IN THE DISTRICT COURT
AT WELLINGTON

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

[2024] NZACC 026 ACR 53/23

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	AIR NEW ZEALAND LTD Appellant
AND	LAVENDER, DANIEL First Respondent
AND	ACCIDENT COMPENSATION CORPORATION Second Respondent

Hearing: 8 February 2024

Held at: Auckland District Court

Appearances: A Sharp for the Appellant
P Schmidt for the First Respondent
M Boyle for the Accident Compensation Corporation ("the Corporation")

Judgment: 13 February 2024

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for work-related gradual process injury – ss 28, 30, Accident Compensation Act 2001 ("the Act")]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 16 February 2023. The Reviewer quashed Air New Zealand's decision dated 14 December 2021 declining cover for Covid 19, on the basis that it was more likely than not that Mr Lavender suffered his COVID-19 infection while at work, in circumstances where the Act provides cover.

Background

[2] Mr Lavender worked as a cabin crew flight attendant for Air New Zealand.

[3] On 14 November 2020, Mr Lavender worked on a voluntary basis on a flight operated by Air New Zealand from Auckland to Shanghai. He also worked on the return flight on or about 18 November 2020. At the time, both China and New Zealand were subject to COVID-19 lockdowns. The flights were for the purposes of repatriating Chinese citizens in New Zealand and New Zealand citizens and residents in China.

[4] The crew on these flights were advised before agreeing to volunteer for the flight that the Chinese government had imposed quarantine restrictions on all aircrew entering China, and that they would have to quarantine at the hotel chosen by the Chinese authorities situated at the airport in Shanghai. The quarantine was a hotel at the airport, not a purpose-built quarantine facility. The crew had to acknowledge that they would not leave their hotel room for the duration of their quarantine and that their food would be delivered to the room. A breach of the quarantine provisions would be met with criminal process by the Chinese authorities.

[5] On 18 November 2020, on Mr Lavender's return to New Zealand, he registered a negative COVID-19 test.

[6] On 22 November 2020, Mr Lavender flew to Shanghai again, on the same basis as before. He underwent mandatory COVID-19 testing on arrival in Shanghai. Chinese authorities informed him that he had returned a positive test, and that it was likely that he was exposed to the virus on the preceding tour of duty to Shanghai between 14 and 18 November 2020.

[7] On his return to New Zealand, Mr Lavender started to experience symptoms associated with COVID-19. The COVID-19 virus that Mr Lavender contracted was established not to be one that was present in New Zealand.

[8] Mr Lavender's statement of evidence is as follows:

> I was assigned to work as cabin crew on an AKL-PVG-AKL return trip to Shanghai, departing Auckland on 14 November 2020 and arriving back around 18 November 2020. This required all crew to layover in China for two nights.
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> The Chinese borders were closed at the time to tourists. The primary purpose of this flight was to repatriate Chinese citizens and return New Zealand citizens back home.
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> We wore gloves and masks prior to reporting for duty, starting from the time we were picked up from the local crew transport pickup point, during the flight, and until we arrived at our hotel rooms in Shanghai. We used hand sanitiser over the rubber gloves. The crew tried to avoid wiping our faces, eyes or nose because we knew the virus could be spread by physical contact. I believe there were nine cabin crew (COVID crewing levels) and three pilots, so 12 aircrew in total.
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> Upon arrival, we disembarked the plane and were ushered into a holding area by China-based Air New Zealand staff and Chinese airport officials. We lined up with other international aircrews and passengers for PCR and throat swab arrival COVID tests.
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> In my opinion there was significant potential for cross-contamination at this stage as the Chinese officials worked through the queue of several hundred passengers. Some people were coughing, and some gagged during the testing. The Chinese tester made a pilot's nosebleed with rough PCR usage. They dropped his sample on the floor and had to perform the test again.
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> Staff wore hazmat suits, but other staff were asleep in what appeared to be public rest areas. I was told that extensive testing of over 25,000 airport staff had been completed the day before following an extensive COVID-19 outbreak among airport workers. It wasn't the efficient structure I had observed at other overseas airports or in New Zealand. It had an element of controlled chaos to it because of the very large number of people that needed to be processed.
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> We exited the testing area, surrendered our bags to officials and went through passport control and several different check points. We were met at the airport by the base manager who gave us entertainment DVDs, SIM cards and some other kit, which was appreciated.
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> After a long traverse through the airport, we were bused a few hundred metres to the hotel. We were taken to the Da Zhong Airport Hotel, which was used to quarantine aircrew. We walked up a service ramp to the hotel's service entrance in the basement of the hotel. We queued for over an hour while several crews were processed from other airlines. We were handed chlorine tablets and water and escorted to our room via the large service elevators used to transport foreign crews.
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> We were not given room keys and were informed that it was illegal to leave our room under any circumstances. Food was delivered in boxes to a table outside our rooms by hotel staff at prescribed intervals throughout the day. We were required to open our doors and collect the food once the staff member had knocked and walked away. We stayed in our rooms until a Chinese official came to collect us at departure time.

