IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 20 **ACR 221/21**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL TO THE HIGH COURT UNDER SECTION 162(1) OF THE ACT
BETWEEN	KC Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the papers

Submissions: The Applicant is self-represented
F Becroft for the Respondent

Judgment: 3 February 2023

JUDGMENT OF JUDGE P R SPILLER
[Leave to appeal to the High Court
s 162 Accident Compensation Act 2001]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour Judge McGuire delivered on 29 November 2022.[1] At issue in the appeal was whether the applicant was entitled to cover for a treatment injury. The Court dismissed the appeal, for the reasons outlined below.

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1 *KC v Accident Compensation Corporation* [2022] NZACC 224.

Background

[2] The applicant is a medical doctor and was employed by a district health board in New Zealand in 2013/2014. During 2014, her life became difficult with workplace, marital and health related issues. In August 2014, the applicant's GP treated her for migraines. Ultimately, she left her job, her marriage broke down, and in early 2015 she moved to Australia.

[3] 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 applicant preferred to have no contact with the Corporation and was not happy to discuss the matter on the telephone.

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

[5] The applicant subsequently applied to review that decision, and 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 … - 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.
>
> 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 devas tat ion. I would like ACC to be welcoming and kind in your processes.

[6] Along with the claim, were a series of communications between the applicant and her former employer, the local district health board (or doctors within the board). These communications made it clear that there were significant relationship/employment issues between the applicant and the board during 2014.

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

[8] On 2 September 2019, the Corporation wrote to the applicant 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

[9] The letter also detailed the list of Schedule 3 events, classified events giving rise to cover under the heading of a sensitive claim.

[10] On 3 September 2019, the applicant replied to that letter 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.

[11] Subsequently, the applicant 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.

[12] On 30 October 2019, a psychological assessment was completed by Dr McLennan, Clinical Psychologist, and Mr Manderson, Neuropsychologist. The assessment explained that the applicant felt that she had two different claims, a work-related claim and a sensitive claim.

[13] The report described the applicant'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 applicant describes her leave being repeatedly declined. The applicant felt that she was discriminated against. The applicant 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 applicant believed that her husband was contacted by work colleagues and informed that she was cheating on him. The applicant indicated that at this stage, her husband became aggressive towards her and became very rough during sex. The applicant advised that she did not consent to the level of violence and derogatory comments made. By February 2015, the applicant had resigned from the DHB and her marriage broke up.

[14] The assessors indicated that the applicant'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.

[15] The applicant 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 that they could reassess her claim.

[16] On 20 November 2019, Dr McLennan and Mr Manderson reported again, noting reports of depression and anxiety in 2015, which appeared to relate to both the applicant'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.

[17] On 4 December 2019, the applicant 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.

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

[19] On 20 January 2020, the claim was reviewed by Ms Swann, Psychology Advisor. She recommended declining the claim.

[20] 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.

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

[22] On 17 June 2020, the review proceeded by video conference. The applicant did not attend. On 16 July 2020, the Reviewer issued a decision dismissing the review application. She was not satisfied that the applicant was suffering mental injury caused by a Schedule 3 criminal act. The applicant filed a notice of appeal.

[23] For the appeal, the applicant 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.

[24] On 21 November 2020, the applicant 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.

[25] During discussions with counsel, the applicant raised the possibility of a treatment injury. There were then ongoing discussions between the applicant and counsel in relation to the treatment injury cover criteria. 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). The Corporation subsequently asked the applicant to provide further details in terms of the basis of the claim.

[26] On 1 March 2021, the applicant 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.

[27] 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.

[28] The same day, the applicant 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 applicant advised 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 district health board respiratory unit. When asked what the treatment was when the injury occurred, the applicant responded:

> 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.

[29] When asked what physical injury the applicant 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.

[30] On 15 July 2021, review proceedings were held. On 20 August 2021, the Reviewer, noted that there was some preliminary obligation on a claimant to clarify the nature of their claim, and concluded that, in the present case, the applicant 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.

[31] Mr Wilson's conclusion was that the Corporation's decision of 5 March 2021 was correct, but noted that, should the applicant provide further appropriate details, then the Corporation would be required to proceed and investigate the application in the usual manner. The review application was dismissed. The applicant filed a Notice of Appeal against this decision.

[32] On 26 September 2022, Dr Randhawa, GP, advised that he was asked by the applicant to provide a medical opinion regarding her ACC injury claims. He stated that in 2014 a psychiatrist, Dr Page, diagnosed the applicant with tension/stress

headaches and that she was then referred back to Dr Bradfield and was placed back under the care of the anaesthesia department at the district health board. Dr Randhawa recorded the applicant's history from 2014 and her requirement for urgent weekly payments.

Relevant law

[33] 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.

[34] 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 …;
>
> (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 … .

[35] Section 32(1) of the Act provides that:

> Treatment injury means personal injury that is—

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

(a) suffered by a person—

(i) seeking treatment from 1 or more registered health professionals; or

(ii) receiving treatment from, or at the direction of, 1 or more registered health professionals; or

(iii) referred to in subsection (7); 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.

The Court's judgment of 29 November 2022

[36] Judge McGuire summarised the relevant facts and law pertaining to the applicant's appeal.

[37] Judge McGuire then noted that:

(1) the report of Dr Randhawa did not assist the Court in determining whether a treatment injury occurred;

(2) there was no medical evidence of a causal link between the GP's diagnosis in 2014 of migraine and treatment; and

(3) there was no documented evidence that, in 2014, she did receive treatment from the anaesthesia department of the DHB.

[38] Judge McGuire concluded that this appeal, relating to an alleged treatment injury, must fail in that, very general assertions aside, there is no evidence that the applicant suffered a personal injury caused by treatment. Judge McGuire observed that 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 section 32 of the Act requires.

The applicant's submissions

[39] The applicant submits as follows. Her appeal was mismanaged, and the District Court did not take into account all of the evidence filed by her for the appeal. This evidence includes health reports/emails by Dr Shaw, Dr Page, Dr.Al-Beer, Dr Alexandrescu, Mr Thuyasithu, Dr Bradfield, Dr Blair and some of the other GPs and psychologists. In particular, there is the assessment by Dr Page, a Psychiatrist, who undertook a mental health assessment at the request of the applicant's employer. The Court overlooked the policies/systems/processes which were activated at the local district health board as a result of these referrals made, which then resulted in mental and physical injuries.

Discussion

[40] This Court notes that the applicant is required to show that Judge McGuire's judgment was wrong in law. Given that the applicant's claim was for a treatment injury, Judge McGuire correctly referred to section 32 of the Act, which defines treatment injury.

[41] Judge McGuire's conclusion, that based on the evidence presented, the applicant had not established she had suffered a treatment injury, is a finding of fact. Such a finding can be treated as an error of law only if 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. Given that, as Judge McGuire pointed out, there is no evidence presented by the applicant that she suffered a personal injury caused by treatment, Judge McGuire's finding of fact cannot be treated as an error of law.

The Decision

[42] In light of the above considerations, the Court finds that the applicant has not established sufficient grounds, as a matter of law, to sustain her application for leave to appeal, which is accordingly dismissed. The applicant 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.

[43] There is no issue as to costs.

Judge P R Spiller,
District Court Judge