IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 001 ACR 119/20

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL UNDER SECTION 162(1) OF THE ACT
BETWEEN	CHRISTOPHER O'NEILL Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Submissions: The Appellant is self-represented
B Johns and A Lane for the Respondent

Hearing: On the papers

Judgment: 9 January 2023

JUDGMENT OF JUDGE P R SPILLER
[Leave to Appeal]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour Judge McGuire, delivered on 4 July 2022.[1] The primary issue in this appeal is whether there are reviewable decisions in respect of three reviews. A related issue is whether Mr O'Neill had a valid claim for cover for his right eye injury, and, if so, whether the Corporation has failed to make a decision on that claim within the statutory time frame. Judge McGuire dismissed the appeal, for the reasons outlined below.

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1 *O'Neill v Accident Compensation Corporation* [2022] NZACC 127.

Background

[2] On 7 March 2019, Mr O'Neill wrote to the Corporation enclosing a letter, dated 30 January 2019, from Ms Sarah Hunt, Optometrist, to Dr Sood, Mr O'Neill's GP. Mr O'Neill believed that he had an historic claim for cover for an eye injury to his left eye, and, following his appointment with Ms Hunt, expected treatment for cataracts to be covered.

[3] On 7 March 2019, the Corporation considered Mr O'Neill's letter and added a note to his file which stated:

> Client is to contact his GP to lodge a late claim for the right eye old injury to get assessed for cover.

[4] Mr O'Neill's GP did not lodge a late claim, and the Corporation did not directly advise Mr O'Neill at the time that his GP could or should do so.

[5] On 20 May 2019, Mr O'Neill spoke to the Corporation's case manager about his right eye injury. That same day, the Corporation wrote to Mr O'Neill and advised him it had no record of an injury to his right eye. The Corporation advised Mr O'Neill that it had requested his medical records from North Shore Hospital to try to confirm the injury to his right eye.

[6] On 22 May 2019, Mr O'Neill wrote to the Corporation and said that he had already made a claim. However, the Corporation again advised that it had no record of any claim for an injury to Mr O'Neill's right eye.

[7] On 18 June 2019, the Corporation wrote to Mr O'Neill and told him that North Shore Hospital had advised that it held no records for him. The Corporation advised Mr O'Neill that, if he wished to lodge to a claim for a right eye injury, he could so through his treatment provider.

[8] On 17 July 2019, Mr O'Neill replied to the Corporation. Mr O'Neill said that he considered that the Corporation had "ignored" his claim, and it could not be declined because it had "lost" his records. Mr O'Neill attached documents that, he said, were evidence of an injury to his right eye. He included a past history from the

Auckland Hospital Board, dated 23 October 1983, noting "scraped R cornea 1976 with stick", and a letter dated 11 July 2019 from the Waitemata District Health Board advising Mr O'Neill that it could not find any historical records for him.

[9] On 10 August 2019, Mr O'Neill wrote to the Corporation again, saying that it had "ignored" the "claim" he had made in his 7 March 2019 letter.

[10] On 13 August 2019, the Corporation wrote to Mr O'Neill acknowledging the information he had provided, and advised him to get a treating provider, for example his GP, to lodge a claim.

[11] On 16 August 2019, Mr O'Neill wrote to the Corporation to dispute the suggestion that he have a treatment provider lodge a claim saying:

> There is no "treating" provider. There was a treatment provider who lodged a claim you destroyed. The treatment provider cannot relodge to cover up your criminal act of destruction as he is dead.

[12] On 23 August 2019, the Corporation wrote to Mr O'Neill, noting that it had previously advised him what he needed to do to lodge a claim and that position was unchanged.

[13] On 13 September 2019, Mr O'Neill wrote to the Corporation's Chief Executive Officer and said that the Corporation had "ignored" his claim, and that the Corporation told him it had no record of an injury to his right eye, and now said he must make "a second claim (to replace the one they destroyed)".

[14] On 28 August 2019, Mr O'Neill sought review of the Corporation's letter of 23 August 2019 (review 6540240). On 3 September 2019, the Corporation responded and explained that Mr O'Neill's application for review did not relate to a reviewable decision.

[15] On 13 September 2019, Mr O'Neill sought review of the Corporation's letter of 3 September 2019 (also review 6540240). This application also sought a further review of the same "decision" purportedly already applied for in the previous application but did not provide any further details about the "decision".

[16] On 11 March 2020, Mr O'Neill sought review of the Corporation's decision dated 14 December 2019 (review 6599693). This application sought "a ruling re the validity of the actions of ACC, J Gratkowski and Fairway re bogus review 6540240".

[17] On 11 March 2020, Mr O'Neill sought review regarding "numerous complaints and requests" (review 6596703).

[18] On 3 April 2020, review 6540240 was dismissed for lack of jurisdiction because, as the Reviewer noted, "without a decision to review, there can be no review application".

[19] On 28 May 2020, reviews 6599693 and 6596703 were dismissed for want of jurisdiction, because the Reviewer was "satisfied that Mr O'Neill's two review applications of 20 March 2020 do not relate to reviewable decisions."

[20] On 13 January 2020, Mr O'Neill has lodged an appeal against "decisions dated 23 November 2019 and 3 September 2019" (possibly review 6540240).

