IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 25 **ACR 62/22**

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

Hearing:	On the papers
Appearances:	J Howard for the Applicant P McBride for the Respondent
Judgment:	21 February 2023

JUDGMENT OF JUDGE D L HENARE
[Leave to Appeal to the High Court –
Section 162(1) Accident Compensation Act 2001]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour Judge P R Spiller, delivered on 18 August 2022, dismissing an appeal against a review decision for want of jurisdiction, and giving reasons outlined below.[1]

[1] *Howard v Accident Compensation Corporation* [2022] NZACC 152.

Background

[2] Mrs Howard has two covered spinal injuries first suffered in 2006 and then aggravated by a further injury in 2007.

[3] On 21 May 2010, an IRP was prepared for Mrs Howard, which she signed on 27 May 2010.

[4] Care Advantage looked for medical advice concerning a path to social or vocational rehabilitation. Consideration was given to assessment by an occupational medicine specialist. Mrs Howard was referred to Dr Courtney Kenny for an assessment.

[5] At the appointment with Dr Kenny, Mrs Howard's husband, Mr Howard, raised questions about Dr Kenny's scope of practice and suitability to conduct the assessment. As a result of the objections raised by Mr and Mrs Howard, Dr Kenny agreed not to conduct the assessment.

[6] On 11 November 2010, Care Advantage wrote to Mrs Howard noting what had transpired with Dr Kenny and advised:

> The appointment was made in accordance with section 72 – Responsibilities of claimant who receives entitlement (d) Undergo an assessment by a registered health professional specified by the Corporation, at the Corporation's expense. The reason for this assessment with an occupational physician has been provided to you on a number of occasions, in writing.
>
> You were provided on several occasions with information on the consequences of not attending and completing this assessment. I therefore regret to advise that we decline to provide entitlements, effective from Friday 26 November 2010.
>
> This decision is made in accordance with section 117 – Corporation may suspend, cancel or decline entitlements.
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> If you are not happy with this decision, in the first instance, you should contact your care manager to discuss the decision further. You should also ensure that any new information that the care manager may not have had at the time of making the decision is disclosed for consideration.

[7] The letter went on to indicate options of referring Mrs Howard to her employer, New Zealand Post Limited for internal review, and in the event issues remain unresolved, that she had rights to apply for a formal review.

[8] Mrs Howard unsuccessfully applied for review, and then appealed to the District Court. In a judgment dated 29 June 2012, Judge Ongley dismissed the appeal on the basis the decision to suspend entitlements was correct.[2]

[9] The Court considered it was reasonable to require Mrs Howard to attend an assessment by an occupational physician and she had not made out the case for reasonable refusal to engage in the assessment. Mrs Howard then appealed Judge Ongley's decision to the High Court, the Court of Appeal and the Supreme Court, without success.[3]

[10] On 20 July 2021, Mrs Howard and the Corporation entered into a settlement agreement, and an *ex gratia* payment of $19,200 was made to Mrs Howard. In clause 9 of the agreement, the parties acknowledged they had the opportunity to take legal advice as to the meaning and effect of the agreement prior to signing it.

[11] Under clause 1 of the settlement agreement, Mrs Howard acknowledged and agreed she had no outstanding entitlement to the date of the settlement. Under clause 4, Mrs Howard agreed she would not personally or by any agent representative, or by proxy initiate or 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.

[12] Clause 6 of the agreement stated, in relation to the *ex gratia* payment:

> 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.

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2 *Howard v Accident Compensation Corporation* [2012] NZACC 218 at [41].

3 *Howard v Accident Compensation Corporation* [2013] NZHC 188; [2013] NZHC 1004; [2013] NZCA 617; and [2014] NZSC 31.

[13] Payment was duly made by two instalments. Less than a month after the second payment of $9,200 was paid, Mr Howard, for Mrs Howard, asked the Corporation to consider making payment for the period between 11 November 2010 and 9 April 2012.

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

> 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.

[15] In reply, Mrs Howard clarified 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".

[16] On 21 September 2021, the Corporation replied to Mr and Mrs 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 30 July 2021.
>
> Therefore, ACC will not be issuing any further decision, or engaging in any further correspondence in regard to this matter. 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.

[17] In October 2021, Mrs Howard applied for review of the IRP of 27 May 2010, alleging her rehabilitation needs under the IRP had not been implemented. Mrs Howard stated it was unfair for the Corporation not to have made weekly compensation entitlements and that no notice of review rights had been given. Mrs Howard sought review of the Corporation's response of 14 September 2021 as being a reviewable decision. Mrs Howard also sought payment for the full period of suspension and contended the sum paid as an *ex gratia* settlement was amenable to review.

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

[19] The review decision was upheld on appeal.

District Court Judgment

[20] Mrs Howard challenged the Reviewer's decision declining jurisdiction in respect to the IRP of 27 May 2010 and the Corporation's email of 14 September 2021.

[21] His Honour noted the submissions for Mrs Howard that the assessment under the agreed IRP for physiotherapy treatment had never been implemented pursuant to clause 8(3) of Schedule 1 of the Act (which requires implementation by the Corporation when an IRP is agreed or finalised). Further, Mrs Howard was not informed of review rights or given notice of decisions in time to make a review application under ss 63 and 64 of the Act.

