

Gary Richard Baigent
Applicant

**ACCIDENT COMPENSATION
CORPORATION**
Respondent

Before: D J Plunkett

Counsel for the Applicant: J Miller

Counsel for the Respondent: P McBride

Date of Decision: 31 October 2014

DECISION

INTRODUCTION

[1] This is an application by Gary Richard Baigent for leave to appeal to the High Court against the final decision of the Authority of 25 June 2014 (*Baigent v Accident Compensation Corporation* [2014] NZACA 15).

[2] Mr Baigent is a tetraplegic who requires 24-hour care. The Corporation has paid backdated attendant care, with the rate of payment based on the care being provided by a registered nurse. The present dispute between the parties concerns the appropriate rate of pay for such nurses. The Authority dismissed Mr Baigent's appeal on 25 June, so he now seeks leave to appeal to the High Court against the Authority's decision. The essential issue for the Authority on this application is whether Mr Baigent has shown that there is a question of law or of public importance or otherwise which ought to be submitted to the High Court.

BACKGROUND

[3] Mr Baigent suffers tetraplegia, as a result of a motor vehicle accident on 6 January 1991.

[4] The claim at issue before the Authority concerns funding for the care provided to Mr Baigent (known as “attendant care”) under section 80(3) of the Accident Compensation Act 1982 (“the 1982 Act”).

[5] The following narrative comes from an earlier interim decision of the previous Authority (*Baigent v Accident Compensation Corporation* [2014] NZACA 10) and those documents sent by the parties on this leave application. Not all of the documents referred to below are before the Authority.

[6] The Corporation provided Mr Baigent with limited care following his discharge from hospital on 8 June 1991 and for the balance of what he needed, he was left to rely on his family, primarily his parents who provided physical care and also financial assistance for the additional care required.

[7] In an even earlier interim decision of the previous Authority on 14 February 2006 (*Baigent v Accident Compensation Corporation* [2006] NZACA 1), setting out a detailed history of the early attendant care provided, the Authority held that Mr Baigent was entitled to a significant period of registered nursing care on a daily basis. The number of hours daily would need to be determined. The parties were invited to formulate a programme for future nursing care, with the Corporation to additionally assess the backdated payment to be made for what Mr Baigent had to personally pay in the past for care.

[8] The Corporation sent a letter to Mr Baigent on 20 March 2006. It agreed to fund 24-hour registered nursing care for a period of nine months, at the Christchurch agency rate of \$40.73 per hour, plus an additional \$20.37 hourly for public holidays. A review of Mr Baigent’s needs would be undertaken at least six months into the period. Mr Baigent’s lawyer and accountant were invited to prepare a claim for payment backdated to the date of his injury.

[9] On 2 June 2006, the Corporation wrote to the applicant’s lawyer advising that it was in the process of arranging an initial attendant care payment of \$344,493 and interest of \$110,599. The entitlement had been on deposit since the Corporation’s decision of 29 November 2000. The Corporation was not, at that time, in a position to issue a decision as to whether a registered nursing rate should be paid, but if it determined that such a rate should be paid, it had

calculated the appropriate rates over the relevant historic period. They were set out in the letter and varied from an hourly rate of \$22.23 for 1990 to \$30.08 for 2006. The lawyer was asked whether the hourly rates were acceptable. The total sum of \$455,092 set out in the letter was paid on 15 June 2006.

[10] The Corporation wrote to the applicant's lawyer again on 22 July 2006 asking whether he had spoken to Mr Baigent regarding the rates proposed in the letter of 2 June. In a note written by hand on a copy of the 22 July letter, the lawyer (his current counsel) agreed to the figures and asked the Corporation to go ahead and calculate the compensation.

[11] On 25 October 2006, the Corporation advised that it had reviewed Mr Baigent's entitlement to attendant care under section 80(3) and had calculated that compensation of \$303,102 was payable for the period from 8 June 1991 to 20 March 2006. This entitlement was said to be based on the November 2001 mediation agreement, together with additional supervision for Mr Baigent's injury related care needs. This calculation allowed for 24.5 hours per week at the registered nursing rate and was in addition to the earlier payments. If he was not satisfied with the decision, he could apply for a review. The sum of \$303,102 was paid to him on 23 November 2006.

