

**PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001 THERE IS A
SUPPRESSION ORDER FORBIDDING PUBLICATION OF THE APPELLANT'S
NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE APPELLANT**

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 224 ACR 221/21

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	KC Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 29 September 2022
Heard at: Auckland/Tāmaki Makaurau

Appearances: The appellant in person via AVL
Ms F Becroft for the respondent

Judgment: 29 November 2022

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Treatment Injury (Requirements of Sections 32 and 33)
Accident Compensation Act 2001]**

[1] At issue is a decision of the respondent dated 5 March 2021 declining to cover for a treatment injury.

[2] The appellant submits that she ought to be entitled to cover for a treatment injury because she suffered an injury because of treatment.

[3] The Corporation's position is that the claim does not meet the statutory criteria for cover of a treatment injury.

Background

[4] On 8 March 2019, an ACC injury claim form was filed for a sensitive claim said to relate to an event on 8 March 2014. The claim form indicated that the appellant preferred to have no contact with the Corporation and was not happy to discuss the matter on the phone.

[5] On 9 May 2019, the Corporation issued a preliminary decision indicating that it was unable to approve the claim.

[6] The Corporation said:

We have a limited period of time to assess claims for cover. This usually means gathering information to better understand what kind of support we can give you. As we haven't progressed to this stage with you, we are unable to approve your claim for the time being.

[7] The appellant subsequently applied to review that decision. The review application provided more details. The appellant wrote:

Sensitive/harmful claim, assault (work and personal) 2014

Work ADHB – without my consent individuals in my private life were contacted, which resulted in the below.

At work, I was shouted at, bullied, sexually harassed, threatened and discriminated against in a big way. I went through privacy breaches and defamation.

Personal home Grafton, Auckland – as a result of communication between individuals, I did not consent to, I was shouted at, pushed, bullied, sexual insulted/harassed, threatened, things were thrown at me, walls were punched next to me, I was accused of infidelity and foul/degrading language was used on me.

[8] The appellant advised:

I would like ACC to pay for my medical expenses relating to these matters. I have not needed a regular GP prior to 2014 in Auckland. These matters affected my health, wellbeing, work, training, and finances. I had to leave my home in New Zealand under dire circumstances. My anaesthesia training has been significantly affected. I would have completed anaesthesia training by latest, early 2017. I was very affected by these traumatic circumstances. Some of these individuals contributed to processes that resulted in further many months (six months plus six months) of unemployment and removal from the anaesthesia training programme. I am still undergoing rehabilitation for my life, work, training, finances and wellbeing. I was made to feel extremely unwelcome in Auckland. I needed compensation and rehabilitation for my health, wellbeing, life and anaesthesia training that has undergone devastation. I would like ACC to be welcoming and kind in your processes.

[9] Along with the claim, were a series of communications between the appellant and her former employer, Auckland DHB (or doctors within DHB). These communications made it clear that there were significant relationship/employment issues between the appellant and ADHB during 2014.

[10] Subsequently, the parties agreed that the appellant would undergo a medical assessment to allow the Corporation to investigate her claim further. The review application was withdrawn.

[11] On 2 September 2019, the Corporation wrote to the appellant to detail the nature of the assessment. The letter advised that the assessment was for mental injury caused by sexual abuse and that it would be undertaken by an experienced clinical psychiatrist. The letter added:

I apologise for needing to ask such a blunt question, but looking at the events you describe in your recent email, none would currently meet the definition of an event for which a sensitive claim would be lodged. You mentioned in your review application sexual harassment at work – am I correct in thinking these are the events for which you have lodged the sensitive claim? The only events that the assessment will be able to look at for injury under the sensitive claim are sexual abuse events. So, it is important to be clear on what these are.

[12] The letter also detailed the list of Schedule three events, classified events giving rise to cover under the heading of a sensitive claim.

