IN THE DISTRICT COURT
AT WELLINGTON

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

[2021] NZACC 127 ACA 02/18

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION TO RECALL DECISION
BETWEEN	CRAIG RICHARD JONES Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing:	On the Papers
Appearances:	Applicant in person D Tuiqereqere for the respondent
Judgment:	11 August 2021

JUDGMENT OF JUDGE AA SINCLAIR
[On Application for Recall of Decision by Accident Compensation Appeal Authority]

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[1] The Accident Compensation Appeal Authority ("the Authority") issued a decision on 5 September 2018 dismissing an appeal by Mr Craig Jones ("the 2018 Substantive Decision"). Mr Jones has now filed an application to recall this decision.

[2] The Accident Compensation Corporation ("the Corporation") opposes this application on the basis that the District Court does not have jurisdiction to recall this decision. Furthermore, even if it did have jurisdiction, the Corporation says that Mr Jones has not demonstrated that the circumstances of this case warrant a recall of the 2018 Substantive Decision.

[3] Mr Jones filed an application for leave to appeal the 2018 Substantive Decision to the High Court. Directions were given by the Authority for the filing of written submissions in support of the application, but none were filed. On 18 June 2019, the Authority proceeded to issue a decision declining the application. ("the 2019 Leave Decision"). Mr Jones filed an application for recall of the 2019 leave decision on 27 May 2020. In a judgment issued under [2021] NZACC 123 dated 5 August 2021, I dismissed this application. Many of the same matters raised in that application are repeated here and I adopt what I said in that judgment. For ease of reference, I repeat relevant extracts in this judgment.

BACKGROUND

[4] The history of Mr Jones' various claims for weekly compensation is detailed in the 2018 Substantive Decision. The facts material to the present application are summarised below.

History

[5] Mr Jones was employed as a postal assistant with the Post Office from 1987 until he was medically retired in February 1993.

[6] On 17 July 1991 Mr Jones suffered a back injury at work and was granted cover ("the July 1991 claim"). Weekly compensation[1] payments were made for three weeks during August 1991.

[7] Thereafter, Mr Jones returned to work but on 29 January 1992, he suffered another back injury. This time, he remained off work until 12 April 1992. No separate claim file was made up for the January 1992 accident with payments being processed under the 1991 claim.

[8] Mr Jones returned to work on 13 April 1992 on a work trial basis but again injured his back ("the April 1992 claim"). He was certified as unfit to work. This injury was treated as a fresh accident event and a new claim file was opened.

[9] On 2 November 1992, Mr Jones attended a work trial and his weekly compensation was stopped. Payments started again in January 1993 when Mr Jones was certified as unfit to

[1] This entitlement was called earnings related compensation ("ECR") under the Accident Compensation Act 1982.

work due to his back injury. The Corporation recalculated his weekly compensation on the basis that there was a new period of incapacity from January 1993.

[10] This recalculation decision was taken on review by Mr Jones. In a review decision dated 31 March 1994, the reviewer determined that there had been a continuous incapacity from 13 April 1992 up to and beyond January 1993. The reviewer directed that the Corporation recalculate Mr Jones' weekly compensation on the basis of his earnings for the period immediately prior to his injury on 13 April 1992.

[11] In March 2015, Mr Jones wrote to the Corporation again contesting the calculation of his weekly compensation. The claim was investigated by the Corporation and a new decision was issued on 20 June 2017. The Corporation accepted that Mr Jones had been continuously incapacitated from 10 February 1992 (as a result of the 1991 back injury) and he was entitled to weekly compensation based on the original calculation commencing on 11 February 1992.

[12] In the same decision, the Corporation considered Mr Jones' further argument that weekly compensation ought to be recalculated from February 1992 based on a payslip from November 1991. The Corporation had previously issued a decision letter dated 11 March 1992 on the 1991 claim calculating the weekly compensation at $432.22 being 80% of Mr Jones' total loss of earnings of $541.52. The Corporation considered Mr Jones' arguments but was not prepared to recalculate his income as the limited information available did not demonstrate that the 11 March 1992 calculation was incorrect.

[13] Mr Jones applied to review the 2017 decision. When this application was unsuccessful he filed an appeal to the Authority.

