IN THE DISTRICT COURT
AT WELLINGTON

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

[2024] NZACC 41 **ACR 7/24**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	HOWARD, MAREE Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the papers

Appearances: The Appellant is self-represented (assisted by J Howard)
P McBride for the Accident Compensation Corporation ("the Corporation")

Judgment: 27 February 2024

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Interpretation of decision - s 6, Accident Compensation Act 2001 ("the Act")]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 1 December 2023. The Reviewer dismissed an application for review of the Corporation's email dated 2 August 2023, on the basis that this was not a reviewable decision under the Act. At Ms Howard's request, this matter has been determined on the papers, following the receipt of submissions from both sides.

Background

[2] In 2006, Ms Howard suffered a spinal injury, and this was aggravated by a further injury in 2007. She suffered pain and functional limitations, was unable to work, and received cover for the injuries.

[3] On 21 May 2010, an individual rehabilitation plan (IRP) was prepared for Ms Howard, which she signed on 27 May 2010. The IRP addressed potential entitlements.

[4] On 11 November 2010, Ms Howard's entitlements (which included weekly compensation) were suspended for non-compliance and failure to attend an assessment with an occupational physician. The decision to suspend entitlements was confirmed on review.

[5] On 29 June 2012, Ongley DCJ found:

> [41] I reach the conclusion that the respondent's decision was correct in the circumstances. It was reasonable to require the appellant to attend for assessment by an occupational physician. The grounds raised by the appellant do not make out a case for a reasonable refusal to engage in the assessment. The evidence does not show that the assessment was terminated by Dr Kenny independently of a refusal by the appellant. I am satisfied that the appellant unreasonably refused to engaged in the assessment, and further that the respondent's decision to suspend entitlements was justified and reasonable.[1]

[6] On 15 February 2013, Williams J, in refusing Ms Howard special leave to appeal Ongley DCJ's decision to the High Court, found that the question of law posed by Ms Howard was not capable of bona fide and serious argument.[2] Likewise, on 10 December 2013, Stevens J, in refusing special leave to appeal to the Court of Appeal, found that it was plain that the proposed appeal did not raise any question of law of the requisite importance.[3] On 1 April 2014, the Supreme Court declined Ms Howard's application for leave to appeal, for want of jurisdiction.[4]

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1 *Howard v Accident Compensation Corporation* [2012] NZACC 218.
2 *Howard v Accident Compensation Corporation* [2013] NZHC 188, at [37]. See also *Howard v Accident Compensation Corporation* [2013] NZHC 1004.
3 *Howard v Accident Compensation Corporation* [2013] NZCA 617, at [18].
4 *Howard v Accident Compensation Corporation* [2014] NZSC 31, at [7] and [10].

[7] On 3 October 2014, Clifford J struck out Ms Howard's statement of claim (seeking to set aside the notice which had required her to attend a medical assessment), as being an abuse of process:

> [36] … I conclude that Mrs Howard not only could have raised the specific issues she raises earlier, but doing so now, four years later in an attempt to collaterally challenge earlier judgments, is abusing the court's processes. That abuse arises because those specific issues have in substance also already been addressed. To the extent they have not, that is because Mrs Howard did not raise them when she should have and it is contrary to the interests of finality, efficiency and economy of litigation to raise those issues now given the protracted path this dispute has taken.[5]

[8] On 1 August 2017, Powell DCJ found that the substantive issue of concern to Mr and Ms Howard continued to be the ongoing effect of the suspension decision of 11 November 2010. In dismissing the appeal, Powell DCJ stated:

> [7] … it is now utterly beyond dispute, and certainly as far as the District Court is concerned, that the suspension decision was and is valid and cannot be challenged, whether directly or indirectly, in the course of the present appeal.
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> …
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> [16] The Corporation seeks costs on the appeal. Although generally the Corporation does not seek costs nor is it the position of this Court in general terms to award costs against unsuccessful claimants the Court retains an overall discretion to do so in appropriate cases. In this case it is apparent for the reasons set out above that the issues sought to be raised on behalf of Mrs Howard have all been conclusively determined and the continued challenge to the suspension decision itself as well as the continued pursuit of the claims for treatment costs can only be categorised as an abuse of process. In those circumstances the Corporation is entitled to costs and reasonable disbursements. …[6]

[9] On 17 December 2018, Courtney J declined Ms Howard's application for special leave to appeal Powell DCJ's judgment, and stated:

> [23] No matter how Mr Howard frames his arguments, the underlying complaint in this case and in all of the other proceedings involving Mrs Howard's claim is that the ACC should not have suspended her entitlements. Rightly or wrongly, that issue has now been determined. Mr Howard does not seem to grasp that finality in litigation relates to the substantive complaint. Once a substantive issue has been raised and determined in litigation between the parties it cannot be raised again. Advancing it in the guise of some other form of proceeding or framed as another kind of complaint cannot disguise its true nature. …

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[5] *Howard v Accident Compensation Corporation* [2014] NZSC 2431.
[6] *Howard v Accident Compensation Corporation* [2017] NZACC 76.

