vocationally independent in the small business manager work type was a finding of fact and one reasonably made on the evidence. Judge McGuire's finding was essentially based on the clear evidence that Ms Calzadilla was a person with proven managerial skills, both with her own businesses and twice since 2005 as kitchen manager for other employers and as a retail manager in 1995.

[58] There was evidence reasonably supporting Judge McGuire's finding, it was not based on flawed assessments or contrary medical evidence, and it did not amount to a finding that Ms Calzadilla was vocationally independent in a subset of the small business manager work type.

The Decision

[59] In light of the above considerations, the Court finds that Ms Calzadilla has not established sufficient grounds, as a matter of law, to sustain her application for leave to appeal, which is accordingly dismissed. Ms Calzadilla 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.

[60] There is no issue as to costs.

P R Spiller
District Court Judge