2018 Substantive Decision

[14] The Corporation had disposed of the July 1991 file and as a preliminary issue, the Authority considered Mr Jones' contention that the destruction of this file was "fraudulent and criminal". The Authority did not agree, stating:

> [45]…..I find there is no reason to believe that the destruction was not in accordance with the normal business practice of disposing of records some years, usually 10, after they were last used. It is not known when the Corporation disposed of the file.

[15] The Authority went on to say:

> [47] In assessing the propriety of the destruction of the records, it is to be remembered that until the Corporation's decision on 20 June 2017, the incapacity from 10 February to 12 April 1992 and hence ERC for the same period were attributed to the July 1991 accident. The Corporation had not opened a new file in relation to the January 1992 accident, so the 11 March 1992 decision and its associated documents and had been placed in the July 1991 file.
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> [48] Mr Jones had not contested the 11 March 1992 decision, a right that was expressly pointed out to him in that decision. Accordingly, some years later, the file was destroyed.

[16] Next, the Authority considered Mr Jones' argument that his incapacity commenced from 29 January 1992 and not 11 February 1992. The Authority found that the contemporaneous evidence being a medical certificate, supported the incapacity commencing on 10 February 1992.[2] In addition, and in any event, the Authority was of the view that there was no material difference between the two dates for the purposes of calculating weekly compensation.

[17] Finally, the Authority considered Mr Jones' primary argument that the assessment of weekly compensation was incorrect and discussed Mr Jones' various alternative calculations. The Authority did not accept any of the proposed calculations and in its decision dated 5 September 2018, the Authority dismissed the appeal.[3]

[18] Mr Jones filed an application for leave to appeal to the High Court from the decision of the Authority on 6 September 2018. He failed to comply with various timetables set for the filing of his grounds of appeal and written submissions and on 18 June 2019, the Authority issued its decision refusing to grant leave to appeal.

[19] On 12 July 2021 Mr Jones filed the present application for recall of the 2018 Substantive Decision.

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[2] The two dates of 10 and 11 February 1992 appear in the documentation. Based on this medical corticate the Authority accepted the date of 10 February.

[3] On 2 May 2019, Mr Jones also filed a late appeal in the District Court from the review decision dated 31 March 1994. Notably, Mr Jones advanced a number of the same arguments in this appeal that he had run it the 2018 Substantive Decision. The matter came before me and in a judgment dated 18 May 2020 (*Jones v Accident Compensation Corporation* [2020] NZACC 47), I dismissed the appeal. On 11 June 2020 Mr Jones filed an application for leave to appeal to the High Court. However, he subsequently advised the Registry on 5 July 2021 that he was withdrawing this application.

APPLICATION FOR RECALL OF DECISION

First Issue: Jurisdiction to order recall?

Relevant Legal Principles

[20] The Authority was disestablished on 11 April 2019 pursuant to s 402 of the Accident Compensation Act 2001 ("the 2001 Act"). However, pursuant to cl 7 of Schedule 1AA to the 2001 Act, the Authority is 'deemed to continue' to operate for the limited purpose of completing "all matters-in-process".

[21] A "matter-in-process" is defined under cl 7(1) as meaning:

> …a matter before the Accident Compensation Appeal Authority immediately before the commencement of this clause and includes –
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> (a) an appeal that had been lodged with the Authority but not finally determined by it; and
>
> (b) an application to the Authority for leave to appeal to the High Court, including any made under –
>
> (i) section 168 of the Accident Compensation Act 1972; or
>
> (ii) section 111 of the Accident Compensation Act 1982.

[22] A matter in progress therefore means a matter lodged with the Authority but which had not been determined before the commencement of the clause on the disestablishment of the Authority. In the present case, the application to recall the 2018 Substantive Decision was lodged well outside this time period on 12 July 2021.

[23] Pursuant to s 391(1) of the 2001 Act, Part 9 of the 1982 Act continues in force in order to apply to reviews and appeals brought from decisions made by the Corporation under the 1982 Act and the Accident Compensation Act 1972.