[13] The appellant replied to that letter on 3 September 2019 as follows:

Thank you for your letter. I have come to ACC as there seems to be something wrong with the justice/legal system in the last six years, whereby I have been treated in an unjust manner. Even my lawyers who represented me have not acted in my best interest. Thus, I will not be taking these matters anywhere else. ACC and ICRA are the only places I would work with prior to taking this to a higher level. Thank you kindly.

[14] Subsequently, the appellant indicated that she preferred to be assessed by a GP or counsellor, rather than a psychiatrist. The Corporation then arranged for an assessment by a psychologist.

[15] A psychological assessment was completed on 30 October 2019 by Dr McLennan, clinical psychologist, and Mr Manderson, neuropsychologist. The assessment explained that the appellant felt she had two different claims, a work-related claim and a sensitive claim.

The report describes the appellant's work situation in late 2013/2014. She was completing her anaesthesiology training; her husband was living in a different town, and she was coping with that and other challenges. She then requested annual leave, so she could spend more time with her husband. This was declined. She requested a transfer, which was also declined. The appellant describes her leave being repeatedly declined. The appellant felt that she was discriminated against. The appellant described workplace bullying and sexual harassment, with colleagues starting rumours that she was not committed to her marriage and make inappropriate comments about her sexual preference. The appellant believed that her husband was contacted by work colleagues and informed that she was cheating on him. The appellant indicated that at this stage, her husband became aggressive towards her and became very rough during sex. The appellant advised that she did not consent to the level of violence and derogatory comments made. By February 2015, the appellant had resigned from the DHB and her marriage broke up.

[16] The assessors indicated that the appellant's description was consistent with sexual violation, however they found it difficult to establish a diagnosable mental injury arising from sexual abuse. They listed possible diagnoses of post traumatic stress disorder and major depressive disorder, or anxiety disorder, but were not confident in any diagnosis.

[17] The appellant subsequently provided further information, including a psychologist letter from 23 October 2015, further email correspondence and some medical certificates and GP notes from 2014 and asked that the information be made available to the assessors, so they could reassess her claim.

[18] Dr McLennan and Mr Manderson reported again on 20 November 2019, noting reports of depression and anxiety in 2015, which appeared to relate to both the appellant's work situation and her marriage breakdown. The assessors noted that it was still difficult to tell from the letters, the extent to which sexual abuse was a factor in the development of depression and anxiety.

[19] On 4 December 2019, the appellant wrote to the Corporation and indicated that if a further claim for cover was needed, then she could do that, for example, for a work-related gradual process injury, or a work-related mental injury.

[20] On 16 December 2019, Ms Price, psychologist, wrote to the Corporation. She indicated she had been treating the appellant since July 2019 and that the appellant had recently raised “sexual issues”, including “abuse” and “harassment” in relation to her workplace and her personal life. The appellant also provided earlier reports from Ms Polymeneas, psychologist, dated 23 October 2015. Ms Polymeneas indicates that she had been treating the appellant in relation to “depression and anxiety relating to her marriage breakdown and the issues she had with her place of employment in New Zealand”.

[21] On 20 January 2020, the claim was reviewed by Ms Swann, psychology advisor. She recommended declining the claim.

[22] On 21 January 2020, the Corporation issued a decision declining the mental injury claim on the basis of the evidence to date, which did not establish a mental injury as a result of a sensitive event.

[23] On 6 February 2020, a review application was filed against the Corporation’s decision. Subsequently, there were a number of communications from the appellant, which detailed concerns in relation to Dr McLennan’s report.

[24] The review proceeded on 17 June 2020 by video conference. The reviewer was Ms Nicole Smith. The appellant did not attend. Ms Smith issued a decision on 16 July 2020 dismissing the review application. She was not satisfied that the appellant was suffering mental injury caused by a Schedule 3 criminal act.

[25] The appellant filed a notice of appeal.

[26] For the appeal, the appellant has filed additional evidence relating to her work in 2014. The parties have also obtained a further psychiatric assessment by consent. The assessor, Dr Turner, also could not identify a mental injury as a result of a Schedule 3 event.