> [25] It is of serious concern that precious court resources continue to be taken up in advancing essentially the same argument in different forms. This litigation may justify an application under s 166 of the Senior Courts Act 2016, which is intended to restrain the unwarranted and vexatious use of the court process for cases that have no merit.
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> …
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> [27] The Corporation is to have costs on a 2B basis.[7]

[10] On 30 July 2021, Ms Howard and the Corporation entered into a settlement agreement, and an *ex gratia* payment of $19,200 was made to Ms Howard in exchange for the full and final settlement. The agreement noted that the parties had the opportunity to take legal advice before signing the agreement. According to the settlement agreement, Ms Howard acknowledged that she had no outstanding entitlements up to the date of the settlement. Ms Howard also agreed that she would not be involved in any further action, claim, application, proceeding or complaint in relation to any entitlements, or any issues in any way related to cover, existing down to the date of the settlement. In relation to the *ex gratia* payment, the agreement stated:

> Subject only to law, payment of the sum will be a full and final settlement of the claim, issue or complaint whatsoever that Maree Howard might have or have had against ACC or its representatives or appointees in respect of any entitlement or claim management issues in respect of any issue down to the date of settlement and whether known, or not known to the parties.

[11] At the time of the agreement, the Corporation had paid $10,000 of the *ex gratia* payment, and agreed to pay the balance of $9,200 by 27 August 2021 (which payment was made).

[12] On 1 September 2021, Mr Howard, for Ms Howard, asked the Corporation to consider making payments for the period between 11 November 2010 and 9 April 2012.

[13] On 14 September 2021, the Corporation responded to Mr Howard's email, noting:

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[7] *Howard v Accident Compensation Corporation* [2018] NZHC 3342. See also *Howard v Accident Compensation Corporation* [2020] NZACC 174.

> We have mutually agreed on the full and final settlement of all issues Maree has had with ACC. We have been reasonable in paying her full entitlement for the full period of suspension. ACC will therefore not [be] progressing this and we see matters as fully concluded between Maree and ACC.

[14] In reply, Ms Howard clarified that the claim was for weekly compensation entitlement for the period between 26 November 2010 and 9 April 2012 and asked the Corporation to "issue an ACC written decision".

[15] On 21 September 2021, the Corporation replied to Mr and Ms Howard:

> ACC's position is that the weekly compensation you have requested has already been the subject of previous review and court decisions. This weekly compensation is also subject to the full and final settlement agreement which you signed on 30th July 2021.
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> Therefore ACC will not be issuing any further decision, or engaging in any further correspondence in regard to this matter.
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> ACC has worked in good faith with you through the settlement process, and is of the view that the matter is closed off by that process.

[16] In October 2021, Ms Howard applied for review of the IRP of 27 May 2010, alleging her rehabilitation needs as of 2010 had not been implemented. Ms Howard also contended it was unfair for the Corporation not to have made weekly compensation entitlements and that no notice of review rights had been given.

[17] Also, in October 2021, Ms Howard sought review of the Corporation's response of 14 September 2021 as being a reviewable decision. Ms Howard sought payment for the full period of suspension and contended that the sum paid as an *ex gratia* settlement was amenable to review.

[18] On 21 March 2022, the Reviewer dismissed the review, concluding that he did not have jurisdiction because there was not a reviewable decision and surrounding circumstances were fatal to Ms Howard's claims. Ms Howard appealed to the District Court.

[19] On 18 August 2022, Spiller DCJ dismissed Ms Howard's appeal, and noted:

> [35] This Court finds, in light of the above considerations, that Mr and Ms Howard's emails amounted to a renewed claim for weekly compensation and thus an attempt to relitigate the claim which she unsuccessfully pursued against

> the 2010 decision, which this Court found was correct, all subsequent appeals on this matter also failing. The hearing of this matter would thus be contrary to the principle of issue estoppel or *res judicata*.[8]

[20] On 21 February 2023, Henare DCJ dismissed Ms Howard's application for leave to appeal to the High Court, finding that there was no tenable basis for the exercise of any discretion to grant leave to advance what was effectively an abuse of process. The Court also granted leave to the parties to file detailed memoranda on costs.[9]