[22] His Honour reviewed the relevant legislative provisions and the evidence before him. He noted the question of implementation of the IRP is moot in light of the Corporation's decision to suspend Mrs Howard's entitlements on 11 November 2010. In consequence, the Corporation was not required to implement the IRP or any other entitlements. His Honour referred to decisions of the High Court where essentially the same substantial points had been made.[4] The Corporation's decision to suspend entitlements was confirmed as correct by the District Court and appeals against the Court's decision were unsuccessful.[5] His Honour also found the Court had no power to make any declaration or grant any other relief in relation to the alleged non-implementation of the IRP.

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4 *Howard v Accident Compensation Corporation* [2017] NZHC 76 at [9], and *Howard v Accident Compensation Corporation* [2020].

5 *Howard v Accident Compensation Corporation* [2012] NZACC 218, [2013] NZHC 188, [2013] NZHC 1004, [2013] NZCA 617 and [2014] NZSC 31.

[23] In respect to Mrs Howard's application for review of the Corporation's email of 14 September 2021, His Honour took into account relevant considerations finding this email was not a decision within the meaning of the Act.

[24] The Corporation simply confirmed it would not issue a decision and that the true decision relating to Mrs Howard's claim was the decision of 11 November 2010 suspending Mrs Howard's entitlements.

[25] Mrs Howard's emails, including a follow up email clarifying the claim for weekly compensation for a period between 26 November 2010 and 9 April 2012 amounted to an attempt to re-litigate the claim which she unsuccessfully pursued against the 2010 decision. For these reasons, His Honour found the Corporation's email of 14 September 2021 did not constitute a reviewable and appealable decision.

[26] His Honour then concluded that:

> [37] Overall, this Court finds that it does not have jurisdiction to hear Ms Howard's review applications of the IRP of 27 May 2010 and the Corporation's email of 14 September 2021. To paraphrase the words of Justice Clifford, the underlying basis of the present appeals, as of others involving Ms Howard, is that the Corporation should not have suspended her entitlements. As Justice Clifford noted, that issue has now been determined finally and adversely to her and cannot be raised again and advancing it in the guise of some other form of proceeding or claim cannot disguise its true nature.[6]

Relevant Law

[27] 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.

[28] In *O'Neill v Accident Compensation Corporation*[7] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:
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> (i) The issue must arise squarely from "the decision" challenged: e.g., Jackson v ACC unreported, HC Auckland, Priestley J, 14 February 2002, AP 404-96-01; Kenyon v ACC [2002] NZAR

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[6] *Howard v Accident Compensation Corporation* [2022] NZACC 152 at [37].
[7] *O'Neill v Accident Compensation Corporation* [2008] NZ ACC 250.

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: e.g., 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 being proscribed: e.g., Northland Co-operative Dairy Co Ltd 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-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: 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 & 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: e.g., Jackson and Kenyon above.

Application for Leave to Appeal

[29] The questions of law identified by Mr Howard are:

(1) Whether certain provisions, namely clause 8(3) and clause 9(1) of Schedule 1, ss 63 and 64, s 6(e) and s 117(3B) of the Act and the Legislation Act 2019 have been properly construed or interpreted and applied to the facts;

(2) Did the Judge properly take into account the facts and law in finding the issues moot;

(3) The Judge failed to take account of relevant material; and

(4) The Judge made an error of law by failing to give adequate reasons for his conclusions and decision.

Case for the Applicant

[30] Mr Howard submitted the wording of section 117(3) under which the Corporation was entitled to "decline to provide any entitlement" did not mean it was entitled to decline "all entitlements". Further, under s 117(3)(B) there is discretion to make such payment declined under subsection (3), which required an evaluation of the applicable circumstances.

[31] Mr Howard submitted His Honour's decision finding the question of the IRP "moot" has a real and practical effect on Mrs Howard's rights to treatment. Further, this finding undermines the rule of law and raises a risk of miscarriage of justice.

[32] Mrs Howard submitted the September 2021 email was "recognisable" as requiring a s 6(e) decision concerning the level of entitlements that would be provided. For this reason, Mrs Howard's earlier request in her email of 1 September 2021 had not been addressed with a written decision.

[33] Mr Howard submitted the Corporation's September 2021 email stating that "We have been reasonable in paying her full entitlements for the full period of suspension" was simply incorrect on the facts, because the Corporation had not provided full entitlements for the full period of suspension.

[34] Mr Howard submitted His Honour failed to provide reasons why the statutory provisions were rejected or irrelevant.

[35] Mr Howard submitted the Corporation's application for costs is opposed because there are seriously arguable questions of law identified and Mrs Howard wants "the Courts to find the whole truth in the overall context and for ACC to fully and properly evaluate the overlapping issues".

Discussion

[36] The central issue for Mrs Howard's claims is the Corporation's decision to suspend Mrs Howard's entitlements in November 2010, notwithstanding Mr Howard's submissions to the contrary. There is also an attempt to avoid the effects of the settlement agreement of 30 July 2021 which Judge Spiller noted in detail and effect, brought an end to the lengthy disputes that had ensued since the November 2010 decision.