[21] On 16 June 2020, Mr O'Neill lodged an appeal against the 28 May 2020 review decision (reviews 65999693 and 6596703).

Relevant law

[22] Section 162(1) of the Accident Compensation Act 2001 (the Act) provides:

> 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, appeal to the High Court.

[23] In *O'Neill*,[2] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:
>
> (i) The issue must arise squarely from 'the decision' challenged: ... Leave cannot for instance properly be granted in respect of *obiter* comment in a judgment …;

[2] *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

(ii) The contended point of law must be *"capable of bona fide and serious argument"* to qualify for the grant of leave …;

(iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed …;

(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, and contradictory of, 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] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law … .

The Court's judgment of 4 July 2022

[24] Judge McGuire began his judgment by referring to his Minute of 23 August 2021 in which he outlined the background to Mr O'Neill's claim and the respective positions of Mr O'Neill and the Corporation. Judge McGuire then noted the provisions of the Act regarding the definition of a decision (in section 6(1)) and the decisions of the Corporation that are reviewable (in section 134(1)).

[25] Judge McGuire found as follows. In this case, the correspondence revealed that the Corporation had made no decisions which attracted review rights under section 134 of the Act. The Corporation's correspondence with Mr O'Neill was advisory in nature. At no time had the Corporation formed a view on, or made a decision about, the merits of any claim Mr O'Neill may have made. Judge McGuire further noted:

(a) The 23 August 2019 letter advised Mr O'Neill that the Corporation had previously advised him what he needed to do to lodge a claim and that the position was unchanged.

(b) The letter of 3 September 2019 advised Mr O'Neill that it had received his review application but that it did not correspond to a reviewable

decision and asked Mr O'Neill to provide further details. A request for information is not a reviewable decision within the contemplation of sections 6 and 134.

(c) The reference to 11 March 2020 appeared to relate to the Corporation's submissions in respect of review 6540250. Submissions relating to a review are not decisions for the purposes of sections 6 and 134.

(d) The letter from the Corporation dated 14 January 2020 confirming a case conference date is not a reviewable decision.

[26] Judge McGuire concluded that, given these findings, the appeal had to be dismissed.

[27] Judge McGuire then observed that a Corporation officer could initiate a claim for cover on behalf of an injured person, and thought that there was sufficient for that process to be initiated in this case. Judge McGuire suggested that, were Mr O'Neill prepared to cooperate with such an endeavour, it would unquestionably aid an investigation as to cover and a final resolution.

The appellant's submissions

[28] Mr O'Neill submits that Judge McGuire:

(a) Issued a decision that was not in favour of either party and therefore the issues before the Court had not been addressed.

(b) Had attempted to 'arbitrate' and he had no jurisdiction to do so.

(c) Did not address the impact of the Covid lockdown on access to justice.

(d) Was incorrect that, if Mr O'Neill cooperated with the Corporation, it might bring an end to the stand-off regarding a claim in relation to his right eye.

(e) Made comments not supported by the evidence and showed bias.

(f) Failed to address: whether Mr O'Neill had a "deemed decision"; the legal definition of "treatment provider"; the allegation that the review hearings were illegal; and the allegation that Mr O'Neill was not notified of one review hearing until after it had taken place.

(g) Failed to determine that the current claim was ongoing from the historic injury.

(h) Failed to recognise that: the alleged destruction of Mr O'Neill's records meant he ought to have a deemed decision; Ms Hunt could not lodge a new claim because it would be based on hearsay and amount to criminal fraud; and it was not possible to move forward without Mr O'Neill's original records, which were destroyed by the Corporation.

(i) Ignored legislation, precedent, and the principles of natural justice.

Discussion

[29] The central issue in Mr O'Neill's appeal to the District Court is whether a series of communications from the Corporation constituted decisions of the Corporation subject to review. This Court finds that the grounds of appeal proposed by Mr O'Neill are either not relevant to the central issue, or not sustainable.

[30] As noted by Judge McGuire, section 134(1)(a) of the Act provides that a claimant may apply to the Corporation for a review of any of its "decisions" on a claim made by the claimant. Section 6(1) of the Act provides that "decision" means a decision about: whether a claimant has cover; the classification of the personal injury a claimant has suffered; whether or not the Corporation will provide any entitlements to a claimant, which entitlements the Corporation will provide and/or the level of any entitlements to be provided; the levy payable by a particular levy payer; or a claimant's complaint under the Code.

[31] The communications from the Corporation in question covered: confirmation of the Corporation's advice about what Mr O'Neill needed to do to lodge a claim; the Corporation's request for further details; the Corporation's submissions in relation to a review; and the Corporation's confirmation of a case conference date.

Judge McGuire correctly concluded that none of these communications constituted decisions as defined by the Act and therefore the communications were not susceptible to review.

[32] Judge McGuire identified the correct law as contained in the Act and made the only conclusion that could be drawn from the facts.

The Decision

[33] In light of the above considerations, the Court finds that Mr O'Neill has not established sufficient grounds, as a matter of law, to sustain his application for leave to appeal, which is accordingly dismissed. Mr O'Neill has not established that Judge McGuire made an error of law capable of *bona fide* and serious argument. Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources. This Court is not satisfied as to the wider importance of any contended point of law.

[34] Costs are reserved.

Judge P R Spiller
District Court Judge