[12] Mr Baigent duly sought review of the Corporation's decision of 25 October and a decision (report and recommendation) was issued by a reviewer on 31 January 2008. The reviewer recommended that the Corporation pay Mr Baigent further attendant care compensation based on 24-hour daily care (not 24.5 hours weekly) at the registered nursing rate, for the period from 8 June 1991 to 20 March 2006.

[13] In a decision issued on 7 April 2008, the Corporation declined to follow the reviewer's recommendation of 31 January 2008.

[14] The issue of backdated attendant care compensation came to the (previous) Authority again. A decision was issued on 24 December 2010 (*Baigent v Accident Compensation Corporation* [2010] NZACA 8).

[15] The Authority deplored the Corporation's treatment of Mr Baigent. It noted that the claim concerned payment for historic attendant care that he did not in fact receive (but should have). It found that the applicant "had not incurred financial costs, had not spent the money in question, and had not had nursing care" ([89]). The decision observed that he was seeking money in respect of retrospective

care, which he did not receive ([105]). The Authority found the Corporation was prepared to pay Mr Baigent a fair and reasonable sum by way of compensation and rejected his claim for increased rates. A timetable was set for further submissions.

[16] A final decision was issued by the previous Authority on 15 July 2011 (*Baigent v Accident Compensation Corporation* [2011] NZACA 3). It found that Mr Baigent had gone without the registered nursing care he needed. He had gone without basic essentials and borrowed considerable sums of money from his elderly parents in order to obtain as much registered nursing care as his limited income would allow. Additionally, he had been required to pay for a trial of three months with 24-hour registered nursing care in Australia in 2003 to convince the Corporation of the need for such care.

[17] The Authority allowed the appeal and restored the reviewer's recommendation of 31 January 2008 that the Corporation pay attendant care compensation based on 24-hour care at the registered nursing rate for the period from 8 June 1991 to 20 March 1996.

[18] On 9 September 2011, the Corporation issued a decision putting into effect the Authority's decision of 15 July 2011. Payment was duly made on 23 September 2011. It was based on 24-hour attendant care at the registered nursing rate for the period up to 20 March 1996. A total of \$623,248.94 was paid, being \$423,599.36 and with an additional LCI (Labour Cost Index) sum of \$199,649.58.

[19] A corrigendum was issued by the Authority on 21 October 2011 to correct the incorrect reference to 1996 in the decision of 15 July and extend the period of payment to 20 March 2006.

[20] The Corporation then issued a decision on 4 November 2011 putting into effect the extended period of backdated care, with the payment being made on 10 November 2011. A total of \$1,385,513 was paid for the extended period, being \$1,103,346 and an additional LCI payment of \$282,167. The present Authority understands that the sums set out in the Corporation's decisions of 9 September and 4 November were not based on the rates set out in the letter of 2 June 2006 but were less than that, though they were registered nursing rates.

[21] Mr Baigent accordingly sought review of the Corporation's decision of 4 November 2011. He contended payment for past attendant care should have

been made at the rates set out in the letter of 2 June 2006, or alternatively at the rate “set in 2006 (\$40.73 per hour)”, being the rate agreed by the Corporation in the letter of 20 March 2006.

[22] The reviewer’s decision is dated 3 April 2013. The reviewer described Mr Baigent as one of a small group of claimants “at the top of the injury pyramid” (p8). As such, the courts had said the Corporation had to apply the legislation in a generous and unniggardly manner for such claimants. He decided that payment should be made at the registered nursing rates set out in the letter of 2 June 2006, ranging from \$22.56 per hour in 1991 to \$30.08 per hour in 2006. He rejected the alternative argument that the rate should be \$40.73 hourly in 2006 (and consequentially higher hourly rates in the earlier years leading to a rate of \$40.73 in 2006). The reviewer said he was not attracted to that submission, but it is not clear to the present Authority why he said this apart from recording that he could see no objection to the rates set out in the 2 June 2006 letter.

[23] The reviewer’s decision of 3 April was accepted by the Corporation and implemented on 11 April 2013. The additional backdated attendant care payable was \$539,515.95, made up of compensation of \$397,725.84 and an LCI adjustment being the balance.

[24] It was this review decision, challenged by Mr Baigent, which led to the previous Authority’s interim decision on 15 April 2014 ([2014] NZACA 10). Mr Baigent argued that the registered nursing rate should have been greater, at least \$40.73 as assessed by the Corporation in March 2006 (with the earlier years from 1991 being higher than those set out in the 2 June letter, in order to reach \$40.73 in 2006). Instead, the rate only reached \$30.08 in 2006, which Mr Baigent said indicated a starting point and subsequent hourly rates in each year which were too low.