> My understanding is that the quarantine arrangements were by way of an agreement between Air New Zealand and the Chinese and New Zealand governments.
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> In terms of my COVID-19 infection, I underwent genetic testing which confirmed that the variant I contracted was active in China (Shanghai) but not present in New Zealand. The symptoms I experienced included severe fatigue, impaired eyesight, coughing, fever, a sore throat and nose, and a loss of smell and taste. I experienced a severe brain fog, affecting my memory, information processing and vocabulary.

[9] Mr Lavender applied to Air New Zealand for cover for a work-related disease or infection. Air New Zealand, an accredited employer for the purposes of personal injury cover for its employees, carried out an investigation of the claim.

[10] On 14 December 2021, Air New Zealand declined Mr Lavender cover for COVID-19 as a personal injury caused by work-related gradual disease or infection. Mr Lavender applied for a review of Air New Zealand's decision.

[11] On 9 September 2022, Air New Zealand again declined Mr Lavender cover for COVID-19. Mr Lavender applied for a review of Air New Zealand's decisions.

[12] On 1 December 2022, Dr Chris Walls, Occupational Physician, noted that:

> On arrival in New Zealand ESR genome testing (25 November 2020) reported:
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> > "The genome of 20-390395-AK is not associated with any NZ cases that are currently sequenced. A new analysis will be performed after the current sequencing run with the latest routine samples finishes. The genome sequence of 20-390395-AK will be confirmed following sequencing at ESR.
> >
> > Currently the closest NZ genome is 7 mutations away and was detected 16/03/2020 indicating that this is unlikely to be the source. Preliminary phylogenetic analysis suggests that this infection is most likely related to an international exposure." …
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> I would be of the opinion, on the balance of probabilities, that this is an infection acquired in the course of Mr Lavender's work, most likely during the initial processing on arrival at Shanghai airport (Mr Lavender describes the airport as just having experienced an "extensive" outbreak amongst staff the day before).
>
> Therefore, with respect to Mr Schmidt's question:
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> Was Mr Lavender at significantly greater risk of contracting this strain of COVID19 than persons not working in this environment?
>
> In my opinion yes.

[13] On 30 January 2023, Dr John Monigatti, Occupational Physician, responded to Dr Walls' report as follows:

> Whatever way you look at this case there is a lot of speculation about how the COVID-19 infection was acquired. If it were a Chinese strain not known in NZ it is unlikely he got it on the flight over, which leaves three possibilities - queuing to be processed at the airport, queuing at the hotel and the sojourn there, and the travel back to the airport and the flight home. If the middle one is non-work related I cannot see any way of eliminating it as a potential cause, notwithstanding that Mr Lavender passed over it in his statement and Dr Walls was clearly under the impression that the whole time counted as work so there was no need to consider the hotel environment separately.
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> Dr Walls is correct in saying that respiratory droplet spread is the main transmission vector, that the main benefit of mask-wearing is to stop this from an infected person at the source, and that the N95 mask offers better protection to a non-infected person than a surgical one because the latter filters out only the larger aerosol particles whereas the N95 traps both large and small. He is wrong in implying that masks are ineffective as a barrier, however, and even at the height of the COVID-19 epidemic here the wearing of N95 masks in health care workers was confined to those deemed at higher risk.

[14] On 17 October 2022 and 13 February 2023, review proceedings were held. On 16 February 2023, the Reviewer quashed Air New Zealand's decision dated 14 December 2021 declining Mr Lavender cover for COVID-19. The Reviewer found it was more likely than not that Mr Lavender suffered his COVID-19 infection while at work, in circumstances where the Act provides cover.

[15] On 17 March 2023, a Notice of Appeal was lodged by Air New Zealand.

