

Michael John Jones
Applicant

**Accident Compensation
Corporation**
Respondent

Before: D J Plunkett

Advocate for the Applicant: M Darke

Counsel for the Respondent: C Hlavac

Date of Decision: 5 December 2016

DECISION

INTRODUCTION

[1] This is an application by Michael John Jones for leave to appeal to the High Court against the Authority's decision of 21 June 2016 (*Michael John Jones v Accident Compensation Corporation* [2016] NZACA 2).

[2] Mr Jones suffered a medical misadventure in 1988 for which he has accident compensation cover. The Corporation declined a claim for earnings related compensation ("ERC") in 1993. A reviewer confirmed that decision in 1994.

[3] More than 20 years later, in 2014, Mr Jones sought leave to appeal to the Authority against the reviewer's decision. That application was heard in May 2016 and dismissed in June 2016. It was dismissed on the basis of an inordinate period of delay in commencing the appeal, an inadequate explanation for the delay and prejudice to the Corporation which had destroyed its file and most of the evidence upon which the earlier decisions had been based. The review decision was also

missing. Moreover, in assessing the merits of the substantive appeal, it was found Mr Jones could not prevail. The overall interests of justice did not favour an extension of time being granted to allow the appeal to proceed.

[4] It is from this decision that Mr Jones seeks leave to appeal to the High Court.

[5] The essential issue for me is whether the questions now raised about the Authority's decision ought to be determined by the High Court.

BACKGROUND

[6] Mr Jones has suffered a number of accidents, both before and after the relevant accident here, and has made numerous claims on the accident compensation scheme over many decades. He has had some success and has obtained coverage, ERC, lump sum payments, medical treatment and psychological counselling costs in respect of various accidents.

[7] The full history of the claim concerning the accident in 1988 and the evidence supporting Mr Jones' claim for ERC are set out in my earlier decision.

Accident and coverage

[8] In brief, on 5 January 1988, Mr Jones suffered a medical misadventure arising out of his treatment with the drug *Largactil* for a heart disorder, Lown-Ganong-Levine syndrome. He described the injuries as extreme restlessness, inability to breathe, fear of impending death, pain and continuing extreme anxiety.

[9] The Corporation accepted coverage under the then accident compensation scheme on an unknown date, following an earlier decision of this Authority on 28 September 1989 which found that there had been a medical misadventure. Mr Jones then received certain entitlements, including lump sum payments, treatment and counselling costs. He was already obtaining ERC for time off work due to an earlier accident.

Claim for ERC

[10] A claim for ERC arising out of the administration of *Largactil* was first made in about October 1990. It is believed to have been a claim for ERC payable from that date. Like most of the documents relating to his various applications for ERC arising out of this accident, it no longer exists. It was declined by the Corporation

on 21 December 1990 and no review was sought. I have not seen the Corporation's decision which is presumably missing.

[11] Mr Jones again sought ERC in about May 1992 and it was declined on 23 February 1993. It is not known whether any review was sought. Again, the decision appears to be missing.

[12] On an unknown date, Mr Jones once more requested ERC, this time being an application for ERC backdated to the accident on 5 January 1988. The claim document is no longer available. This is the claim which is the subject of the current application to the Authority.

Backdated ERC declined

[13] The Authority's decision of 21 June 2016 sets out the medical evidence and internal memoranda of the Corporation relating to this claim that are still available.

[14] In summary, the application for backdated ERC was declined by the Corporation on 19 May 1993, with only page 1 of the decision letter now being available. While the complete reasoning and evidence relied on are not known, a primary reason for the decline was that the Corporation did not accept any ongoing incapacity suffered by Mr Jones directly related to the accident of 5 January 1988.

[15] A review of the Corporation's decline of ERC was dismissed by a reviewer on 28 June 1994. That decision is no longer available. Mr Jones did not appeal to the Authority against the reviewer's decision until 24 June 2014.

[16] From time to time, Mr Jones continued to seek ERC from the Corporation, which then obtained medical reports. Some of those reports and the Corporation's internal memoranda are available and are set out in the earlier decision. ERC was again declined on 25 June 1997 and a review was declined on 13 October 1997. Both of these decisions were under later legislation concerning accident compensation.