[25] It has not been explained to the present Authority why there is such a difference in registered nursing rates, but the higher scale appears to be that charged during the relevant period by private nursing agencies in Christchurch and incorporated weekend and overnight work (though not for public holidays which attracted a higher rate), as against the lower annual rates for nurses the Corporation was able to access as a ‘bulk buyer’ of such services (see [2014] NZACA 10 at [25]-[26]).

[26] In the decision of 15 April, the Authority accepted the Corporation’s submission, based on *ARCIC v Campbell* [1996] NZAR 278, that it had a

discretion to determine the rate of payment. It had paid in excess of \$3,000,000, based on the rates set out in the letter of 2 June 2006, for the value of the care that Mr Baigent should have been provided with during the historical period. According to the Authority, the total payment was beyond the rate that the Corporation calculated would have been paid at the time, because it included an enhancement factor recognising the delay in payment and changes in the value of money. No deduction had been made for what appeared to be a very significant amount (unknown to the present Authority) that the Corporation had already paid for attendant care during the historical period.

[27] Furthermore, according to the decision of 15 April, the Authority was satisfied that the rates chosen by the Corporation were not so unreasonable as to warrant interfering in its broad discretion to set the rates it would pay for registered nursing care in historic attendant care claims. The Authority could find no evidence that Mr Baigent (or his lawyer) had sought a decision from the Corporation to pay the \$40.73 rate agreed to by the parties in March 2006. The situation was one where Mr Baigent (through his lawyer) had agreed to the rates set out in the 2 June letter and, having taken further legal advice, he had now changed his mind and felt himself entitled to additional compensation. However, according to the Authority, the ensuing decision making and review/appeal proceedings had been based on his acceptance of the rates set out in the 2 June letter.

[28] The Authority concluded that Mr Baigent was appealing a review decision made in his favour in accordance with what he had agreed and which had been implemented. It could see no good reason to interfere with the Corporation's exercise of its discretion as to the rates paid for registered nursing care under section 80(3).

[29] The Authority then went on to assess two "procedural problems". It found that the appeal should have been brought against the Corporation's decision of 11 April 2013 (rather than the review decision of 3 April) and secondly, that it had been made out of time. Mr Baigent was invited to correct these problems and was advised that if he did so, "the interim decision will be made final and Mr Baigent will have the right to seek leave to appeal the decision to the High Court on its merits" ([45]).

[30] Mr Baigent duly corrected the two flaws identified and on 25 June 2014, the present Authority issued a brief final decision ([2014] NZACA 15). The outcome of that decision was to formally grant leave to appeal to the Authority out of time and

then to make the interim decision final. The appeal to the Authority was accordingly dismissed on its merits, for the reasons given in the interim decision of 15 April.

[31] It is this final decision that Mr Baigent now seeks the Authority's leave to appeal to the High Court. In effect though, Mr Baigent is seeking leave to appeal the reasoned interim decision of 15 April, which deals with the substantive merits of his claim to be paid backdated attendant care at higher annual nursing rates.

CASE ON APPEAL

[32] There are submissions from Mr Miller of 27 August and 23 September 2014, with supporting documents. Mr Miller submits that the Authority has misinterpreted the law and advances a number of questions of law for the High Court to answer.

[33] The Corporation's submissions are dated 9 September 2014, with supporting documents. The Corporation opposes leave to appeal, on the basis that the Authority's decision is based on Mr Baigent's factual circumstances and does not raise any issues of law or public importance which ought to be determined by the High Court.

THE LAW

[34] By virtue of section 391(1) of the Accident Compensation Act 2001, the Authority has jurisdiction to hear this application. It is to be determined pursuant to section 111 of the 1982 Act:

Appeal to High Court

- (1) Where any party is dissatisfied with any order or decision of the Accident Compensation Appeal Authority, that party may, with the leave of the Authority, appeal to the High Court against that order or decision:

Provided that, if the Appeal Authority refuses to grant leave to appeal, the High Court may grant special leave to appeal.

