IN THE DISTRICT COURT
AT WELLINGTON

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

[2024] NZACC 029 **ACR 306/21**
ACR 31/22

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACCIDENT COMPENSATION ACT
BETWEEN	BRETT MACDONALD Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the papers

Appearances: Ms K Koloni, advocate for the Applicant
Mr P McBride, counsel for the Respondent

Date of Ruling: 16 February 2024

JUDGMENT OF JUDGE C J MCGUIRE
[FURTHER RULING ON APPLICATION TO RECALL JUDGMENT]

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[1] In my ruling in this matter dated 12 January 2024, I said the following:

> 1. In my minute of 22 December 2023, declining to recall judgment in this matter, I said that no formal submissions in support of the application had been filed.
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> 2. I was advised by the Registry yesterday that formal submissions entitled "APPLICATION TO RECALL JUDGMENT [2023] NZACC 175" and dated 30 November 2023 were in fact received by the Registry, but by error not forwarded to me.

3. In all the circumstances therefore, the appropriate course now is that my decision contained in my minute of 22 December declining to recall judgment be quashed and I direct that the application to recall judgment be heard afresh by another Judge.

[2] However, the Guidelines to Practice and Procedure for Accident Compensation Appeals in the District Court (ACA Practice Guidelines) issued by the Chief District Court Judge on 1 April 2023 provide as follows, at paragraph 8.2.2:

> The application to recall must specify the category of recall applicable to the application and the reason why the judgment should be recalled. Once an application for recall is made, it will be referred to the judge who heard the appeal.

[3] I therefore consider the application to recall again, on the papers, now that I have received Ms Koloni's submissions dated 30 November 2023.

Appellant's Submissions on Application to Recall Judgment

[4] Ms Koloni makes these submissions:

1. This application for recall of the Court's judgment of [2023] 175 MacDonald v ACC, is made in accordance with the Guidelines to Practice and Procedure for the Accident Compensation Corporation appeals in the District Court (as per s 228 District Court Act 2016) and 8.2 Challenging a Judgment.

2. In applying for this recall, we rely on the category of 8.2.1(c):

   "Where, for some other special reason, justice requires the judgment to be recalled."

3. We rely on the following reasons:

   (a) Article 14 of the International Covenant on Civil and Political Rights (ICCPR – Universal Instrument), which New Zealand ratified on 28 December 1978 states:

      (i) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.

We submit that Mr MacDonald has not had a fair hearing. We were pushed for time by the court without regard to procedural fairness, which has resulted in errors of fact and evidence. We were prevented from completing our presentation of the evidence, and speaking to the NZ Statutes we rely on in our argument.

This is a breach of Article 14 of the ICCPR – Universal Instrument.

(b) New Zealand Bill of Rights Act 1990

Section 27 Right to Justice

(i) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(ii) Every person whose rights, obligations, or interests protected or recognised by law have been affected by determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(iii) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, accordingly to law, in the same way as civil proceedings between individuals.

4. We submit that Mr MacDonald has the right to be heard in his appeal and natural justice and we believe this right has been breached by the court. The right to a fair and impartial hearing (with no bias) cannot be said to have transpired.

5. Mr MacDonald and his partner, Melanie Kelly, were present in court to give their oral evidence, and the court directed me to ensure that they were ready to give evidence (as per 6.1.2 of the Practice Guidelines).

6. The timeslot for the hearing was moved from 10.00am to 11.45am by the court. The Judge pushed us for time and we were informed that our submissions must end by 3.30pm, at the hearing on 27 July 2023 (see hearing transcript, page 34, line 18).

7. We communicated at least once during the hearing itself (page 56 of the hearing transcript, line 20) and explained that:

> … We just simply ran out of time and I was asked to cut my presentation short and never got to this page.

8. We also communicated by email to the court on 31 July, requesting another half day hearing to give evidence in support of our re-hearing.

> At the beginning of the appeal hearing, Judge McGuire spoke to the change of time from 10.00am to 11.45am, and the additional documents I had provided from Brett's claim file (not provided in ACC's bundle for full disclosure to the court), and Brett's affidavit.

> Judge McGuire informed us that as a starting point we would make as much progress as we could.
>
> I was prevented from speaking to my submissions from 3.30pm and only proceeded up to page 93 out of 110 pages, trying to rush through. This did not allow for a complete presentation and we never addressed the other issues before the court, nor the summary of other authorities relied on.
>
> In light of the additional information now requested from Tauranga Hospital, and the delay in response, plus the principles of natural justice to have Brett's appeal heard in full, we request another half day hearing to finish the presentation and arguments.
>
> Please make this request known to Judge McGuire.

9. This request was presented to ACC, who did not object (email of 1 August 2023).

10. On 4 August 2023, Judge McGuire directed via email that further written submissions could be made in regard to the question posed by Dr Thwaites – but that … otherwise submissions are closed.

