IN THE DISTRICT COURT
AT WELLINGTON

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

[2021] NZACC 145 ACR 243/18

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 162 OF THE ACT
BETWEEN	EUPHEMIA ROSS Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the Papers

Judgment: 22 September 2021

JUDGMENT OF JUDGE AA SINCLAIR
[Application for leave to appeal: s 162 Accident Compensation Act 2001]

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[1] In a decision dated 5 January 2021, Judge P R Spiller dismissed an appeal by the applicant, Euphemia Ross, from a review decision in which the Reviewer had upheld the decision of the Accident Compensation Corporation ("the Corporation") dated 18 July 2014 determining Ms Ross to be vocationally independent.

[2] Ms Ross now seeks leave to appeal to the High Court from Judge Spiller's decision.

District Court Judgment

[3] In July 1997, Ms Ross sustained an injury to her right wrist while lifting heavy computer files. Ms Ross' medical treatment and the steps taken to assist her to achieve vocational independence in the following years are detailed in the judgment.

[4] At the hearing, Ms Ross contended that the vocational independence process was flawed because no up-to-date initial occupational assessment (IOA) and initial medical assessment (IMA) were completed. As well, Ms Ross' psychological/psychiatric profile had not been updated. Addressing these issues, the Court stated:

> [66] It is acknowledged that the IOA and IMA date back to 2003, which is 11 years prior to the third assessment upon which the Corporation made its vocational independence decision in 2014. However, there is no statutory requirement for further IOA and IMA. Further, Ms Ross also underwent three VIOs and three VIMAs, in 2006, 2007 and 2014. These assessments involved specialist occupational physicians and a rheumatologist. It has been previously held the claimants should not be subjected to unnecessary assessments, including the repeat of initial occupational and medical assessments.[1]
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> [67] Ms Ross' psychological/psychiatric profile was repeatedly updated between 2003 and 2014. During this period, Ms Ross was carefully monitored by the Corporation, in light of the rehabilitation that she received. She was referred for repeated psychiatric and psychological assessments, to an occupational specialist, the Pain Clinic, a physiotherapist, a pain consultant and an occupational consultant.

[5] Ms Ross submitted that the she had not achieved vocational independence. She asserted that she had ongoing debilitating pain which had not improved, and which prevented her from working. In addition, she contended that her computer skills were minimal including her skills around dragon dictation, and were not sufficient to enable her to undertake the identified clerical roles.

[6] As to Ms Ross' computer skills, the Court detailed the computer training undertaken by her and referred to the completion report which indicated the progress made by Ms Ross. A vocational work readiness report was prepared and in January 2014, the Corporation wrote to Ms Ross advising that her vocational independence would now be assessed and outlining the procedure to be followed.

[7] A third Vocational Independence Occupational Assessment ("VIOA") was completed by Occupational Consultant, Mr Heasley. Fifteen work types were identified as vocationally suitable for Ms Ross. Specialist Occupational Physician, Dr Antoniadis, carried out a Vocational Independence Medical Assessment

[1] *McGrath v Accident Compensation Corporation* [2011] NZSC 77 at [32]; and *Farquhar v Accident Compensation Corporation* [2002] NZHC 2703 at [26]-[27].

("VIMA") on 25 February 2014. He concluded that Ms Ross was fit to work fulltime in employment which was sedentary or light in demand and which allowed for flexibility of posture. He determined that Ms Ross would be able to manage 30 hours per week employment in six of those work types.

[8] Dr Antoniadis had a further assessment meeting with Ms Ross on 17 June 2014. This followed a report from Mr Heasley of 3 April 2014 advising that dragon software could be used for the roles of general clerk, receptionist, and inquiry clerk but would be unsuitable for the three sales assistant roles. Dr Antoniadis provided a follow up VIMA on 1 July 2014. The Court noted that this report covered the history of Ms Ross' injury, her medical, social and occupational history, the physical examination and investigations and Dr Antoniadis' opinion. In addition, the Court noted that the report explicitly addressed Ms Ross' pain and diagnosis of major depressive disorder, and went on to state:

> [71] Dr Antoniadis noted that Ms Ross had some clear psychological means to manage her pain and that these were well ensconced; and that [she] was on antidepressant medication and did not require any further psychological input. In light of her condition, Dr Antoniadis specifically excluded employment that would constrain her posture, require repetitive forceful use of her right hand, require frequent or constant computer-based activity or involve cognitively difficult tasks or those that require high levels of concentration. The tasks that Dr Antoniadis recommended were those that were suitable, when considering her covered injury and residual and persisting arm pain.