- (2) The Appeal Authority or the High Court, as the case may be, may grant leave accordingly on a question of law or if in its opinion the question involved in the appeal is one which by reason of its general or public importance or for any other reason ought to be submitted to the High Court for decision.

Leave to appeal - principles

[35] The principles and factors applicable in considering leave to appeal on the

ground of a question of law were all conveniently listed by the District Court, following a number of High Court authorities, in *O'Neill v Accident Compensation Corporation* DC Wellington Decision No 250/2008, 8 October 2008 at [24], as follows:

- (i) the issue must arise squarely from the decision challenged and not from *obiter* comments;
- (ii) the contended point of law must be capable of *bona fide* and serious argument;
- (iii) care must be taken to avoid allowing issues of fact to be dressed up as questions of law;
- (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 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.

[36] It is not necessary to show that the decision-maker was wrong, only that there is a *bona fide* arguable question of law, a "modest test"; *Bondarenko v Accident Compensation Corporation* HC Wellington CIV 2006-485-555, 23 February 2007 at [3] & [23] (while a case concerning special leave, the same threshold applies to leave applications).

[37] The Authority's jurisdiction is not merely confined to questions of law, since leave can be granted where, "for any ... reason", there is a question which ought to be submitted to the High Court, including by reason of its general or public importance.

[38] In exercising its discretion, the Authority is mindful of the proper use of the scarce resources of the High Court. Leave is not given as a matter of course; *O'Neill* at [25].

[39] Such an applicant seeks an indulgence, so the onus rests on him or her to

satisfy the Authority that, in all the circumstances, the interests of justice require that leave be given; *Kenyon v Accident Compensation Corporation* [2002] NZAR 385 at [15].

ASSESSMENT

[40] Following a lengthy and somewhat tortuous legal process, Mr Baigent has received backdated attendant care compensation for the period from 8 June 1991 (when he was discharged from hospital) until 20 March 2006 (the significance of this date is not explained, but presumably the Corporation made prospective payments for attendant care from then beyond the period of nine months referred to in the letter of that date). The Corporation paid him on the basis that he needed 24-hour care by registered nurses during the historic period.

[41] The dispute now rests within a narrow compass. It is whether the annual rates for the period from 1991 to 2006 should be those set out in the Corporation's letter of 2 June 2006 as agreed by Mr Baigent's lawyer in July 2006, or the higher rates agreed earlier by the parties in March 2006 for what appears to be a trial period of nine months. It is to be remembered that this is not about whether Mr Baigent should be reimbursed for nursing care provided and expenses actually incurred in that historical period, but what level of compensation he should have received.

[42] The attendant care at issue here is provided pursuant to section 80(3) of the 1982 Act:

Where a person suffers personal injury by accident in respect of which he has cover and the injury is of such a nature that he must have constant personal attention, the Corporation, having regard to any other compensation payable, may pay to that person, or if it thinks fit to the administrator of that person, such amounts as the Corporation from time to time thinks fit in respect of the necessary care of the person in any place of abode or institution.

[43] It is well established that the "place of abode or institution" can be the claimant's own home.

[44] The Corporation has a discretion in setting the appropriate hourly rate; *ARCIC v Campbell* [1996] NZAR 278 at 284-286. There are limitations to this discretion. The decision concerning cost "is discretionary only to a limited extent within a range of funding that would secure the necessary care that has already been decided upon"; *Chittock v Accident Compensation Corporation* DC Wellington Decision No. 122/09, 22 July 2009 at [15].

[45] Turning then to the Authority's decision of 15 April, Mr Miller contends there are three questions of law that out to be submitted to the High Court.

First proposed question – whether law of accord and satisfaction applicable

[46] The first question is whether it was correct to apply the law of accord and satisfaction. The present Authority agrees with Mr Miller that this could not be a lawful basis for the decision, but it was only a subsidiary basis of the decision of 15 April. The decision was primarily on the ground that the rates chosen by the Corporation were "not so unreasonable as to warrant interfering with the broad discretion ACC has to set the rate" ([2014] NZACA 10 at [34]). The Authority returns to this later in the interim decision, "...I can see no good reason to interfere in ACC's exercise of its discretion to set the rate of registered nursing care" (at [38]). The law of accord and satisfaction is not the primary basis of the 15 April decision.