[24] The operation of s 391(1) is qualified by subs 391(1A). This provides that any appeals brought under the 1972 and 1982 Acts that are commenced on or after 12 April 2019 must be made to the District Court and not to the Authority. In addition, to the extent practicable, the procedure for such appeals is to be the same as under Part 5 of the 2001 Act.

[25] The power of the Authority to recall a decision under the 1982 Act was considered by the High Court in *Accident Compensation Corporation v Smith*.[4] In that case, the Authority had issued a decision in 1995 dismissing Mr Smith's appeal. The Authority's decision was upheld on appeal to the High Court in February 1998. In proceedings brought by Mr Smith some years later the Authority issued a decision dated 6 March 2014 recalling its 1995 decision. The Corporation was granted leave to appeal to the High Court on the question as to whether the Authority had the power to recall its earlier sealed decision and whether it was relevant that the High Court had upheld the decision. Mr Smith contended that the Authority had the "discretion" to recall its judgment as it considered its earlier decision was in error.

[26] Nicholas Davidson J noted that the Authority had no express power in statute or regulations to recall a previous decision. He went on to state that a "statutorily-constituted court or tribunal has no inherent jurisdiction beyond its power to regulate its own procedure to the extent necessary to enable it to act effectively".

[27] His Honour observed that there was a 'distinction between powers and procedure'. This had been discussed in *Browne v Minister of Immigration*[5] where the Court had considered an order by the Deportation Review Tribunal to re-hear an application. The Court concluded that "such an order went to jurisdiction and was not merely a matter of procedure". Nicholas Davidson J considered that the Authority was "a similar body, of statutory constitution and possessed of limited powers".

[28] Nicholas Davidson J went on to conclude that the Authority did not have power to recall its decision which had earlier been sealed and its 2014 decision was therefore made in error.

Discussion

[29] In the present case, in determining a matter under Part 9 of the 1982 Act, the District Court has available the procedures under Part 5 of the 2001 Act. The High Court in *Smith* drew a distinction between powers and procedure, determining that an order for a recall was not a matter of procedure. Therefore, the District Court in determining appeals under Part 9 of the 1982 Act has no greater powers than those conferred on the Authority.

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[4] *Accident Compensation Corporation v Smith* [2016] NZHC 2051.
[5] *Browne v Minister of Immigration* [1990] NZAR 67 (HC).

[30] As the High Court held in *Smith,* the Authority has no power to recall a decision once it is sealed. In accordance with the practice of the Authority (and other Tribunals), the 2018 Substantive Decision was issued under the seal of the Authority on 5 September 2018.[6] Accordingly, I am satisfied that the District Court does not have jurisdiction to order a recall of the 2018 Substantive Decision.

Second Issue: Grounds for Recall of 2018 Substantive Decision?

[31] Even if the District Court did have jurisdiction (and I have found it did not), I do not consider that Mr Jones has established grounds for the granting of such an application. I set out my reasons below.

Relevant Legal Principles

[32] The exercise of the power to recall a judgment must be balanced against the importance of finality. In *Horowhenua County v Nash (No.2*)[7] Wild CJ observed that "generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty". The grounds for recall are therefore strictly limited.

[33] In *Horowhenua County (No.2)*[8] Wild CJ identified three categories of cases in which a judgment may be recalled:

(1) where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and higher authority;

(2) where Counsel have failed to direct the court's attention to a legislative provision or authoritative decision of plain relevance; and

(3) where for some other very special reason justice requires that the judgment be recalled.

[34] The limited grounds for recall were discussed by Asher J in *Faloon v Commissioner of Inland Revenue*[9]. His Honour said:

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[6] *Michael John Jones v Accident Compensation Corporation* [2014] NZ ACA 17.
[7] *Horowhenua County v Nash* (No.2) [1968] NZLR 632.
[8] At pg 633.
[9] *Faloon v Commissioner of Inland Revenue* (2006) 22 NZTC 19,832 (HC) Asher J.

> [13] While the third category is not defined with particularity in the judgments, it is quite clear that the discretion to recall must be exercised with circumspection, and it must not in any way be seen as a substitute for appeal. In particular there are some things that it can be said the power to recall does not extend to. It does not extend to a challenge of any substantive findings of fact and law in the judgment. It does not extend to a party recasting argument previously given and representing them in a new form. It does not extend to putting forward further arguments, that could have been raised at the earlier hearing but were not.

