

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2022] NZACC 86 ACR 68/21

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPEAL UNDER SECTION 149 OF
THE ACT

BETWEEN NICOLA FOSTER
Appellant

AND ACCIDENT COMPENSATION
CORPORATION
Respondent

Hearing: 22 April 2022
Held at: Auckland/Tāmaki Makaurau
By AVL

Appearances: K Koloni for Ms Foster
P McBride for the respondent

Judgment: 11 May 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Late filing of review application and costs – ss 135 and 148 , claim regarding
Code of Claimants’ Rights - s 149(3), deemed decision - s 146, Accident
Compensation Act 2001]

Introduction

[1] This is an appeal from the following decisions of a Reviewer:

- (a) Review decision of 9 November 2020: dismissing an appeal against the Corporation’s decision of 20 July 2020 declining to accept the late filing of Ms Foster’s review application regarding the Corporation’s decision of 14 June 2016; and declining jurisdiction in respect of this decision.

- (b) Review decision of 8 December 2020: declining jurisdiction in respect of the Corporation's decision of 29 May 2020 regarding the Code of Claimants' Rights and declining to award costs.
- (c) Review decision of 11 March 2021: dismissing the claim that there were two deemed decisions in Ms Foster's favour.

(a) 9 November 2020 review decision

Background

[2] Ms Foster was born in 1972, and she worked as a health care assistant.

[3] On 20 May 2015, Ms Foster reported spinal pain following lifting at work. On 25 May 2015, Dr Willem Jordaan, GP, lodged a claim for lumbar sprain. Cover was granted and entitlements were paid.

[4] On 9 May 2016, WellNZ, on behalf of Ms Foster's employer, suspended entitlements for non-compliance in relation to attendance at an MRI scan.

[5] Imaging and other specialist medical investigations were later conducted. On 14 June 2016, a further decision was issued by WellNZ suspending entitlements, on the basis that Ms Foster's ongoing symptoms did not result from the covered lumbar sprain injury. Ms Foster sought a review of this decision, but, on 1 December 2016, withdrew the application.

[6] On 27 February 2020, Ms Foster again sought a review of WellNZ's decision of 14 June 2016.¹ That application identified that it was being lodged because Ms Foster's advocate, Ms Koloni, had been through the file and had identified an alleged as a "breach" by WellNZ.

[7] On 20 July 2020, the Corporation issued a decision declining to accept the late lodgement review. That decision was based on:

¹ Ms Foster also sought a review of Well NZ's earlier decision of 9 May 2016, but this was withdrawn on 17 June 2020.

- (a) There being no evidence that extenuating circumstances affected the ability of Ms Foster to meet the time limits for lodging a review application in 2016; and
- (b) The review application in respect of the same primary decision was made within time on 31 August 2016, involving Ms Foster's then representative. Ms Foster subsequently withdrew that application on 1 December 2016, as confirmed by Fairway on 22 December 2016.

[8] On 10 September 2020, Ms Foster lodged a review application against the Corporation's decision of 20 July 2020 declining to accept the late lodgement review of the Corporation's decision of 14 June 2016.

[9] On 9 November 2020, a hearing was held to consider the review of the Corporation's decisions of:

- (1) 20 July 2020 declining to accept the late filing of Ms Foster's review application; and
- (2) 14 June 2016 suspending Ms Foster's entitlements.

[10] On 9 November 2020, the Reviewer dismissed the application in relation to late filing, as Ms Foster's reason for the delay in submitting her review application did not constitute an extenuating circumstances and therefore determined that there was no jurisdiction to consider the substantive matter of the 2016 decision suspending entitlements. The Reviewer made no order as to costs, on the basis that Ms Foster did not seek costs.

[11] On 9 March 2021, a Notice of Appeal was lodged.