Relevant law

[16] Section 6(1) of the Act provides that a place of employment means any premises or place occupied for the purposes of employment, or to which a person has access because of his or her employment.

[17] Section 28(1) provides that a work-related personal injury is a personal injury that a person suffers:

> (a) while he or she is at any place for the purposes of his or her employment, including, for example, a place that itself moves or a place to or through which the claimant moves; or

(b) while he or she is having a break from work for a meal or rest or refreshment at his or her place of employment; or

(c) while he or she is travelling to or from his or her place of employment at the start or finish of his or her day's work, if he or she is an employee and if the transport –

(i) is provided by the employer; and

(ii) is provided for the purpose of transporting employees; and

(iii) is driven by the employer or, at the direction of the employer, by another employee of the employer or of a related or associated employer.

[18] Section 30 of the Act provides:

(1) Personal injury caused by a work-related gradual process, disease, or infection means personal injury—

(a) suffered by a person; and

(b) caused by a gradual process, disease, or infection; and

(c) caused in the circumstances described in subsection (2).

(2) The circumstances are -

(a) the person -
(i) performs an employment task that has a particular property or characteristic; or
(ii) is employed in an environment that has a particular property or characteristic; and

(b) the particular property or characteristic -
(i) causes, or contributes to cause of, the personal injury; and
(ii) …;
(iii) may or may not be present throughout the whole of the person's employment; and

(c) that, if the particular property or characteristic is present in both the person's employment tasks or environment and non-employment activities or environment, it is more likely that the person's personal injury was caused as a result of the employment tasks or environment rather than the non-employment activities or environment.

(2A) However, even if it is established that a claimant's personal injury was caused in the circumstances described in subsection (2), the Corporation may decline the claim if the Corporation establishes that the risk of suffering the personal injury is not significantly greater for persons who—

(a) perform the employment task than it is for persons who do not perform it; or

(b) are employed in that type of environment than it is for persons who are not.

[19] In *Weal*,[1] Davidson J stated:

> [84] In my view, Judge MacLean correctly interpreted s 28(1)(a) as requiring the injury to be suffered at a time when someone is at a place for the purpose of employment, and in effect that a nexus must be established between the "place" and the "employment"…
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> …
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> [88] The question of how s 28(1)(a) may apply in other factual circumstances therefore does not arise. It would arise, perhaps, where someone was engaged for example in construction work in Fiji and seconded for that purpose for (say) six months. If that person was bitten, perhaps multiple times, and contracted dengue fever, the exact location when bitten and the disease contracted may not be provable but it might be established when broadly the mosquito bites occurred and the fever contracted still leaving the question of whether it was at work, whether on a construction site or while in residence associated with being in Fiji only for work, or in a weekend on an island. It seems anomalous if because of the inability to identify which mosquito bite caused dengue fever, the injury was not "work-related" if it reasonably may have been at work. This is not like an accident where the exact time and place are not in doubt.

[20] In *M*,[2] Powell DCJ stated:

> [14] Clearly being at "any place for the purpose of his or her employment" is a wider concept than the "place of employment" and I disagree ... that a claimant must be in their place of employment and be there for the purposes of their employment in order for a personal injury to be work related pursuant to s 28(1). If that were the case it would limit the ambit of s 28(1)(a) to the physical boundary of the place of employment and would lead, as Miss Peck correctly noted, to "surprising and unintended results". Instead while a lawyer's "place of employment" would be his or her office, if he or she was injured travelling to, from or at Court (clearly being present not only at the Court itself but at all places in between for the purposes of employment) that would be sufficient to make the injury work-related. …

[21] In *Woolyarns*,[3] Ongley DCJ stated:

> [27] ... In an attempt to articulate the purpose of prescribing the boundaries of work-related cover, my view is that the extension beyond actual work activity reaches places where the employee is required or permitted to be because of the fact of or the nature of the employment …

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1 *Weal v Accident Compensation Corporation* [2016] NZHC 2612.
2 *M v Accident Compensation Corporation* [2015] NZACC 286.
3 *Woolyarns v Accident Compensation Corporation* (2006) 7 NZELC 98.