[21] On 5 July 2023, Cull J declined Ms Howard's application for special leave to appeal, and granted leave to the parties to file memoranda on costs. Cull J stated:

> [30] I am in agreement with the conclusions of Judge Henare, and the earlier substantive findings of Judge Spiller, that the fundamental premise of Ms Howard's challenge is that ACC ought to make further payments to her, or provide her with further entitlements under the IRP, notwithstanding the various decisions which have found ACC's suspension of her entitlements to be correct at law. Ms Howard has utilised extensive judicial resource to repeatedly revisit the issue of suspension and its effect on her.
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> [31] Even if Ms Howard had advanced matters not previously answered in substance by the Courts, there are strong public policy reasons why I would refuse to exercise my discretion to grant special leave. Ms Howard has engaged in what can only be seen as an abuse of process to advance yet another appeal.[10]

[22] Ms Howard, through Mr Howard, continued to raise queries with the Corporation, to the effect that the issues they had raised with the Corporation remained unaddressed and unresolved. Included amongst the issues raised was weekly compensation.

[23] On 2 August 2023, a Corporation resolution manager replied to Ms and Mr Howard by email. The manager stated that she had reviewed Ms Howard's file, which included several queries and various emails. A summary was provided of the case file review findings, including the issue of weekly compensation:

> weekly compensation – these matters have been settled in previous review and court decisions. I also refer to the attached settlement agreement which offers Maree the settlement of $19,200. This was an offer of good faith to cover

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8 *Howard v Accident Compensation Corporation* [2022] NZACC 152.
9 *Howard v Accident Compensation Corporation* [2023] NZACC 25, at [57] and [62].
10 *Howard v Accident Compensation Corporation* [2023] NZHC 1734.

> Maree's weekly compensation entitlements following the suspension until her super age. This settlement is final and won't be revisited.

[24] The manager concluded that the Corporation was not able to offer Ms Howard any different responses or outcomes on what she had raised.

[25] On 6 August 2023, Ms Howard, by email from Mr Howard, sought a review of the Corporation's email of 2 August 2023 on the basis that Ms Howard had an extant, unprocessed claim for weekly compensation entitlements between 26 November 2010 and 9 April 2012.

[26] On 10 November 2023, review proceedings were held. On 1 December 2023, the Reviewer dismissed the review, on the basis that the Corporation's email of 2 August 2023 did not constitute a reviewable decision under the Act, and so the Reviewer did not have jurisdiction to make a decision under the Act.

[27] On 5 January 2024, a Notice of Appeal was lodged.

Relevant law

[28] Section 134 of the Act provides:

> (1) A claimant may apply to the Corporation for a review of—
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> (a) any of its decisions on the claim:
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> (b) any delay in processing the claim for entitlement that the claimant believes is an unreasonable delay: …

[29] Section 6(1) of the Act provides:

> Decision or Corporation's decision includes all or any of the following decisions by the Corporation:
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> (a) a decision whether or not a claimant has cover;
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> (b) a decision about the classification of the personal injury a claimant has suffered (for example, a work-related personal injury or a motor vehicle injury):
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> (c) a decision whether or not the Corporation will provide any entitlements to a claimant:

(d) a decision about which entitlements the Corporation will provide to a claimant:

(e) a decision relating to the level of any entitlements to be provided:

(f) a decision relating to the levy payable by a particular levy payer:

(g) a decision made under the Code about a claimant's complaint.

[30] In *Smith*,[11] Cadenhead DCJ noted:

> [19] In *Hawea v ACC* (High Court, Napier, CIV-2003-441-607, 6 July 2004), Gendall J. referred to the definition of "decision" in s. 6(1) of the 2001 Act, and stated, at paragraphs 17-18:
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> "...The definition section is not exclusive. To make a decision is to make up one's mind, to make a judgement, to come to a conclusion or resolution. Only when a decision has been made can there be a right of review and if no right of review exists then s133(5) has no application. ... The substance [of the communication in question] has to be analysed." …
>
> [47] … merely administrative issues and requests, do not amount to a 'decision' within the meaning of s.6 of the legislation. Whether a 'decision' has been made needs to be determined in the factual context and circumstances.

[31] In *Estate of Waenga*,[12] Gendall J stated:

> [28] … the reality is that the matter regarding backdating to birth had been determined several years earlier and resolved once and for all by the settlement of the appeal proceedings in August 1996.
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> [29] … the Courts are bound by the legislative requirements. Such of course are to be given a generous, and even benevolent, interpretation so that claimants are not subjected to any "niggardly" analysis. But that is not the case here where the issue is one of jurisdiction to review a refusal to reconsider an earlier decision, which had already been the subject of review and appeal, which was settled with legal advice.