[9] Finally, the Court considered the report provided by Rheumatologist, Dr Rajapakse dated 30 March 2015. Dr Rajapakse opined that Ms Ross' condition had not changed substantially since he had seen Ms Ross in 2007 and had diagnosed chronic pain syndrome. Dr Rajapakse considered there was insufficient evidence to conclude that the psychological issues relating to chronic pain syndrome had substantially changed and Ms Ross' chronic pain and associated depressive state made her unsuitable to do any of the jobs identified by Dr Antoniadis. The Court preferred the report of Dr Antoniadis describing it as being "more fully considered, nuanced and balanced" than that of Dr Rajapakse.

[10] The Court went on to conclude that the Corporation's decision that Ms Ross was vocational independent was not flawed either in process or substance. The appeal was dismissed accordingly.

Questions of Law

[11] Ms Ross proposes the following questions of law for determination by the High Court:

(a) Did the District Court err in law by accepting that despite a VIMA in 2008[2] finding that no suitable jobs existed, it was permissible to dispense with further initial assessments and proceed directly to vocational independence assessments in 2014?

(b) Did the District Court make an error of law by accepting a further amended VIMA could take place on 17 June 2014 when there was already a VIMA dated 25 February 2015, in place?

(c) Did the District Court make an error of law by failing to address one of the key submissions namely, that the test in s 110(3) had not been satisfied?

(d) Did the District Court err in law by finding that the vocational independence procedure was not flawed either in process or substance?

Discussion

[12] Section 162(1) of the Accident Compensation Act 2001 ("the Act") provides that 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, apply to the High Court. Importantly, the contended point of law must be "capable of bona fide and serious argument" to qualify for the grant of leave.[3]

[2] 2007.
[3] *Impact Manufacturing Ltd v Accident Rehabilitation & Compensation Insurance Corporation* HC Wellington AP 260/00, 6 July 2001.

[13] I turn now to address each of the four questions put forward by Ms Ross:

(a) *Bypassing initial assessments?*

[14] Ms Ross submits that the vocational independence process commences with the completion of a IOA and IMA. When the requirements under s 110(3) of the Act are met, the Corporation can then refer the claimant to participate in the vocational independence assessment process consisting of the VOIA and VIMA.

[15] Ms Ross acknowledges that the vocational independence process needs to be flexible. However, she contends that it is not possible to amend the statutory requirements. Where the VIMA does not identify any suitable job types (as in the present case), then the process comes to an end. If the Corporation wishes to recommence the process, it has to do so by completing a new IOA and IMA.

Consideration

[16] Section 89 sets out the means to assess a claimant's vocational rehabilitation needs. The assessment consists of an IOA to identify the types of work that may be appropriate for the claimant having regard to that person's skills, knowledge and experience and an IMA to determine whether the types of work identified are likely to be medically sustainable for the claimant.

[17] In this case, the initial assessments were undertaken in 2003. The Corporation then tested Ms Ross' vocational independence in both 2006 and 2007. The VIOAs undertaken at this time confirmed that Ms Ross had the skills to undertake a number of job options. Accordingly, the exercise of assessing Ms Ross' skills, suitable work types and any rehabilitation required had already been done, and in these circumstances, there was no reason to subject Ms Ross to another IOA before commencing the vocational independence process in 2014. The VIMAs carried out in 2006 and 2007 identified the reasons why Ms Ross was not vocationally independent at that time and also the treatment that needed to be provided. Again, there was no utility in carrying out a further IMA.

[18] There is no statutory requirement for further initial assessments to be undertaken where vocational independence is not found. Moreover, as the Court observed, to require another IOA and IMA asking the same questions where two VIOs and two VIMAs have been done in the interim, would have been to subject Ms Ross to unnecessary assessments.[4]

[19] On this basis, I find that the Court did not err in determining that a further IOA and IMA were not required, and consequently, I am satisfied that Ms Ross raises no seriously arguable point of law.

(b) *Two Vocational independent assessments?*

[20] Dr Antoniadis provided a VIMA on 25 February 2014 and a second VIMA on 1 July 2014. Ms Ross submits that the vocational independence procedure does not cater for amendments to the VIMA. Rather, she says the procedure has been carefully crafted and does not allow for reports to be continually amended.