[17] The Corporation appears to have declined ERC on other occasions, with reviews against those decisions having been withdrawn (see the two review decisions of 20 July 2013).

Appeal against decline of backdated ERC

[18] The application made to the Authority on 24 June 2014 for leave to appeal out of time against the review decision of 28 June 1994, was heard on 23 May 2016, with leave being declined in a decision issued on 21 June 2016.

[19] In summary, I found that the delay of 20 years was inordinate, that the responsibility for the delay lay overwhelmingly with Mr Jones, that his explanations for the delay were not accepted and that there had been serious prejudice to the Corporation, given the destruction of its file and the missing decisions and medical evidence.

[20] In respect of the merits of the substantive appeal, the most important factor in assessing whether to grant an extension of time, I found that Mr Jones would not prevail (on the assumption the Authority granted an extension and therefore had jurisdiction to consider the substantive appeal). He had no reasonable prospect of showing that any incapacity was substantively or significantly caused by the January 1988 accident, nor could he establish the loss of earnings, if any.

CASE ON APPLICATION FOR LEAVE TO APPEAL

[21] There are submissions from the advocate for Mr Jones, dated 26 August and 11 November 2016. He sets out a number of questions, which it is contended should be determined by the High Court. I will discuss them shortly.

[22] There are submissions from the Corporation's counsel dated 24 October 2016.

THE LAW

[23] By virtue of section 391(1) of the Accident Compensation Act 2001, the Authority has jurisdiction to hear this application. As the accident occurred in January 1988, it is to be determined pursuant to section 111 of the Accident Compensation Act 1982 ("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

[24] The principles applicable in considering whether to grant leave to appeal on the ground of a question of law, are all conveniently listed by the District Court, following a number of High Court authorities, in *O'Neill v Accident Compensation Corporation* DC Wellington 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.

[25] 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).

[26] The Authority's jurisdiction is not merely confined to questions of law, since leave can be granted where "the question involved" ought to be submitted to the High Court, by reason of its general or public importance or for any other reason. Questions of fact could meet this criterion.

[27] In order to grant leave, there must be “some interest, public or private, of sufficient importance to outweigh the delay and cost of a further appeal”; *Murray v Accident Compensation Corporation* [2013] NZHC 2967 at [6].

[28] 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. It is for the applicant to show that the interests of justice require that leave be given; *Kenyon v Accident Compensation Corporation* [2002] NZAR 385 (HC) at [15], *O'Neill* at [25].

ERC - principles

[29] The claim for ERC is made under section 59 of the 1982 Act. Mr Jones bears the burden of establishing that “as a result of incapacity due to personal injury by accident”, he suffered a temporary loss of earning capacity (s 59(1)). The temporary loss of earning capacity is determined by calculating the actual loss of earnings (s 59(2)).

[30] The parties’ representatives agree that the accident need not be the *sole* cause of the incapacity, but it must be a *substantive* or *significant* cause.

ASSESSMENT

[31] Mr Darke contends there are a number of questions arising from the earlier decision, which should now be determined by the High Court. I will deal with each in the same order they appear in his submissions of 26 August.

(1) *That the Authority erred in law in its approach to determining whether a causal link had been established between incapacity and the relevant covered injury*

[32] It is submitted that, in assessing the strength of the case, Mr Jones had to show only an arguable case. However, the Authority instead considered all the evidence and made a substantive decision that there was insufficient evidence to found a claim. The Authority had wrongly entered the realm of a determination on the substantive issue.

[33] First, I do not accept that it was sufficient for Mr Jones to merely show an arguable case, given the prolonged delay of 20 years and the prejudice to the Corporation by the loss of the decisions and the evidence. Mr Jones had to show

sufficient merit to overcome those seriously adverse factors, in order to establish that the interests of justice lay with him. That is more than an arguable case.

[34] Second, it is clear from the Authority's conclusion that, in any event, Mr Jones could not meet the standard of an arguable case (see "no reasonable prospect" finding at [128] and "no basis" at [118]). I decline to again traverse the medical and other evidence and redetermine the merits, as Mr Darke invites me to do in his submissions.