[35] In *Ngahuia Rihana Whanau Trust v Flight* the Court of Appeal expressed concern at litigants' use of applications for recall of judgments which they refuse to accept, stating:[10]

> [3] It is becoming a matter of concern not just to this Court but to others in the western common law system that disaffected litigants, usually appearing in person, repeatedly make application for recall of judgments which they steadfastly refuse to accept. It is timely to characterise plainly unmeritorious applications of that sort as an abuse of the Court's process and to reaffirm the rarity of legal justification for recalling judgments.

Grounds relied upon by Mr Jones

[36] In summary, Mr Jones submits that the Authority held that the Corporation had a right to destroy his 1991 claim file and this finding is wrong having regard to the decision of the Human Rights Review Tribunal ("HRRT") in *Vivash v Accident Compensation Corporation.*[11]

[37] Further, he asserts that the HRRT is a superior court to the Authority and that the Authority's finding that the Corporation had not acted criminally or fraudulently or in breach of its document destruction practice when it destroyed Mr Jones' 1991 claim file, has in effect been overturned by the HRRT decision in *Vivash.*

[38] Mr Jones says the Corporation's alleged failure to produce the 1991 claim file meant that there were missing records[12] which would have been useful, and he has been prejudiced in proving his claim as a consequence.

[39] In these circumstances, Mr Jones contends the destruction of the 1991 claim file satisfies the third category in *Horowhenua County (No.2).*

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[10] *Ngahuia Rihana Whanau Trust v Flight* CA23/03 26 July 2004.
[11] *Vivash v Accident Compensation Corporation* [2020] NZ HRRT 16
[12] In particular, the C3 earning certificate that would have shown the true earnings of Mr Jones working on the night staff in the box room at New Zealand Post in the period at issue.

Discussion

[40] In *Vivash* the HRRT considered whether the Corporation's destruction of Mr Vivash's physical claim file was a breach of Information Privacy Principle 5 (IPP5) of the Privacy Act 1993 entitling Mr Vivash to relief under that Act. The HRRT determined that the destruction of a physical claim file, even if in line with the Corporation's internal document destruction policy, could constitute a breach of IPP5. On the facts in that case, the destruction of Mr Vivash's physical claim file was found to be in breach of IPP5. The breach had caused interference with Mr Vivash's privacy under s 66 of the Privacy Act; and accordingly, he was entitled to relief, including damages, under s 85 of that Act.

[41] In the 2018 Substantive Decision, the Authority found that the destruction of Mr Jones' 1991 claim file was "likely in accordance with the normal business practice of disposing of records 10 years after they were last used". Mr Jones contends that the HRRT decision overrides or supersedes the Authority's finding with respect to the destruction of this file. On this basis, he submits that that the claim should be sent back to the Corporation for reconsideration in light of the HRRT findings in *Vivash.*

[42] I do not accept that the decision by the HRRT has any application in relation to the Authority's 2018 Substantive Decision. Significantly, the HRRT decision arises in a different jurisdiction considering different legislation. Moreover, the HRRT is not a superior decision-making body to the Authority. Whether or not the destruction of Mr Jones' 1991 claim file is in breach of IPP5 is relevant to relief that may be available to Mr Jones under the Privacy Act. However, such a breach does not affect the question of entitlements under the accident compensation legislation.[13]

[43] Accordingly, I do not consider that any special reason has been established which necessitates the granting of the application for recall of this decision under category 3 in *Horowhenua County (No 2).*

[13] I note by way of reply submissions, Mr Jones referred to a number of other cases. These cases do not assist in a consideration of the present application.

DECISION

[44] I have found that there is no jurisdiction to recall the Authority's 2018 Substantive Decision. Furthermore, even if there had been such jurisdiction, I am satisfied that no ground has been established warranting the making of an order recalling this decision.

[45] The application for leave to recall the Authority's 2018 Substantive Decision is dismissed. There is no issue as to costs.

Judge AA Sinclair
District Court Judge

Solicitors: Medico Law Limited, Solicitors, Auckland