Relevant law

[12] Section 135 of the Act provides:

- (1) The [review] application must—
...
(f) be made within 3 months of—

- (i) the date on which the claimant has a decision under section 58;
- (3) Despite subsection (2)(f) ... and any time frame prescribed in regulations made under section 328A for the lodgement of a review application, the Corporation must accept a late application if satisfied that there are extenuating circumstances that affected the ability of the claimant to meet the time limits, such as—
- (a) where the claimant was so affected or traumatised by the personal injury giving rise to the review that he or she was unable to consider his or her review rights; or
 - (b) where the claimant made reasonable arrangements to have the application made on his or her behalf by an agent of the claimant, and the agent unreasonably failed to ensure that the application was made within the required time; or
 - (c) where the Corporation failed to notify the claimant of the obligations of persons making an application.

[13] In *Kohe*,² Beattie DCJ stated:

[14] ... the meaning and purpose of the provision is that the extenuating circumstances must relate to the ability of the claimant to lodge the application within the three-month period. It cannot extend to cover extraneous reasons such as capriciousness, forgetfulness, or any circumstances that are within the control of the claimant.

[14] In *Smith*,³ Ongley DCJ stated:

[10] The legislative language does not suggest a high threshold of circumstances causing difficulty in filing an application in due time. “Extenuating” does not suggest a need to show unusual or extraordinary circumstances. It is more akin to mitigating or explaining. The extenuating circumstance must be something of reasonable substance. Oversight or forgetfulness, for example, could not suffice on its own: *Gordon v ACC* (165/05). Secondly, the claimant needs to provide the Corporation or the Court with enough information to decide whether there are extenuating circumstances in a given case. The information needs to match periods of delay with reasons for delay. Vague assertions are unlikely to be enough. The Court needs to know what the circumstances are with reasonable precision.

[15] In *Moananui*,⁴ Powell DCJ stated:

[28] ... the complexity of a substantive decision is not a matter which can be considered when deciding if the extenuating circumstances provisions apply. That is because, the extenuating circumstances provisions are directed toward

² *Kohe v Accident Compensation Corporation* [2005] NZACC 95.

³ *Smith v Accident Compensation Corporation* [2010] NZACC 66.

⁴ *Moananui v Accident Compensation Corporation* [2014] NZACC 54.

circumstances which limited the person's ability to lodge the application, The fact that Mr Moananui may have been unable to personally calculate the interest which was, or should have been paid, is not the same as saying he could not have sought a review of that decision. If it was that Mr Moananui had reason to doubt ACC's decision, he could nevertheless have lodged the application for review to protect his position.

[16] Section 148 of the Act provides:

- (2) Whether or not there is a hearing, the reviewer—
 - (a) must award the applicant costs and expenses, if the reviewer makes a review decision fully or partly in favour of the applicant:
 - (b) may award the applicant costs and expenses, if the reviewer does not make a review decision in favour of the applicant but considers that the applicant acted reasonably in applying for the review:
 - (c) may award any other person costs and expenses, if the reviewer makes a review decision in favour of the person.
- ...
- (4) The award of costs and expenses under this section must be in accordance with regulations made for the purpose.

[17] Schedule 1 of the Accident Compensation (Review Costs and Appeals) Regulations 2002 (as amended) provides a scale of costs and expenses on review. Costs can be awarded for preparing and lodging an application for review; relevant and necessary reports by registered specialists and persons with a recognised qualification to express a competent view on a matter in issue; and other expenses reasonably incurred associated with a hearing, such as transport to a hearing, time off work for an applicant, and disbursements such as photocopying

Discussion

[18] The issues in this matter are:

- (1) whether the Corporation correctly declined to accept the late filing of Ms Foster's review application;
- (2) if so, whether there is jurisdiction to consider the Corporation's decision of 14 June 2016 suspending Ms Foster's entitlements; and
- (3) whether the Reviewer correctly awarded no costs.

[19] A review application must be made within three months of the date on which a claimant has a decision issued by the Corporation, unless the Corporation is satisfied that there are extenuating circumstances that affected the ability of the claimant to meet the time limits.⁵ Extenuating circumstances do not cover extraneous reasons such as capriciousness, forgetfulness, or circumstances that are within the control of the claimant.⁶ Extenuating circumstances must be of reasonable substance, must be outlined with reasonable precision,⁷ and do not relate to the complexity of the matter at hand.⁸

[20] Ms Foster submits that the Reviewer ignored the circumstances and evidence, and made mistakes of fact and law, and that the decision be quashed and costs awarded. Ms Foster notes that she filed her application for review within the three-month time-frame and then withdrew the application, and that it was then filed much later. She submits that, when she withdrew the application, she did not receive the support and advice from her then representative, in order to make an informed decision, and that she was dealing with a number of personal issues at the time and did not feel that she was mentally prepared to undergo a review.