Consideration

[21] The second VIMA provided by Dr Antoniadis followed Mr Heasley's report of 3 April 2014 and considered the application of the voice dictation software in respect of the job types identified in the first VIMA. The Corporation did not issue its vocational independence decision until 18 July 2014, after it had received both Dr Antoniadis' reports.

[22] I agree with the Corporation that the Act is not formulaic in terms of the form of a VIMA. Clause 28 of Schedule 1 sets out the conduct of the medical assessment and in particular, the information that the medical assessor must be provided with. Clause 29 sets out the parameters of the report on the medical assessment. It is not in dispute that Dr Antoniadis was appropriately qualified and that the report was otherwise properly completed.

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[4] *McGrath v Accident Compensation Corporation*. See also *Farquhar v Accident Compensation Corporation.* Above n 1.

[23] I do not consider the fact that two reports were provided as part of the same assessment is in any way contrary to the statutory process. Importantly, both reports were available to the Corporation when it made its vocational independence decision.

[24] In my view, the requirements of the VIMA were clearly met, and no arguable question of law arises.

(c) *Compliance with Section 110(3)?*

[25] Ms Ross says that at the hearing, it was argued that there had been inadequate rehabilitation with little progress made in her computer training and a failure to update her psychiatric condition. On this basis, Ms Ross asserts that "it would be hard to see how the Corporation could say that vocational independence was likely pursuant to s 110" when it decided in January 2014 to again assess Ms Ross' vocational independence.

[26] Ms Ross accepts that the Court does not have to examine every submission in detail, but asserts that in this case, it did not address the s 110(3) issue at all. Accordingly, Ms Ross submits that this constitutes an error of law.

Consideration

[27] On analysis, this issue is a factual one and does not give rise to any question of law. The Court reviewed the steps taken leading up to the Corporation's decision to assess Ms Ross' vocational independence in 2014. The Court referred to the further rehabilitation provided during July 2012 to May 2013 including input from a clinical psychologist. The Court also noted the vocational training in particular, the computer training and training in the use of voice activated dictation software and the vocational rehabilitation work readiness report provided by Mr Heasley. The Court went on to refer to the Corporation's decision to assess Ms Ross' vocational independence and letter to Ms Ross of 9 January 2014 advising of the commencement of the vocational independence process, both of which steps are taken under s 110.

[28] Importantly, the Court set out the requirements under s 107 of the Act for determination of vocational independence. In reaching its finding that the Corporation's decision was not flawed either in process or substance, the Court must necessarily have been satisfied that the requirements under this section had been satisfied. These requirements included that the Corporation had determined Ms Ross' vocational independence in accordance with s 110.[5]

[29] On this basis, I am satisfied that no seriously arguable point of law arises.

(d) *Flaws in the process?*

[30] Ms Ross contends that there were a number of flaws in the process. In particular, she says: (i) the computer training showed little promise; (ii) Dr Antoniadis said that no further psychological assistance was necessary however, he is not a psychologist or a psychiatrist; and (iii) Dr Antoniadis did not address the issue of Ms Ross' depression or the effect of her medication on the identified suitable job types. Ms Ross submits that these flaws taken together with those under (a), (b) and (c) above, reach the stage that the Court should have found that the process was flawed, and the Court erred in not doing so.

Consideration

[31] This appears to be a "catch all" argument. The Court's alleged failure to find that the process was flawed involves matters of fact and does not give rise to any question of law. Furthermore, the alleged flaws in the process were raised at the hearing. It is plain that the Court gave careful consideration to the evidence including Dr Antoniadis' two reports describing his final report as "fully considered, nuanced and balanced" in reaching its conclusion that there was no flaw in the process or substance of the Corporation's decision.

[32] Consequently, I do not consider that any seriously arguable point of law arises. As Ms Ross links these alleged flaws with the matters alleged under (a), (b) and (c) above, I also refer to my discussion above

[5] Accident Compensation Act 2001, s 107(2).

Summary

[33] The Court undertook a careful analysis of the evidence and process followed by the Corporation concluding that the Corporation's decision that Ms Ross was vocationally independent was not flawed either in process or substance. For the reasons discussed above, I am satisfied that Ms Ross has not raised any question of law capable of bona fide and serious argument which would qualify for the grant of leave in this case.

Result

[34] The application for leave to appeal to the High Court is dismissed. There is no issue as to costs.

AA Sinclair
District Court Judge

Solicitors: Medico Law Limited, Auckland, for the Respondent.