[37] I turn to consider the questions in the leave application.

The effect of s 117(3B)

[38] At the core of the case submitted by Mr Howard, is the repeated contention as to entitlement to weekly compensation said to arise under s 117(3B). It has been identified repeatedly and underscored by Judge Spiller's decision, there is no merit to any such argument.

[39] The discretion under s 117(3B) is not triggered merely because Mr Howard keeps asking the Corporation to provide entitlement.

[40] His Honour referred at length to the findings of the Court relevant to s 117(3B), which means that even if some legal issue was to be identified (and there are none of any *bona fide* or credible nature) then leave will only properly be refused within the Court's discretion.

[41] This Court finds no question of law properly arises.

The question of implementation of the IRP

[42] The courts have found Mrs Howard unreasonably refused to engage in an assessment under the IRP and the Corporation's decision to subsequently suspend entitlements was considered justified and reasonable.

[43] The fact Mrs Howard does not like the answer which has been conclusively determined against her, does not properly allow a repeated complaint.

[44] In considering the extensive litigation and the principle of issue estoppel and *res judicata*, His Honour took into account the evidence and the extensive findings of the superior courts.

[45] There are matters where there is some real live and/or important and undecided issue. Here however, any issue was decided long ago against Mrs Howard. Rather, the question is properly whether despite issue estoppel or res judicata, can Mrs Howard continue to present her views in different disguise. That answer has already been substantially provided to her[8].

[46] Further, Judge Spiller explained Mrs Howard's entitlements having been suspended, the Corporation was not required to implement the IRP or other entitlements. Judge Spiller also took into consideration the provisions of the settlement agreement of 30 July 2021. Judge Spiller determined there was no live issue in the appeal, which he described as "moot".

[47] This Court finds no question of law properly arises.

The Corporation's email of 14 September 2021

[48] This Court finds Mr Howard 's submission on the nature of the Corporation's email of 14 September 2021 is another attempt to seek entitlements that were suspended.

[49] His Honour identified the relevant considerations within the email exchange between Mrs Howard and the Corporation, particularly the Corporation's email of 14 September 2021. He noted the Corporation's express position that it would not be issuing any further decision. Further, and as reflected in the 2010 decision, the entitlements already requested by Mrs Howard had already been the subject of previous review and court decisions.

[50] His Honour concluded the email of 14 September 2021 did not constitute a reviewable and appealable decision. For this reason, the Court concluded it did not have jurisdiction to determine the application.

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8 *Howard v ACC* [2018] NZHC 3342 (Courtney J) at [21].

[51] This Court finds no question of law properly arises.

Failure to take account of relevant material or provide adequacy of reasons

[52] It is accepted that absence of reasons can, in appropriate cases, comprise an error of law.[9] However it is not necessary in any jurisdiction for reasons to be given that a party agrees with.

[53] This Court finds His Honour considered the relevant issues, evidence and law to support the clear and sufficient reasons given for his decision. He considered the effect of the settlement agreement of 30 July 2021, jurisdictional issues and considerations arising in respect to the IRP of 27 May 2010, the Corporation's email of 14 September 2021 against the available evidence and overall context of all appeals to the higher courts.

[54] His Honour referred to Justice Courtney's decision in which she declined leave to appeal on substantially the same points (and grounds) noted in this leave to appeal application. Justice Courtney 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 determine 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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> …
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> [25] It is a 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 processes that have no merit.

[9] See *R v Taito* [2003] 3 NZLR 577, Lewis v Wilson & Holton Limited [2000] 3 NZLR 546 (CA)

[55] Judge Spiller's conclusion (paraphrasing Justice Clifford) [10] makes the same point. Judge Spiller identified the correct law and factual context and made the only conclusions that could be drawn from the facts before him.

[56] This Court finds the reasons of His Honour far surpass any inadequacy that might comprise error of law.

Decision

[57] In light of the above considerations, the Court finds there is no tenable basis for the exercise of any discretion to grant leave to advance what is effectively an abuse of process. This Court concludes it has not been established that Judge Spiller made an error of law capable of *bona fide* and serious argument.

[58] 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.

[59] The Corporation seeks costs against Mrs Howard, with Mr McBride previously indicating his advice to her that the Corporation would do so. Mr McBride submitted at least category 2B costs are sought by the Corporation on the application.

[60] Mr McBride also submitted the Court might decide that where "she continues to persist with proceedings (particularly where there have been clear indications to [her] that they are ill conceived)" the Court will be forced to consider higher than normal scale costs which should be on the basis of what litigation is actually costing those she is pursuing.[11]

[61] Mr Howard opposes the costs application of the Corporation.

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[10] See para [27] above.
[11] *Reid v NZ Fire Service Commission* HC Wellington CP 435/89, 13 December 1995

[62] The Court grants leave to the parties to file detailed memoranda on costs within one month of this judgment.

Denese L Henare
District Court Judge

Solicitors: McBride Davenport James, Barristers and Solicitors, Wellington, for the Respondent