[21] The Court notes that the Corporation issued its decision on 14 June 2016. Ms Foster applied for a review of the decision on 31 August 2016 (before the deadline of 14 September 2016). She withdrew her application on 1 December 2016; and she again applied for a review on 27 February 2020. The fact that Ms Foster made her review application within the three-month timeframe establishes that she did have the ability to meet the time limit.

[22] This Court finds, in light of the above circumstances, that the Corporation correctly found that it was not satisfied that there were extenuating circumstances, and so did not accept the later filing of the review. The Court further finds that, because there was therefore no valid application for review of the Corporation's decision of 14 June 2016, the Reviewer did not have jurisdiction to deal with the merits of the Corporation's decision.

⁵ Section 135 of the Act.

⁶ See *Kohe*, n2 at [14].

⁷ See *Smith*, n3 at [10].

⁸ See *Moananui*, n4 at [28].

[23] There remains, however, the ancillary matter of the Reviewer's decision regarding costs of the review. Section 148(2) of the Act provides that, if a Reviewer does not make a review decision in favour of an applicant but considers that the applicant acted reasonably in applying for the review, the Reviewer may award the applicant costs and expenses. The proceedings held to consider the above matters were conducted by Zoom audio, with Ms Foster, Ms Koloni and Mr McBride connected to the Reviewer. It appears that, at a certain point, the audio connection with Ms Koloni was lost. Towards the end of the hearing, the Reviewer asked Ms Foster if she wanted to claim any costs for the review application. Ms Foster replied that she thought that Ms Koloni did want to claim costs. The Reviewer then advised Ms Foster to tell Ms Koloni to send an invoice regarding the current review application. Mr McBride then clarified that Ms Foster did not want to make a claim for costs but that Ms Koloni did. At the conclusion of the Reviewer's decision, under the heading "Costs", the Reviewer noted that Ms Foster did not seek costs. No reference was made to expenses.

[24] This Court notes that it was unfortunate that Ms Koloni was disconnected from the hearing, particularly during the discussion about costs and expenses. In the interests of justice being seen to be done, this Court (in terms of section 161(2)(c)) quashes the Reviewer's decision in relation to costs, and directs that the Reviewer make a new decision on costs and expenses after receiving the submissions of Ms Koloni and Mr McBride on this issue.

(b) 8 December 2020 review decision

Background

[25] Ms Foster lodged complaints about the way in which her accredited employer, by its third party, administrator WellNZ, was said to have handled Ms Foster's claim.

[26] On 29 May 2020, a Corporation Resolutions Specialist issued a decision, finding that there were no established breaches of the Code of Claimants' Rights. Ms Koloni applied for review of the above decision. The Corporation then agreed to re-investigate the matter.

[27] On 13 November 2020, a Corporation Resolutions Specialist revoked and replaced the 29 May 2020 decision. The Corporation found that there had been breach of three specified rights under the Code.

[28] Although the Corporation's decision of 29 May 2020 had been revoked, Ms Foster sought to advance the review in respect of this decision.

[29] On 7 December 2020, review proceedings were held. On 8 December 2020, the Reviewer held that there was no jurisdiction to entertain the review about the revoked decision, as it had been superseded by the 13 November 2020 decision.

Relevant law

[30] Section 149(3) of the Act provides that neither a claimant nor the Corporation may appeal to the District Court against a review decision on a decision by the Corporation under the Code on a complaint by the claimant.

[31] In *Nicholls*,⁹ Powell DCJ stated:

[15] Having accepted that the Corporation had jurisdiction to revoke the decision of 8 January 2016 it is clear that a valid revocation has taken place. At that point there can no longer be any substantive or jurisdictional basis upon which Review 4532094 in respect of the 8 January 2016 decision can proceed. The reason for this is that a review under s 134(1)(a) is by definition a review of a decision on the claim, and if that decision has been revoked there is nothing left to review.