11. On the 5th September 2023 via another email – this represented the third objection and communicated the breaches of the principles of natural justice:

> The presentation of Brett's evidence and arguments were not completed in time as alluded to in court, Judge McGuire said the hearing would "make a start", on the matters before the court. We formally object to the court stating that submissions are closed, as the principles of natural justice have not been observed.

The court did not reply to this email.

12. On the 5th September 2023, a new message was emailed, with attached directions that submissions were due by 15 September 2023 and a question regarding seeking an extension.

13. I replied that I can't meet that deadline as I was waiting for shoulder surgery from an injury that occurred on 23 July 2023.

14. On the 29th of September 2023 I formally objected for the fourth time.

15. On the 17th of October 2023 judicial notice was filed with a further four pages of points regarding the principles of natural justice and the reasons why we felt this had been breached, including this comment below:

> This is not our preferred way to be heard and this has been communicated to the court at least three times prior to today. As communicated, my oral submissions on behalf of Brett MacDonald were up to page 78 of the documents I

> provided to the court. Mr MacDonald and his partner, Melanie Reid [sic Kelly] did not have an opportunity to give evidence, and the hearing time did not allow proper closing arguments and references to the Parliament of NZ Statutes, and caselaw etc.

16. In summary, the special reasons why justice requires the judgment to be recalled is on the basis of procedural unfairness which has prejudicially effected the outcome of the hearing.

17. We were rushed through too quickly and did not have enough time to present our case in full and argue the defence.

18. Mr MacDonald and Ms Kelly returned after the lunch break, with the reasonable expectation of giving oral evidence. This did not transpire, as evidenced in the hearing transcript.

19. We understand that natural justice is the right to a fair hearing where neither party must be deprived of the opportunity to have their day in court, and to be heard. An additional half day was requested, as the three reviews at appeal plus arguments on costs should never have been allocated, just half a day.

20. This re-hearing appeal is very important to Mr MacDonald – as is his right and being in an investigative tribunal (rather than adversarial) it was important for all parts of the claim to be presented, in accordance with Parliament of New Zealand Statute law, which is there to protect the rights of ACC claimants in the claims process.

21. Aspects of the claim process and evidence and facts were discussed at the hearing and not considered in the judgment, with no reasons given.

22. Relevant evidence was missing when ACC decision-makers determined Mr MacDonald did not meet the requirements for cover – so how could those decisions ever pass the claimant's expectation of the highest standards of service and fairness, or the "reasonable test" as required by a Crown entity?

23. This prejudice and procedural unfairness has been ignored by the court, therefore the resulting judgment is not an accurate and complete representation of the hearing in accordance with s 110 of the District Court Act 2016.

> 110. Judge must record various matters
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> (1) The Judge at a hearing in a proceeding in which there is a right of appeal without leave must record or cause to be recorded, whether by way of transcript or otherwise, the following matters:
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> (a) the facts in evidence; and
>
> (b) any question of law or equity raised at the hearing; and

(c) the Judge's decision and of his or her determination of the proceeding.

For the reasons we apply for this judgment to be recalled.

Respondent's Submissions

[5] In his submissions dated 4 December 2023, Mr McBride refers to *Jones v NZ Bloodstock Finance and Leasing Limited*[1] where the Supreme Court said that recall is only properly exceptional. He refers to *Ngahuia Reihana Whanau Trust v Flight*[2] where the Court of Appeal said it was a truly rare occurrence. He also refers to *Horowhenua County Council v Nash (No 2)*[3] where the Court said that special reasons are required before recall.

[6] He refers to *Gibson v Official Assignee*[4] where the Court said that once it has made a decision, there are very strong policy reasons for that to stand as conclusive.

[7] He refers to *Ideal Investments Limited v Earthquake Commission*[5] where the Court of Appeal said:

> [5] … A judgment should not be recalled in order to consider a challenge to substantive findings of fact or law, nor to allow a party to recast arguments previously made or advance arguments that could have been raised earlier, but were not. Recall applications that do not engage with the established grounds for recall, but rather attempt to re-open the merits of the judgment sought to be recalled are an abuse of process and will be dismissed on that basis.

[8] Mr McBride submits that here the appellant purports to rely on the Court's Practice Guidelines as the source of jurisdiction, claiming that for some other special reason justice requires the judgment to be recalled.

[9] Mr McBride notes that the two appeals were filed in December 2021 and February 2022 and that there were then extensive delays in non-compliance with court directions. He refers to the Court's minute dated 23 May 2023.

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1 *Jones v NZ Bloodstock Finance and Leasing Limited* [2023] NZSC 133.
2 *Ngahuia Reihana Whanau Trust v Flight* (CA23/03, 26 July 2004).
3 *Horowhenua County Council v Nash (No 2)* [1968] NZLR 632.
4 *Gibson v Official Assignee* [2019] NZHC 532 at [21], [22].
5 *Ideal Investments Limited v Earthquake Commission* [2023] NZCA 388.

