

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 181

ACR 37/23

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPEAL TO THE HIGH COURT
PURSUANT TO SECTION 162 OF THE
ACCIDENT COMPENSATION ACT

BETWEEN WARREN SMITH
Applicant

AND ACCIDENT COMPENSATION
CORPORATION
Respondent

Hearing: On the papers

Appearances: The Applicant in person
Ms F Becroft for the Respondent

Judgment: 8 November 2023

RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[s 162 Leave to Appeal to the High Court–Accident Compensation Act 2001]

[1] The applicant applies for leave to appeal against the judgment of Judge Spiller dated 27 June 2023.¹ In that judgment Judge Spiller dismissed the applicant’s appeal which claimed backdated interest on late payments of weekly compensation for the periods from 4 October 1991 to December 2004

¹ *Smith v Accident Compensation Corporation* [2023] NZACC 98.

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

(1) A party to an appeal who is dissatisfied with the decision of the District Court as being wrong in law may, with the leave of the District Court, appeal to the High Court.

[3] The principles relevant to the exercise of the discretion were discussed in *O'Neill v ACC*² Cadenhead DCJ held, inter alia:

[24] The Courts have emphasised that for leave to be granted:

- (i) The issue must arise squarely from the decision challenged: eg. *Jackson v ACC* unreported, HC Auckland, Priestley J, 14 February 2002, AP 404-96-01; *Kenyon v ACC* [2002] NZAR 385. Leave cannot for instance properly be granted in respect of obiter comment in a judgment; *Albert v ARCIC* unreported, France J, HC Wellington, AP 287/01, 15 October 2002;
- (ii) The contended point of law must be “capable of bona fide and serious argument” to qualify for the grant of leave: eg. *Impact Manufacturing* (unreported), Doogue J, HC Wellington, AP 266/00, 6 July 2001;
- (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former be proscribed: eg. *Northland Co-operative Dairy Co Limited v Rapana* [1999] 1 ERNZ 361, 363 (CA);
- (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law: *CIR v Walker* [1963] NZLR 339, 354;
- (v) A decision-makers 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: *Edwards v Bairstow* [1995] 3 All ER 48, 57;
- (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law: *Commissioner of Inland Revenue v Walker* [1963] NZLR 339, 353-354 (CA); *Edwards v Bairstow* [1995] 3 All ER 48, 57.

[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: eg. *Jackson* and *Kenyon* above.

² *O'Neill v ACC* [2008] NZACC 250.

[4] In his application for leave to appeal dated 13 July 2023 against Judge Spiller's judgment of 27 June 2023, the applicant, Mr Smith, set out these questions:

- Are decisions based on documentary evidences of facts and proof beyond the balance of probabilities?
- In law, is the Court behoved in examine correctly all documentary evidence presented to the Court for that processing?
- Is a claimant entitled to a fair hearing in any legal process, ie: a review or a Court of Law?
- Has a claimant had a fair hearing in a legal process – when the decision-makers failed to correctly interpret the issues, ACC paid to have Mr Smith leg amputated in 2001 its incredulous that ALL decision makers could believe you would NOT be incapacitated from that time.
- ACC unlawfully withheld the Farr report in May 2007 that Mr Smith was severely incapacitated to the date of Mr Smith's leg amputation in 2002 – did ACC breach the Act under section 154(1)(c) of the Act?
- Does the legal process sanction ACC's perjury, lies, deceit and deliberately withholding documentary medical evidence that delays and denies a claimant his rights in law, when a Court has determined the claimant is entitled to interest on that late payment of weekly compensation?
- Did ACC backpay Mr Smith?
- Did ACC have a file in its custody relating to surgery that was required to treat the ACC covered incapacity?
- When documentary evidence is presented to a Judge in Court processing's (sic) – in law is the Judge behoved to correctly construe that evidence that would make a material difference to the outcome before making any decision?
- Is it legal for ACC to claim equity in a Court of Law when their error and service failures have resulted in quantifiable loss to the claimant?

[5] In a further document filed by the applicant entitled "Leave to Appeal to the High Court on a Question of Law" dated 19 October 2023, he filed in reply to Ms Becroft's submissions. He endeavours to clarify his questions of law and makes the following submissions:

- First, he submits that the District Court Judge's claim that he did not have jurisdiction is wrong. He says that the Judge has an obligation under s 161 to dismiss, modify or quash the review. He says the Judge could have

modified or quashed the review decision and substituted a positive and affirmative decision.

- Secondly, he submits that the Judge and the reviewer claimed judicial estoppel without regard to the common law exceptions to the judicial estoppels rule. The fresh new evidence that ACC withheld from the courts is evidence of a material nature, not previously available and must be taken into account to prevent a manifest error of justice. The District Court Judge failed to recognise the exception regarding new evidence that proved beyond the balance of probabilities that a case of incapacity and entitlement to weekly compensation and interest existed from 1991.
- Thirdly he submits that the entitlement to interest is mandatory and not discretionary on the precise reading of s114 of the Act and that the Judge failed to identify the difference.
- Fourthly he submits that the Judge failed in the observance of the principles of natural justice protected by section 27 of the NZ Bill of Rights Act 1990, by making a decision which fairly recognises the rights and interest protected for the appellant and did not give that provision prominence in his decision.

Respondent's Submissions

[6] Ms Becroft notes that the applicant contends that the District Court's decision is wrong and that the main thrust of his argument is that he was not afforded fair legal process. She notes that he submits that the process has sanctioned "ACC's perjury, lies, deceit ...".

[7] She notes however that the applicant, in his initial submissions, does not identify how or where Judge Spiller erred.

[8] Referring to Judge Spiller's decision, Ms Becroft notes that the applicant's entitlement to interest has now been considered by the District Court on at least ten separate occasions.