Discussion

[32] The issue in this case is whether a Reviewer correctly held that there was no jurisdiction to entertain a review about a revoked Corporation decision, as it had been superseded by a later decision, and then awarded limited costs. Ms Foster submits that the Reviewer ignored the circumstances and evidence, made mistakes of fact and law, and should have awarded further costs.

[33] This Court notes that, at the point of revocation of the 29 May 2020 decision, there was longer any substantive or jurisdictional basis upon which a review of this

⁹ *Nicholls v Accident Compensation Corporation* [2018] NZACC 7.

could proceed. The reason for this is that a review under s 134(1)(a) is, by definition, a review of a decision on a claim, and, if that decision has been revoked, there is nothing left to review.¹⁰ This Court therefore finds that the Reviewer correctly found that he had no jurisdiction to consider this review. In view of this plain reality, the Reviewer correctly exercised his discretion to award limited costs.

[34] In any event, section 149(3) of the Act provides that a claimant may not appeal to the District Court against a review decision on a decision by the Corporation under the Code on a complaint by the claimant.

(c) 11 March 2021 review decision

Background

[35] As noted above, on 27 February 2020, Ms Foster sought a review of WellNZ's decisions of 9 May 2016 and 14 June 2016. On 19 May 2020, in a case conference, the applications were set down for review hearing. On 17 June 2020, the review of the decision of 9 May 2016 was withdrawn.

[36] On 9 October 2020, Ms Foster lodged further review applications, seeking deemed decisions in respect of WellNZ's decisions, on the basis that the review applications had not been set down for hearing within legislative timeframes.

[37] On 10 March 2021, review proceedings were held. On 11 March 2021, the Reviewer dismissed the review, on the basis that the review applications had been set down within the legislative timeframe. The Reviewer concluded, accepting the Corporation's submission, that the purported reviews were not reasonably brought, and declined costs.

Relevant law

[38] Section 146 of the Act provides:

- (1) The reviewer is deemed to have made a decision on the review in favour of the applicant if—

¹⁰ See *Nicholls*, n9 at [15].

- (a) the date for the hearing has not been set within 3 months after the review application is received by the Corporation; and
 - (b) the applicant did not cause, or contribute to, the delay.
- (2) The date of the deemed decision is 3 months after the review application is received.

[39] In *Henson*,¹¹ Powell DCJ observed that the review jurisdiction is entirely statutory.

Discussion

[40] The issue in this case is whether a Reviewer correctly dismissed the claim that there were two deemed decisions in Ms Foster's favour, and then awarded no costs. Ms Foster submits that the Reviewer ignored the circumstances and evidence, made mistakes of fact and law, and should have awarded costs.

[41] Section 146(1) of the Act provides that a Reviewer is deemed to have made a decision on a review, in favour of an applicant, if the date for the hearing has not been set within three months after the review application is received by the Corporation. In the present matter, the review applications regarding the Corporation's decisions of 9 May 2016 and 14 June 2016 were received by the Corporation on 27 February 2020, leaving a deadline of 26 May 2020 for the date of the hearing of the reviews to be set. In this case, the applications were set down for review hearing on 19 May 2020, within the deadline.

[42] In light of the above facts, this Court finds that the clear statutory provisions regarding deemed decisions were complied with by the Corporation. It follows that the Reviewer correctly dismissed the review, and correctly exercised his discretion not to award costs as no reasonable argument could be made in support of decisions having been deemed.

Conclusion

[43] In light of the above considerations, the Court finds:

¹¹ *Henson v Accident Compensation Corporation* [2017] NZACC 98, at [12].

- (a) The review decision of 9 November 2020 is upheld and the appeal is dismissed, except in relation to the matter of costs and expenses, which matter is remitted to the Reviewer to determine.
- (b) The review decision of 8 December 2020 is upheld and the appeal is dismissed.
- (c) The review decision of 11 March 2021 is upheld and the appeal is dismissed.

[44] I make no order as to costs.

A handwritten signature in black ink, appearing to read 'P R Spiller', is written over a faint, circular stamp or watermark.

P R Spiller
District Court Judge

Solicitors for the Corporation: McBride Davenport James.