[10] He notes that the appellant, in a joint memorandum dated 20 May 2022, explicitly agreed that following the filing of submissions "the matters can then be set down for a half day hearing". And the same memorandum, also noted:

> 11. The Appellant has not suggested the filing of any further evidence (or any application for leave to do so).

[11] He notes that the appellant's advocate failed to meet the date for filing submissions. He notes that the matter was set down for a hearing on 1 May 2023 and that by minute dated 3 March 2023, the Court noted that no adjournment would be granted absent exceptional circumstances.

[12] Mr McBride submits that despite the Practice Guidelines, and the content of the joint memorandum, the appellant failed to prepare or advance the requisite joint bundle. Rather, upon failure by the appellant, and absent requested input from the appellant, ACC latterly did so.

[13] By minute dated 12 June 2023, the Court sought to assist the advocate to understand the jurisdiction. The matter was then sent down for hearing on 27 July 2023.

[14] With the scheduled 11.45am start, three quarters of a day was available for hearing. The hearing commenced later than scheduled, because the appellant only then sought to adduce substantial documentation, and what was described as a "previously unsworn" affidavit. Further time was taken to affirm that before the Registrar, and for copying.

[15] The hearing then commenced at 12.06pm, with the Court noting that there was a little over half a day to complete the hearing.

[16] The appellant's advocate commenced her submissions at 12.16pm and the Court took an abbreviated lunch adjournment from 1.05pm, recommencing at 2.02pm. Ms Koloni concluded her submissions at 3.33pm.

[17] From 3.47pm to 4.44pm, counsel for the respondent addressed the Court. Ms Koloni's reply commenced at 4.44pm and the hearing concluded at 5.20pm.

[18] Following the hearing Mr McBride notes that the Court framed a question for Dr Thwaites, whose medical notes were in issue at the hearing.

[19] Dr Thwaites replied promptly and supplementary submissions were then sought relating to this medical evidence of Dr Thwaites. These were during August 2023.

[20] In that context he notes that Ms Koloni complained about other matters, which she claimed were not addressed, or not sufficiently addressed, at the hearing.

[21] Mr McBride notes that by minute dated 3 October 2023, the Court allowed additional written submissions from the appellant, strictly in reply to submissions made by counsel at the hearing. Ms Koloni provided further submissions on 17 October 2023.

[22] He notes that the Court issued its judgment on 26 October 2023 and on 8 November 2023, Ms Koloni emailed the registry to "confirm" an application for recall, and to complain that further additional material should have been before the Court.

[23] In response to Ms Koloni's claims Mr McBride submits that natural justice is properly about the opportunity to be heard. A litigation strategem or decision (even if misinformed or misguided) not to avail oneself of the opportunity to be heard under standard processes is no breach of natural justice and cannot convert to some different or more extensive opportunity to be heard.

[24] He submits that an allegation of bias, even if particularised and tenable, is a matter properly addressed by appeal and not recall.

[25] Mr McBride referred to *R v Nahkla (No. 2)*[6] where the Court said:

> As to complaints … that the Court did not deal with certain submissions and attributed to counsel a submission he did not make it may be observed that a belief on the part of counsel, specially after a hard fought case, that his argument had not been fully understood or adequately discussed is by no means uncommon. Nor, of course, can the reactions of counsel or the disappointment of his client in themselves afford ground for a rehearing. The Court is not obliged in giving its reasons for judgment to discuss every aspect of argument.

[26] Mr McBride also referred to *Nottingham v Real Estate Agents Authority*[7]. The Court of Appeal said:

> … However, it is quite clear that the discretion to recall must be exercised with circumspection, and it must not in any way be seen as a substitute for appeal. In particular there are some things that it can be said the power to recall does not extend to. It does not extend to a challenge of any substantive findings of fact and law in the judgment. It does not extend to a party recasting arguments previously given, and re-presenting them in a new form. It does not extend to putting forward further arguments that could have been raised at the earlier hearing but were not. It does not extend to asking the Court to reverse interlocutory decisions such as adjournment decisions on the grounds they were wrongly decided.

[27] Mr McBride submits the Court demonstrably addressed the particular issues properly before it in the two particular appeals. Within its discretion it, entirely properly, did not address other extraneous matters.

[28] Mr McBride submits that Ms Koloni's reference to section 110 of the District Court Act is misconceived. The provision requires the hearing of a proceeding in which there is a right of appeal to be recorded, namely the facts and evidence, any question of law or equity raised at the hearing, and the Judge's decision, and his or her determination of the proceedings. He submits it has no bearing whatsoever to recall of a judgment.