[27] On 21 November 2020, the appellant emailed the Corporation referring to mental health treatment investigations in 2014 involving the DHB. She explained that a mental health assessment was undertaken, that she was getting treatment for tuberculosis exposure in 2014 and that she was a patient at the DHB in 2014/2015. She suggested that harmful events at

work and at home in 2014 caused mental health problems, including anxiety and depression. She also referred to acquired disc degeneration at C5/C6.

The Current Claim

[28] During discussions with Counsel in relation to ACR 160/20, the appellant raised the possibility of a treatment injury. There were then ongoing discussions between the appellant and counsel in relation to the treatment injury cover criteria.

[29] These conversations resulted in the issue being put to the Corporation to consider a claim for treatment injury (later giving rise to the decision that is the subject of this appeal).

[30] The Corporation subsequently asked the appellant to provide further details in terms of the basis of the claim.

[31] On 1 March 2021, the appellant emailed the Corporation and said:

I think the basis of the claim is the mental health diagnosis and thus subsequent maltreatment. Also subsequent respiratory sequela.

[32] The Corporation was unable to identify the essential elements of a treatment injury claim, or even a clear basis from which to investigate further.

[33] On 5 March 2021, the Corporation declined the claim on the basis that there was insufficient clarity around it and so a physical injury could not be assessed.

[34] The same day the appellant applied for a review of the Corporation's decision. Attached to the review application were responses to questions previously put to her by the Corporation. The appellant indicated that she had received treatments and medication in 2014 and that processes and policies were put in place to support her healthcare, with lasting effects, because she was mis-diagnosed, maltreated, abused, discriminated against and bullied. She listed the healthcare providers involved as Dr Page, psychiatrist; Dr Bradfield, anaesthetist; Dr Blair, anaesthetist; and the DHB Respiratory Unit. When asked what the treatment was when the injury occurred, the appellant responded:

Psychiatric reports, the New Zealand Medical Council Psychiatrist, Dr Page, handed over my psychiatric care to the DHB, the DHB reported me to the New Zealand Medical

Council after I lodged a police report. I was also receiving treatment from the Respiratory Unit at the DHB soon after that. There were also harmful “supports” occurring at work and in my personal life.

...

I was getting mental health treatment and investigations in 2014, involving the DHB and my bosses, mentor and individuals in my personal life. The MCNZ was involved. I needed to have a mental health assessment and there were multiple unconsented communications between the psychiatrist, individuals in my workplace and individuals in my personal life. I was also getting treatment for TB exposure in 2014. I was a patient of the DHB in 2014/2015. I also did not actually get any assistance for the harmful events and circumstances that were actually occurring to me, at work and at home in 2014, causing me mental health problems such as anxiety and depression. My mental health and circumstances worsened significantly after the MCNZ complaint and mental health assessments and investigations in 2014.

[35] When asked what physical injury the appellant received during the treatment, she responded:

I have acquired a disc degeneration at C5/C6 and posterior disc abnormality, which I never had prior to 2014. I have never suffered from headaches or neck pain prior to 2014.

[36] The matter went to review on 15 July 2021 before Mr Wilson, reviewer. In the decision dated 20 August 2021, the reviewer, Mr Wilson, traversed the treatment injury provisions. The issue before him was whether the Corporation’s March decision was correct (the basis of which being that the Corporation had insufficient materials before it at that time to investigate the claim further). He concluded that there was some preliminary obligation on a claimant to clarify the nature of their claim, and that in the present case the appellant had failed to do so. He noted:

At various stages [KC’s] claim would seem to be related to disc injury/degeneration, a failure to diagnose or treat, and/or a mental injury, although it unfortunately is entirely unclear what any underlying physical injury is purported to be.

[37] Mr Wilson’s conclusion was that the Corporation’s decision of 5 March 2021 was correct, but noted that should the appellant provide further appropriate details, then the Corporation would be required to proceed and investigate the application in the usual manner. The review application was therefore dismissed.