Second proposed question – whether binding commitment not to challenge Corporation's rates

[47] The next proposed question is whether the Authority was correct to interpret the intimation given to the Corporation (on 22 July 2006) that it could calculate the rates based on the 2 June letter, as a binding commitment in law not to challenge these rates, if the Corporation failed to promptly pay compensation at those rates. This is a recasting of the first question, in a slightly different form. It fails for the same reason as the first question does. In [37] and [38] of the 15 April decision, the Authority uses language which suggests a binding commitment but, as noted above, goes on to restate the primary basis of the decision, being that there was no good reason to interfere in the Corporation's exercise of its discretion to set the appropriate rates.

Third proposed question – whether a principled exercise of discretion would have led to the higher rate previously agreed by the Corporation

[48] The third proposed question is whether the Authority should have required a principled exercise of discretion by the Corporation to reach the rate offered in negotiations in March 2006 for future care (\$40.73 hourly in 2006). Furthermore, Mr Miller submits that any principled exercise of discretion would take into account that the Corporation's withholding of such compensation over many years had caused Mr Baigent considerable hardship and allowed the Corporation to financially benefit from that withholding and be unjustly enriched.

[49] This is really a question of fact, dressed up as a question of law. It was for the Corporation to decide the appropriate rates of pay for registered nursing care for the historic period. That is a factual enquiry. It is not suggested by Mr Baigent that the 2 June rates are not for registered nurses. The evidential basis for the 2 June rates, unknown to the present Authority, is not challenged.

[50] The Corporation eventually accepted it should pay for 24-hour care, based on that care being given by a registered nurse. It paid out, finally, on rates set out in the 2 June letter. The agreement of the applicant to those rates on 22 July may not bind him in any legal sense, but it does show that at that time, he thought the rates were reasonable. He knew then of the higher 20 March rates, which the Corporation, or at least one of its officers, had agreed to. The existence of those other annual rates (working backwards from the higher 20 March 2006 rate) – rejected by the Corporation in sending the letter of 2 June – does not make the 2 June rates now unreasonable or unprincipled.

[51] The Authority has already noted that the issue here is not about reimbursing for historical payments Mr Baigent was forced to make, but is to compensate him for care he did not receive though should have. Mr Baigent is not being left out of pocket by adherence to the 2 June rates.

[52] It is for this reason that the principle in *Chittock*, on which Mr Miller relies, does not assist Mr Baigent. In *Chittock*, it was stated that the Corporation could not exercise its discretion to fix the hourly rate (or the number of hours) in such a way as to reduce the Corporation's funding below that which would secure the necessary care for the injured person.

[53] However, there is no question of the compensation at issue here having that effect. This is not about prospective attendant care for Mr Baigent, nor even about compensation for historic attendant care which he was forced to fund himself. It is about compensation for care that was not, but should have been, provided. Nor is any evidence adduced that the 2 June rates would have been too low, for the Corporation at least, to pay for the registered nursing care that should have been provided during the earlier period.

[54] Furthermore, the present Authority endorses the view of the previous Authority (see [2014] NZACA 10 at [30]) that the purpose of section 80(3) is to provide the injured person with the necessary care following their injury (or commensurate compensation) and not to punish the Corporation for wrongdoing, perceived or actual. It is not accepted that the Corporation has been unjustly

enriched since, as the Authority noted in the interim decision, the Corporation paid more to reflect the delay in payment and changes in the value of money ([2014] NZACA 10 at [34]).

[55] The previous Authority concluded the interim decision by stating that if the procedural flaws were cured and the decision thereby made final, Mr Baigent would have the right to seek leave to appeal to the High Court on the merits. The present Authority does not read this as a grant of leave to appeal, merely as a statement that if the interim decision was made final, Mr Baigent could then seek leave (but could not do so on the basis of an interim decision). He has now sought such leave, but as will be seen shortly, it will be refused.

Conclusion

[56] The Authority finds that there is no question of law capable of *bona fide* and serious argument which ought to be submitted to the High Court. The previous Authority correctly relied on *Campbell* to find that the exercise by the Corporation of its discretion to fix the hourly rates was not unreasonable and there was no good reason to interfere in the Corporation's exercise of its discretion. Nor is there any question which, by reason of its general or public importance or for any other reason, ought to be submitted to the High Court. The interests of justice do not require that leave be given.

OUTCOME

[57] The Authority declines Mr Baigent leave to appeal to the High Court from the decisions of 15 April and/or 25 June 2014.