[9] She submits that in respect of this application, the key problem with the applicant's application for leave, is his failure in his initial submissions to identify any basis upon which to grant leave. He does not identify any question of law. He does not identify where Judge Spiller erred in Law.

[10] She refers to the application for special leave to appeal that was heard and dismissed by Moore J in December 2016.

[11] She submits that the Court in that case noted that the thrust of the applicant's submission was that at all material times, the Corporation had all information necessary to make the backdated compensation payments. Moore J noted that very argument had been fully canvassed and determined in previous District Court decisions and that no question of principle or law was engaged in the special leave application. The High Court also considered whether there was any special reason to permit the special leave application or whether there was any reasonable prospect of success in the appeal. Moore J determine that the answer to both questions was no.

[12] She submits that the present application is no different from the previous leave and special leave applications. It is, in the Corporation's submission, wholly without merit. She submits that Judge Spiller's decision on jurisdiction was entirely correct on both the law and the facts. Not only was the review application not lodged against any decision of the Corporation, but the issue of interest has already been fully and finally determined by the District Court.

Decision

[13] In his judgment, the subject of this appeal, Judge Spiller from paragraph [3] to [46] sets out in considerable detail the background and history of the applicant's injuries; his dealings with ACC and the number of times he has challenged ACC's decision relating to the interest payable on his backdated weekly compensation.

[14] At paragraph [40] Judge Spiller refers to what Judge Christiansen said in his judgment of 8 August 2018:³

[88] This is the eighth occasion on which Mr Smith's entitlement to interest on the same arrears payments has been considered by this Court. The Court accepts all issues regarding Mr Smith's entitlement have been fully and finally determined

[15] In paragraphs [4] to [9] above, I have set out, from the applicant's Application for Leave to Appeal to the High Court dated 13 July 2023 as well as his Leave to Appeal to the High Court on a Question of Law document dated 19 October 2023, the issues that he identifies as the basis of his present application for Leave to Appeal to the High Court.

[16] In his 13 July 2023 Leave to Appeal, the applicant asks a diverse series of questions, none of which identify an alleged error of law in Judge Spiller's Judgment of 27 June 2023.

[17] In his latter Leave to Appeal document dated 19 October 2023 the Applicant says that Judge Spiller's Judgment is wrong in law because:

- a. S 161 empowered the Judge to dismiss, modify or quash the review decision, so the Judge had jurisdiction to do so.
- b. The fresh new evidence that ACC unlawfully withheld from the courts is evidence of a material nature, not previously available it must be taken into account to prevent a manifest error of justice.
- c. The entitlement to interest is mandatory and not discretionary on the precise reading of s114 of the Act.
- d. Judge Spiller breached 27 of the Bill of Rights Act by not making a decision which fairly recognises the rights and interest protected for the appellant.

³ *Smith v Accident Compensation Corporation* [2018] NZHC 128.

[18] As to a, this is simply a statement of the statutory powers of the Judge on appeal. It does not ground any argument in this application for leave to appeal against Judge Spiller's judgment of 27 June 2023.

[19] As to b, the "fresh new evidence unlawfully withheld from the courts" is not specified. It might be speculated that it is evidence that ACC had which would have required it to pay interest on back dated weekly compensation from an earlier date. If so then this issue of the correct date for interest to commence on backdated weekly compensation has been before the court on numerous occasions and as Judge Christiansen said in his Judgment of 8 August 2018.⁴

[20] As to c, under s 114 the Corporation is liable to pay interest on any payment of weekly compensation if the Corporation has not made payment within one month after the Corporation has received all information necessary to enable it to calculate and make the payment. Again, at least eight Judgments have considered and ruled on this issue.

[21] As to d, Judge Spiller reached his conclusions after demonstrably careful and painstaking analysis. This ground is without foundation.

[22] Measured against the criteria set out in *O'Neill*,⁵ therefore, none of the applicant's questions of law are capable of bona fide and serious argument.

[23] And as Judge Spiller said:⁶

[67] The central issue raised in the present appeal, in relation to Mr Smith's claim for interest on arrears of weekly payment, has previously been decided and repeatedly reaffirmed by the District Court, and so issue estoppel applies, preventing Mr Smith from relitigating the issue.

[24] This application for leave to appeal is therefore refused.

⁴ See above, paragraph [14].

⁵ See *O'Neill* note 2 above.

⁶ See *Smith* note 1 at [67].

[25] I noted in my judgment of 19 March 2020 that the time was long overdue for Mr Smith's sequence of appeals to end and that should he attempt to re-litigate the issue of entitlement to interest on arrears payments, he opened himself to a risk of a costs award against him.

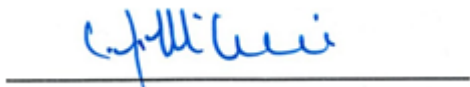
[26] Judicial resources are finite. There are each year several hundred ACC appeals filed that need to be dealt with. In the Applicant's case, as mentioned, Judge Spiller notes that since Judge Beattie's decision in June 2007, the question of the applicant's entitlement to interest on late payments of weekly compensation has been back before the Court ten times.

[27] These seemingly endless attempts by the applicant to relitigate this issue amount to an abuse of the processes of the Court.

[28] Judge Spiller noted in his judgment:⁷

By a narrow margin, I make no order as to costs against Mr Smith. The Court reiterates Judge McGuire's observation that Mr Smith's repeated attempts to relitigate the same issue expose him to a risk of a costs award against him.

[29] Regrettably for Mr Smith, that time has now come. He is ordered to pay costs of \$500.



CJ McGuire
District Court Judge

Solicitors: Medico Law, Grey Lynn

⁷ See *Smith* note 1 at [69].