Appellant's Submissions

[38] In written submissions filed ahead of the hearing, the appellant provided a fairly detailed history of her life prior to 2014, emphasising her good health and her successful career, and her committed relationship.

[39] In early 2014, her personal relationship changed for the worse and, as she describes it, she was sexual harassed, tortured and abused in 2014. She described her work environment as toxic and unsupportive. She says that healthcare providers used by ACC could possibly have conflicts of interest against her.

[40] She said she was forced to move from New Zealand to Australia under great duress and urgency.

[41] In oral submissions at the appeal hearing, she confirmed her good health status before 2014.

[42] She says that a doctor who became her boss and mentor in 2013 crossed professional boundaries and that she did not feel confident within the mentor/mentee relationship.

[43] She told the court she was not sure whether this doctor was giving her any treatment.

[44] She told the court that this doctor, and another, breached confidentiality.

[45] She said that in July 2014, sexual abuse began.

[46] She spoke of having migraines in 2014 for the first time. She described the migraines as being both a physical and mental injury. Therefore, she says, that gives rise to an ACC claim.

[47] She refers to Dr Page, psychiatrist, in 2014 being very concerned about the stresses on her and he diagnosed stress/tension headaches.

[48] She said her treatment in the workplace worsened and the cough that was ignored until October 2014 was diagnosed as a tuberculosis infection.

[49] She says that the processes that were activated by the DHB were toxic and unsupportive. She said she did not get the assistance that she needed at the time. She says that her mental injuries of depression, anxiety and stress were confirmed by registered psychologist Ms Price in 2019.

[50] She says that as a result, her entire anaesthetics training was derailed and she had to leave New Zealand and was extremely traumatised.

Respondent's Submissions

[51] Ms Becroft notes that the appellant has ACC cover for depression.

[52] She says it is important to acknowledge that this claim was filed directly by the appellant herself, not by a doctor.

[53] Ms Becroft says that the treatment injury provision is very specific, namely it is a personal injury caused by treatment.

[54] She submits that the appellant has not shown that any physical injury has been suffered by her as a result of her treatment.

[55] She says that in this case, ACC was left with nothing to investigate, therefore the claim was declined, because the essential elements of an injury had not been made out.

Appellant's Reply

[56] In her submissions in reply, the appellant says that as a result of delaying getting treatment, she now suffers from a chronic cough, which is a physical injury, and that her diagnosis of tuberculosis, which was a physical injury, was not picked up in July 2014, but picked up later in October 2014.

[57] She again said that migraine was a physical injury caused by what happened in New Zealand.

[58] In respect of tuberculosis, she says that she should have been tested earlier, and was not.

[59] She says that the maltreatment caused by Drs Bradfield and Page, and her partner, caused the chronic cough and that workplace processes, including extreme amounts of computer typing, contributed to her right arm injury.

[60] She disagrees with ACC's position that she had not been receiving treatment in 2014 and says she was treated by Drs Bradfield, Page and Blair. She says that treatment includes diagnosis and non-diagnosis, as well as misdiagnosis.

Decision

[61] This is an appeal against the respondent's decision of 5 March 2021 declining cover for a treatment injury.

[62] It appears that it was during discussions with ACC's counsel in respect to another appeal (ACR 160/20) that the appellant raised the possibility of a treatment injury. There were then ongoing discussions between the appellant and ACC's counsel in relation to the treatment injury cover criteria.

[63] These conversations resulted in the issue being put to the Corporation to consider a claim for a treatment injury.

[64] After being asked to do so by ACC, the appellant provided further details in terms of the basis of the claim.

[65] In an email to the Corporation dated 1 March 2021, the appellant said:

I think the basis of the claim is the mental health mis-diagnosis and thus subsequent maltreatment. Also subsequent respiratory sequela.