[35] Third, Mr Jones effectively obtained the benefit of a hearing of the substantive appeal, as if leave had been given (as was made clear at [128] of the Authority's decision). I could do this as the parties had produced all the evidence that could possibly be mustered. They had been advised that the appeal would effectively be heard at the same time as the leave application (see Authority's letter of 24 December 2015). This was explained by me at the telephone conference between the Authority and the representatives on 15 January 2016. It was made clear that the parties should file all available evidence for the purpose of an appeal.

[36] The Authority can determine its own procedure (s 108(11) of the 1982 Act) It is my practice to hear both matters together, having given notice to the parties. Two hearings and decisions, one for the leave application and then a subsequent one for the substantive appeal if leave is given, would gratuitously increase the parties' costs and delay the determination of the matter.

(2) That the Authority, by taking the disposal of documentation by the Corporation as evidence against the granting of leave to appeal out of time, made an error of law

[37] This is not separately addressed by Mr Darke. It is dealt with as part of his question no.7. I will do the same.

(3) That the Authority erred in its construction of s 59 of the Act by applying the wrong test for "loss of earning capacity"

[38] Mr Jones had to establish, not only that any incapacity was (substantively or significantly) caused by the accident, but the degree or extent of the incapacity. This is measured by the loss of earnings (s 59(2)). However, Mr Jones could not do so. He could not establish quantum (loss of earnings). This is dealt with at [118] of the earlier decision.

[39] The memorandum of Ms Styles (22 July 1997) on which Mr Darke relies, is insufficient. It does not set out Mr Jones' post-accident earnings from employment nor the ERC he was already receiving from another accident, all of which would have to be deducted.

[40] The "flexibility" (as Mr Darke calls it) the Corporation possesses to calculate the loss of remuneration and therefore ERC, requires an adequate evidential basis. It cannot guess what might be about right. It is that proper evidential basis for calculating his loss of earnings and therefore the extent of incapacity which is missing here (along with medical evidence of incapacity and the relevant decisions).

[41] I agree with Mr Darke that the observation at [118] in my earlier decision concerning the post-28 June 1995 period, is irrelevant (see also the discussion of jurisdiction at [85]–[86] of that decision). That distraction in the decision does not undermine the conclusion that Mr Jones cannot establish his loss of earnings during the relevant period (from 1988 until 1993/1994).

(4) That the Authority failed to take into account the discretions vested in the Corporation, in relation to fairly and reasonably determining relevant earnings under s 53

[42] Mr Darke provides no submissions in support of this question because, he says, it is unnecessary to do so given the information set out in the memorandum of Ms Styles (see question no. 3 above). I have already dealt with the inadequacies of the information in that memorandum.

(5) That the Authority erred in law by failing to give any weight to the findings of Review Officer Ian Roy in his decision of 1990

[43] As I said (at [116] of the earlier decision), I placed little weight on the review decision of about July 1990 (hearing 26 June 1990). Mr Darke contends it binds me. It does not. The reviewer was dealing with a different claim (lump sums, not ERC). Furthermore, he made findings without any discussion of factual or medical evidence. I agree with Mr Hlavac that Mr Roy's findings do not address the issues before the Authority, namely whether Mr Jones was incapacitated and whether there was a causal connection between the 1988 injury and any employment incapacity. No issue estoppel arises here.

(6) *That the Authority made, in the course of considering the appellant's application for leave, factual findings that were not supported by any evidence*

[44] The two findings of fact made, which Mr Darke challenges, were explained in the decision at the paragraphs he cites ([97] & [92] respectively). They are inferences reasonably available on the evidence. These findings were in the context of considering Mr Jones' various explanations for the delay. They were not sufficiently critical to have any bearing on the outcome of the leave application, whether correct or not. In particular, they were not relevant to the assessment of the merits of the intended appeal.