[22] In *Air New Zealand*,[4] Sinclair DCJ noted the legislative history of section 28 of the Act:

> [14] In the Accident Rehabilitation and Compensation Insurance Act 1992 ("the 1992 Act") a work injury was defined in s 6 as a "personal injury arising out of and in the course of employment of that person". …
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> [15] The definition of work injury was changed in the Accident Insurance Act 1998 ("the 1998 Act"). At the first reading of the Accident Insurance Bill 1998, the drafting of clause 28 contained a definition for "work related personal injury". …
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> …
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> [19] … the Department of Labour explained that the change in working "was deliberate" and observed that "subclause (1)(a) makes employers responsible for employees while they are at work". The Report further noted:
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> > An employer is responsible generally for the work environment and is capable of influencing behaviour within it. To focus on 'employment tasks' leaves workers vulnerable to lesser protection if they suffer a personal injury because of the environment (for example, tripping over discarded offcuts in a sawmill when on the way to the toilet.) …
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> …
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> [44] Significantly, s 28(1)(a) employs the language of "any place" and "purposes of employment". The focus is not on whether an employee was at the workplace performing an employment task but on whether, at the time the injury occurred, the employee was at the "place" for the "purposes of his or her employment". While the definition of employment focuses on work engaged in for pecuniary gain or profit the use of the words "purposes of his or her employment" support a broader interpretation.

[23] In *Christian*,[5] Cadenhead DCJ stated:

> [22] It cannot be that the mere fact that there is no research in the particular employment tasks or in respect to the other group for comparison should prohibit the claim. If that was the case, then no person, who was not in a classified group that had been the subject of research into the particular employment tasks under consideration could claim. The assessment of risk is a subjective matter that may be aided by medical experience and comparative analysis.

[24] In *Turner*,[6] Ongley DCJ stated:

> [60] Once causation is established and attributed to work tasks or work environment, it would seem to be an unfair barrier to obtaining cover for a work

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4 *Air New Zealand and Kuli v Accident Compensation Corporation* [2020] NZACC 163.
5 *Christian v Accident Compensation Corporation* [2006] NZACC 133.
6 *Turner v Accident Compensation Corporation* [2007] NZACC 229.

> related gradual process injury if the risk factor had to be markedly or substantially greater than the risk occurring in the general population. The of heightened risk would also be difficult to define in order to achieve consistency between claims. The alternative approach to construction, as Mr Beck submitted, is to regard 'significantly' to mean more than marginally, or a statistically significant increased risk. That is a construction more in line with the purpose of the legislation to provide for a fair and sustainable scheme for managing personal injury.
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> …
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> [62] … if there is expert opinion either that an aspect of the tasks poses a special risk, or that epidemiological studies show that there is a palpably greater risk for the occupational group measured against the general population excluding persons doing that task, then the test would be satisfied without requiring proof that the difference is major or substantial. …

Discussion

Was Mr Lavender at a place for the purposes of his employment?

[25] A work-related personal injury is a personal injury that a person suffers while he or she is at any place for the purposes of his or her employment.[7] There must be a nexus between the "place" and the "employment".[8] The concept of "place for the purposes of employment" has been held to be wider than "place of employment", and includes places where an employee is required or permitted to be because of the fact of or the nature of the employment.[9]

[26] Air New Zealand submits as follows. On the evidence it is unlikely that Mr Lavender contracted the particular variant of Covid-19 whilst on the flight or at the airport. It is likely that Mr Lavender contracted the virus whilst at the airport hotel where he carried out his quarantine. The hotel cannot constitute a place of work for the purposes of employment that would entitle Mr Lavender to cover. The collective agreement that Mr Lavender was party to, as part of his employment, provides that the hotel accommodation of an airline layover is not a place of work. The Court in *Air New Zealand v ACC and Kuli* stated that a person needs to be

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7 Section 28(1)(a).

8 *Weal*, above note 1, at [34].

9 *M*, above note 2, at [14], *Woolyarns*, above note 3, at [27], and *Air New Zealand*, above note 4, at [44].

actively engaged in work for pecuniary gain at the time when the injury occurs.[10] The time spent on layover is not "for the purposes of employment".

[27] This Court acknowledges the submissions of Air New Zealand. However, this Court finds, within the peculiar facts of this case, that Mr Lavender was at a place for the purposes of his employment from the time he left New Zealand on the repatriation flight on 14 November 2020 until his return on 18 November 2020. The Court notes that:

(a) Mr Lavender's presence in the repatriation exercise, including his stay in China, was because of his work, and at no stage was he there in a non-employment capacity.