[66] On 5 March 2021, ACC declined the appellant's claim. ACC's letter said:

We are unable to accept your claim because it does not meet the criteria for a treatment injury.

[67] ACC included with this decision a treatment injury report, which included the following:

Treatment Injury Criteria

When We'll Cover a Treatment Injury

For ACC to approve cover for a treatment injury claim, the following requirements apply:

- There is a personal injury; and
- It was caused by treatment provided by, or at the direction of, a registered health professional; and
- The personal injury was not a necessary part or ordinary consequence of treatment – when taking into account the relevant circumstances of the injury event.

ACC's Decision

Treatment injury is defined in section 32 of the Accident Compensation Act 2001 as personal injury suffered by a person seeking treatment or receiving treatment from a registered health professional and caused by treatment; and not a necessary part, or ordinary consequence of the treatment, taking into account all the circumstances of the treatment, including the person's underlying health condition at the time of the treatment; and the clinical knowledge at the time of the treatment.

First and foremost, to assess a claim for a treatment injury, ACC must establish the basis of the claim, in the case of your claim, ACC has no clarity on what the basis of the claim is, and so a physical injury cannot be assessed.

As ACC is not able to ascertain that a physical injury has occurred from treatment from a registered health professional, your client does not meet the statutory criteria for cover and therefore is declined for cover.

[68] Treatment injuries are dealt with in sections 32 and 33 of the Accident Compensation Act 2001.

[69] So far as it is relevant, section 32 provides:

- (1) Treatment injury means personal injury that is:
 - (a) Suffered by a person;
 - (i) Seeking treatment from one or more registered health professionals; or
 - (ii) Receiving treatment from, or at the direction of, one or more registered health professionals

...

and

- (b) Caused by treatment; and
- (c) Not a necessary part or ordinary consequence of the treatment, taking into account all the circumstances of the treatment, including –
 - (i) The person’s underlying health condition at the time of the treatment; and
 - (ii) The clinical knowledge at the time of the treatment.

[70] The term “treatment” is defined in section 33 and includes the diagnosis of a person’s medical condition.

[71] Section 26 of the Act defines personal injury to include:

- (c) Mental injury suffered by a person because of physical injury suffered by the person.

[72] On 1 March 2021, the appellant emailed the Corporation and said:

I think the basis of the claim is the mental health mis-diagnosis and thus subsequent maltreatment. Also subsequent respiratory sequela.

[73] In a very recent report addressed to ACC dated 26 September 2022, Dr Randhawa, general practitioner, says that he was asked by the appellant to provide a medical opinion regarding her ACC injury claims. He says that in 2014 a psychiatrist, Dr Page, diagnosed the appellant with tension/stress headaches and that she was then referred back to Dr X and was placed back under the care of the anaesthesia department at the DHB.

[74] It is assumed that Dr Randhawa had some documentation before him that allowed him to report thus. His letter records the appellant’s history from 2014 and her requirement for urgent weekly payments but does not assist the court in determining whether a treatment injury occurred.

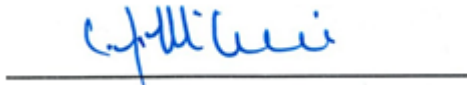
[75] The appellant has produced documentation that her GP in August 2014 treated her for migraine, which she had never had before. However, there is no medical evidence of a causal link between that diagnosis and treatment defined in s 32 of the Act

[76] Next there is no documented evidence that, in 2014, that she did receive treatment from the anaesthesia department of the DHB.

[77] Therefore, this appeal relating to an alleged treatment injury must fail in that very general assertions aside, there is no evidence that the appellant suffered a personal injury caused by treatment. That is to say, there is no evidence on which the Court could rely that she suffered a personal injury as defined in the Act while she was seeking/ receiving treatment from a registered health professional, as s 32 requires.

[78] Accordingly, therefore, this appeal is dismissed.

[79] There is no issue as to costs.



CJ McGuire
District Court Judge

Solicitors: Medico Law Limited, Grey Lynn