(7) *That the Authority erred:*

- (a) *in determining whether leave should be granted, by failing to take into account all the relevant evidence in its totality, when assessing the merits of the intended appeal, any prejudice and the reasons for the delay, or*
- (b) *in determining whether leave should be granted, by failing to take into account all the relevant evidence in its totality and considering the relevant considerations, when assessing the merits of the intended appeal, any prejudice and the reasons for the delay*

[45] Mr Darke has two very similar versions of this question, the former in the notice of appeal and the latter in his submissions.

[46] Mr Darke has couched this question in legal terms, but it is really about whether certain findings of fact can be justified on the evidence. He seeks to re-argue some of the same factual questions argued earlier. In the previous decision of the Authority, I dealt with the various matters he now raises and made those findings, for the reasons given there.

[47] In particular, I was aware of the apparently incorrect test used by the Corporation, as noted at [33], [40], [42] of the earlier decision. I found at [41] and [42] that the flaw was not material, for the reason given by the officer in the memorandum of 12 June 1997. Mr Jones' claim failed, even on the correct law. In reality, I heard the appeal on its merits and found against Mr Jones. The error of law by the Corporation, which did not in any event affect the outcome of the Corporation's decision, was cured by the appeal.

[48] As for the existence of prejudice to the Corporation as a result of the missing evidence (medical, earnings and the actual decisions), that was dealt with in the Authority's decision (at [119]-[126]). A clear case of prejudice was found. Given the inordinate delay of 20 years it took Mr Jones to bring the appeal, the loss of the documentation is his responsibility. However, as real as the prejudice is, it is not the primary reason for declining leave to appeal. The appeal failed on its merits.

(8) *That in terms of the Accident Compensation Act 1982, the approach to the application for leave, did not reflect the underlying philosophy and purpose of the Act*

[49] It is contended that both the Accident Compensation Act 1972 and the 1982 Act provided a flexible and generous scheme to ensure that injured persons received as much help as possible within reasonable limits. According to Mr Darke, those Acts sought to make the legislation work rather than just apply rigid statutory formulae and rules.

[50] Mr Darke no doubt has in mind the "generous, unniggardly" approach to interpretation of accident compensation statutes directed by the higher courts (*Harrild v Director of Proceedings* [2003] 3 NZLR 289 at [130]). That must, however, be tempered with the observation that accident compensation legislation "does not have as its principal purpose being generous to claimants (*Robinson v Accident Compensation Corporation* [2007] NZAR 193 (CA) at [49]).

[51] I do not agree that the statutory formulae have been applied too rigidly. Even when I looked at the merits, putting to one side the delays and prejudice to the Corporation, the evidential basis for both causation and the degree of incapacity is wholly inadequate. The "generous, unniggardly" approach is not an excuse to award compensation contrary to the statutory criteria.

[52] It is submitted by Mr Darke that he and Mr Jones were under the impression that only incapacity would be dealt with by the Authority, not the periods for which Mr Jones could be paid. He submits the Corporation never addressed this, which would require a new decision of the Corporation if incapacity could be proved.

[53] It is difficult to follow this submission. Incapacity and the period(s) (of incapacity) are bound together. A finding of incapacity would necessarily beg the question as to when. Mr Jones had to establish either a continuous period of

incapacity from 1988 to 1993/94, or one or more discrete periods within that extended period.

[54] If Mr Darke is talking about earnings evidence, the Authority made it clear in its letter on 2 February 2016 to the representatives that evidence as to earnings was part of the leave application, since it was an element of the Corporation's prejudice argument.

[55] If the Authority had granted, not just leave to appeal, but the substantive appeal, it would have specified the periods of incapacity and left the issue of earnings loss for a subsequent decision of the Corporation (but it did not do so, one of the factors being the impossibility of calculating any loss of earnings).

OUTCOME

[56] Mr Jones has, in effect, had the benefit of a substantive appeal before the Authority on the merits, despite the delay in seeking leave to appeal and the prejudice to the Corporation. In terms of the current application for leave to appeal to the High Court, he has raised no questions of law or fact which should be addressed by the High Court. The interests of justice do not require leave. I decline leave to appeal to the High Court.

[57] The question of costs is reserved. Any party may seek costs by filing an application within 21 days, with the other party having 14 days to respond.

D J Plunkett