[29] Mr McBride again notes that recall is an exceptional procedure.

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6 *R v Nahkla (No. 2)* [1974] 1 NZLR 453 at 456.

7 *Nottingham v Real Estate Agents Authority* [2017] NZCA 145 at [9].

[30] He submits that Ms Koloni's contentions about running out of time or not being permitted to speak to some presentation are without an objectively valid basis and absent proper context.

[31] He notes that no Court is required to allow unlimited time for submissions; still less on appeal, or about matters properly irrelevant to the issue properly for decision.

[32] Mr McBride also submits that the allocation of three quarters of a day and the use of most of that time by the advocate addressing matters not appearing in submissions and documentation belatedly filed, is notable.

[33] He also notes that the court enabled still further submissions to be provided in writing after the event.

[34] Mr McBride also submits that Ms Koloni appears to not understand what an appeal by way of rehearing is and he refers to *McGechan on Procedure*[8]:

> *Appeal by Way of Rehearing*
>
> The expression "Appeal by Way of Rehearing" has a technical meaning. It does not mean that the court starts with a clean slate. It does, however, have to come to its own conclusion, based on the material presented before the decision-maker, and any further evidence which has been admitted.

[35] Mr McBride concludes his submissions with this summary:

- No proper basis (very special reason) has been identified or established allowing of recall.
- Regardless, nothing is identified requiring recall.
- What is in reality sought is to challenge the judgment, to continue the disputation and to adduce more material to do so. This is the stuff of appeal, or re-hearing (were that available).
- The application is an abuse of process and is only properly dismissed.

[36] Mr McBride seeks costs.

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8 *McGechan on Procedure* – Reference HHR 20.18.01

Decision

[37] These two appeals, like all appeals in this particular jurisdiction, were case managed to a hearing.

[38] In a Minute dated 23 May 2022, Judge Henare made time tabling directions in terms of a joint memorandum signed by Mr McBride and Ms Koloni and dated 20 May 2022. Appellant's submissions were to be filed and served by 29 July 2022 and ACC's submissions were to be filed by 9 September 2022.

[39] The same joint memorandum also said:

> 11. The appellant has not suggested the filing of any further evidence (or any application for leave to do so).

[40] The agreed timetable for the filing of appellant's submissions by 29 July 2022 was not met.

[41] Following a Covid-related delay the matter was set down for a hearing on 27 July 2023.

[42] On 27 July 2023, the hearing commenced at 12.06pm with Ms Koloni commencing her submissions on behalf of the appellant at 12.16pm. She continued until the Court broke for lunch at 1.05pm. She resumed at 2.02pm and continued until the afternoon adjournment at 3.33pm.

[43] From 3.47pm until 4.44pm, Mr McBride made submissions on behalf of the respondent. Ms Koloni then exercised her right of reply until approximately 5.15pm. Accordingly, in terms of hearing time, Ms Koloni's submissions and her reply had a duration of two hours and 51 minutes. Mr McBride's submissions on behalf of the respondent took 57 minutes.

[44] The transcript of the proceedings shows that Ms Koloni had ample time to make her submissions and her submissions in reply.

[45] The Supreme Court said recently in *Jones v NZ Bloodstock Finance and Leasing Limited*[9] that:

> Recall is an exceptional procedure; … a judgment will only recalled in exceptional circumstances, being those identified in *Horowhenua County v Nash (No. 2)* as applied by this court in *Saxmere Co Limited v Woolboard Disestablishment Co Limited (No. 2)* a recall application cannot be used to relitigate the [matter].

[46] Ms Koloni's submissions in respect of the recall application are set out in full earlier in this judgment. Ms Koloni's submission that her client has not had a fair hearing is rejected. The procedural steps taken prior to the hearing in this case and the conduct of the hearing itself set out in full in the transcript answers this allegation.

[47] The hearing commenced with an objection by Mr McBride to the filing of a further affidavit on behalf of the appellant, as well as a folder of documents relating to the appellant.

[48] Despite Mr McBride's concern and in effect being taken by surprise, I provisionally admitted the affidavit and the ring binder of documents.

[49] Ms Koloni then presented her submissions and concluded them at 3.33pm.

[50] Following Mr McBride's submissions, Ms Koloni replied from 4.44pm until just prior 5.20pm.

[51] I am satisfied therefore that Ms Koloni had a reasonable opportunity to put before the court all relevant matters on behalf of her client.

[52] Accordingly, her assertion that:

> We were rushed through too quickly and did not have enough time to present our case in full and argue the defence.

is rejected.

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[9] *Jones v NZ Bloodstock Finance and Leasing Limited* [2023] NZSC 133.

[53] For the above reasons her application to recall judgment is declined.

[54] Costs are reserved.

CJ McGuire
District Court Judge

Solicitors: McBride Davenport James, Wellington