(b) The places where Mr Lavender could be were tightly circumscribed by the COVID-19 restrictions in force at the time: he was on the aeroplane, processed after arrival, at his hotel, and then back on the aeroplane. Each place was accounted for, and Mr Lavender was not permitted to leave any of his locations at any time.

(c) The employment relationship in Mr Lavender's collective agreement, that when personnel are on a layover they are off work and not employed, clearly applies when personnel have freedom of movement. However, during the repatriation exercise, Mr Lavender was required by his employer and the Chinese authorities to submit himself to severe restrictions on personal freedoms and movements for the duration of his stay. If Mr Lavender had not complied with these restrictions, Air New Zealand itself would reasonably have been at risk of repercussions for breach of the permissions and exemptions it had, to allow it to operate during these times.

(d) While the Court in *Air New Zealand v ACC and Kuli* referred to the definition of employment as work engaged in for pecuniary gain or profit, the Court added that the use of the words "purposes of his or her

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[10] Above, note 4, at [44].

> employment" support a broader interpretation.[11] Throughout the repatriation exercise, Mr Lavender continued to be paid for his employment.

[28] The Court concludes from the above consideration that, throughout the repatriation exercise, Mr Lavender was an employee who was required to be in the places he was, including his hotel, because of the fact and nature of his employment at the time.

Did Mr Lavender satisfy the requirements for a work-related gradual infection?

[29] For Mr Lavender to qualify for cover for a work-related gradual process infection, he needs to meet three requirements under section 30(2) of the Act. First, he needs to perform an employment task, or be employed in an environment, that has a particular property or characteristic. Second, the particular property or characteristic of his work must cause, or contribute to the cause of, his personal injury, and not be found to any material extent in his non-employment activities or environment. Third, his risk of suffering his personal injury must be significantly greater for persons who perform his employment task, in his type of environment, than for persons who do not.

[30] Air New Zealand submits as follows. The requirements of section 30(2) do not cover situations that develop as "one off" properties or characteristics. Air crew were not at any more risk than other groups for contracting COVID-19. There have been very low infection rates in air crew over the initial period of the pandemic. In the absence of any evidence as to what positions involved the same tasks as flight attendants, it is difficult to see the basis on which the Reviewer reached the conclusion that Mr Lavender was at a greater risk.

[31] This Court acknowledges the above submissions. However, the Court makes the following findings.

[32] First, Mr Lavender performed an employment task, or was employed in an environment, that had a particular property or characteristic. Because his work

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11 Above, note 4, at [44].

required him to travel abroad during the COVID-19 pandemic, Mr Lavender was subject to increased exposure of COVID-19, and, in particular, to the non-New Zealand variant of COVID-19 that he contracted.

[33] Second, the particular property or characteristic of Mr Lavender's work caused, or contribute to the cause of, his personal injury, and was not found to any material extent in his non-employment activities or environment. Mr Lavender's exposure to the non-New Zealand variant of COVID-19 caused his personal injury, and he was unable to be engaged in non-employment activities whilst adhering to strict rules and regulations from the time he left New Zealand until when he returned.

[34] Third, Mr Lavender's risk of suffering his personal injury was significantly greater for persons who performed his employment task, in his type of environment, than for persons who do not. The test here is whether there is evidence of a palpably greater (more than marginal) risk rather than for the general population.[12] Mr Lavender's job meant that he had a significantly greater risk of suffering the infection he suffered, because members of the public (both in China and New Zealand) were unable to travel internationally at the time, and were subject to restrictions which significantly reduced the risk they would be exposed to the virus. Dr Walls, Occupational Physician, advised that Mr Lavender had a significantly greater risk of contracting the (non-New Zealand) strain of COVID-19 than persons not working in his employment environment.

Conclusion

[35] In light of the above considerations, the Court finds that Mr Lavender was at a place for the purposes of his employment, in terms of section 28 of the Act, and the circumstances in which Mr Lavender contracted Covid-19 satisfy the requirements of section 30(2) of the Act. The decision of the Reviewer dated 16 February 2023 is therefore upheld. This appeal is dismissed.

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12 Turner, above note 6, at [60] and [62].

[36] I make no order as to costs.

P R Spiller
District Court Judge

Solicitors for the First Respondent: Schmidt and Peart Law.
Solicitors for the Second Respondent: Meredith Connell