[32] In *Briggs*,[13] Barber DCJ stated:

> [48] In the present appeal, the appellant sought reinstatement of his weekly compensation for the period since cessation from 3 January 1996. The letter issued by ACC on 24 November 2009 simply confirmed its primary decision of 15 December 1995. In that respect, ACC did not issue a fresh decision In substance, ACCs letter of 24 November merely declined to reconsider its decision of 15 December 1995 i.e. it was confirmatory of that 1985 decision. …

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[11] *Smith v Accident Compensation Corporation* [2004] NZACC 305.
[12] *Estate of Adam Waenga v Accident Compensation Corporation* [2006] NZAR 396.
[13] *Briggs v Accident Compensation Corporation* [2012] NZACC 67.

Discussion

[33] The issue in this case is whether the Reviewer erred in law in finding that the Corporation's email of 2 August 2023 was not a reviewable decision under the Act.

[34] Mr Howard, for Ms Howard, submits as follows. The Corporation's email of 2 August 2023 constitutes a decision under the Act. The Corporation acknowledged in its email of 2 August 2023 that the amount of $19,200 paid in 2021 by the Corporation was to cover Ms Howard's weekly compensation entitlements following the suspension until her superannuation age. This shows that the Corporation only partially reinstated weekly compensation in 2021, when it calculated and made payment of the amount of $19,200, and did not consider the full period starting from 10 November 2010. The Corporation's calculation is incorrect because, to cover Ms Howard's weekly compensation entitlements following the suspension until her superannuation age, the Corporation will have to recalculate weekly compensation from 10 November 2010 (the date weekly compensation was suspended) to 24 December 2012 (qualification age for national superannuation). The Corporation should know that a further $42,000 should have been recalculated for the period in question.

[35] This Court acknowledges the above submissions. However, the Court notes the following considerations.

[36] First, this Court finds that the Corporation's email of 2 August 2023 does not constitute a decision under the Act. It has been established (at both the District Court and High Court levels) that a refusal to reconsider an earlier decision, which had already been the subject of review and appeal, does not constitute a decision under the Act.[14] The Corporation manager's email of 2 August 2023, in advising that the Corporation was not able to offer any different responses or outcomes for Ms Howard, expressly stated that Ms Howard's weekly compensation matters had been settled in previous review and court decisions.

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[14] *Estate of Waenga*, above note 12, at [29], and *Briggs*, above note 13, at [48].

[37] Second, this Court reiterates the repeated findings of the District Court and the High Court that Ms Howard's ongoing attempt to relitigate her unsuccessful claim for weekly compensation, is contrary to the principle of issue estoppel or *res judicata*. Six-and-a-half years ago, Powell DCJ correctly observed that it was "utterly beyond dispute, and certainly as far as the District Court is concerned, that the suspension decision was and is valid and cannot be challenged, whether directly or indirectly".[15] Over five years ago, Courtney J noted that "once a substantive issue has been raised and determined in litigation between the parties it cannot be raised again", and that "advancing it in the guise of some other form of proceeding or framed as another kind of complaint cannot disguise its true nature".[16]

Conclusion

[38] In light of the above considerations, the Court finds that the Reviewer correctly found that the Corporation's email of 2 August 2023 was not a reviewable decision under the Act. The decision of the Reviewer dated 1 December 2023 is therefore upheld. This appeal is dismissed.

Costs

[39] It is now nearly 10 years ago since the Supreme Court finally confirmed that there was no further right of appeal against the decision to suspend Ms Howard's entitlements on 11 November 2010. Ms Howard's subsequent attempts to relitigate this matter have been repeatedly described by the Courts as an abuse of process.[17] As a result, past Courts (notably Powell DCJ and Courtney J) have found that the Corporation is entitled to an award against Ms Howard for costs and reasonable disbursements.[18]

[40] For the same reason, this Court directs that the Corporation is entitled to costs and reasonable disbursements arising out of the present appeal. The Court directs that the Corporation is to file submissions on the appropriate amount of costs and

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[15] Above, note 6, at [7].
[16] Above, note 7, at [23].
[17] Per Clifford J (above note 5), Powell DCJ (above note 6), Courtney J (above note 7), Henare DCJ (above note 9), and Cull J (above note 10).
[18] Above note 6, at [16], and above note 7, at [27].

disbursements sought within 10 days of the release of this judgment. Ms Howard will have 10 days to respond, following which the Court will determine the issue.

P R Spiller
District Court Judge

Solicitors for the Respondent: McBride Davenport James.