IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 53 **ACR 90/21**

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

Submissions: The Appellant is self-represented
H Ifwersen for the Respondent

Hearing: On the papers

Judgment: 4 April 2023

JUDGMENT OF JUDGE P R SPILLER
[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 McGuire, delivered on 30 November 2022.[1] Judge McGuire dismissed Mr Savage's appeal against the decision of a Reviewer on 31 March 2021, upholding the Corporation's decision of 1 March 2019 declining Mr Savage's claim for an additional lump sum payment.

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[1] *Savage v Accident Compensation Corporation* [2022] NZACC 227.

Background

[2] On 1 July 1983, Mr Savage suffered an injury to his left hip. In 1986, the Corporation granted him a $500 payment. On 27 September 1988, the Corporation found that a 21 percent lump sum payment was appropriate. However, payment of only 10.5 per cent ($1,785.00) was made, with the other 10.5 percent being apportioned to another accident in Australia in 1972, which was not covered.

[3] On 20 March 1985, Mr Savage suffered a sprain of the right shoulder and arm. On 11 November 1988, a 7 percent payment of $3,000.00 was made.

[4] On 15 July 1986, Mr Savage suffered a sprain of the right wrist. On 15 November 1988, a 5 percent payment of $1,500.00 was made.

[5] On 16 July 1991, Mr Savage suffered a noise-induced hearing loss. On 21 December 1993, a 9.2 per cent payment of $1,564.00 was made.

[6] On 14 November 1998, the Corporation wrote to Mr Savage revoking its decision of 27 September 1988 to make a 10.5 per cent ($1,785.00) lump sum payment for the 1983 left hip injury. The Corporation advised that it considered his disability resulting from his hip injury was wholly attributable to his uncovered Australian accident, and therefore that he was not entitled to any compensation from the resulting disability. The Corporation advised, however, that it would not be seeking to recover any payment from Mr Savage.

[7] The 14 November 1998 decision noted that Mr Savage had applied to review the 27 September 1888 decision that it was now revoking, deeming Mr Savage's application for review "unacceptable" now that the relevant decision had been revoked. There is no record of Mr Savage applying to review the 14 November 1998 decision.

[8] On 3 February 2014, Mr Savage requested further lump sum compensation on the basis that he had received new medical evidence that the 1988 lump sum payment was inadequate. The new medical evidence referred to arose in the context of a District Court judgment on his entitlement to weekly compensation for his 1983

hip injury.[2] This judgment found that historical medical evidence established that Mr Savage's 1983 hip injury was the cause of much of his physical impairment and/or pain. This injury was distinct from the previous 1972 hip injury, which Mr Savage did not have cover for, and which was relied upon in the Corporation's 1998 revocation decision as the reason for deciding that Mr Savage was not entitled to any compensation for the resulting disability.[3]

[9] On 14 April 2014, the Corporation issued a decision letter declining Mr Savage's request for a further lump sum payment, stating that:

> I have considered all the information you have provided and advise that ACC declines your request for further lump sum compensation under the 1982 Act, sections 78 and 79.
>
> This is because the 1982 Act was repealed by the 1992 Act and lump sum compensation has been replaced by independence allowance.
>
> The date of your injury determines that if you apply for compensation now, it would be an independence allowance.

[10] In 2015, Mr Savage applied for an independence allowance for his 1983 hip injury. On 20 November 2015, the Corporation issued a decision letter declining this application on the basis that he was not entitled to an independence allowance. This was because his level of impairment was too low for him to be eligible for this form of entitlement. In its letter advising the appellant of its decision, the Corporation listed the injuries that were assessed for a combined independence allowance (for injuries before 1 July 1999):

> 15/07/1986— Sprain/Sprain/strain of right wrist;
>
> 20/03/1985— Sprain of shoulder and upper arm — right;
>
> 1/07/1983— Traumatic arthropathy— hip— left;
>
> 16/07/1991 — Noise induced hearing loss— left and right.
>
> The assessment identified your level of impairment to be 32 per cent. However, as you have previously been paid a lump sum payment, we have to take this into account when we determine your entitlement to an independence allowance.
>
> The calculation is as follows:

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2 *Savage v Accident Compensation Corporation* [2008] NZACC 184.

3 At [48]-[49].

> Assessed level of impairment — 32 percent
>
> Previous lump sum compensation impairment (for injuries before 1 July 1992) — 31 per cent
>
> Impairment to be considered for an independence allowance— 1 per cent.
>
> As your impairment considered for an independence allowance is less than 10 per cent (the minimum level eligible for an allowance) we must decline your application.

[11] Mr Savage applied to review this decision.

[12] On 11 August 2016, Reviewer, Ms Hill, modified the Corporation's decision of 20 November 2015 on the basis that Mr Savage had not yet been compensated for 10.5 per cent level of impairment (which was his 1983 left hip injury). This finding required the Corporation to amend its original calculations and ultimately resulted in Mr Savage being eligible for an independence allowance.

[13] At the review hearing, Mr Savage made submissions on the 1988 lump sum payment, which was the subject of the Corporation's 15 April 2014 decision. He submitted that this payment was insufficient compensation for his hip injury. However, Mr Savage had not filed a review application challenging the Corporation's 14 April 2014 decision declining to make a payment of lump sum compensation. In considering Mr Savage's submissions regarding this payment, the Reviewer stated:

> The first of Mr Savage's concerns that I must address is that he would like a further lump sum to be awarded under the provisions of the previous legislation because he does not believe he received adequate compensation for the 1983 hip injury in 1988. He referred to the findings of to the findings of the District Court decision about the fracture in the hip now being now being attributed to the 1983 accident.
>
> While I understand what Mr Savage is submitting, I simply have no jurisdiction or ability to direct ACC to consider the now defunct Act, or even look at ACC's decision of 14 November 1988.
>
> Furthermore, as noted by (Counsel for ACC) there has been a decision issued to the effect that ACC could not award any further lump sum under the 1982 Act. As I understand it, there was no review application filed against that. My jurisdiction relates to the decision of 20 November 2015. I have no inherent jurisdiction to widen the scope of the review.

[14] On 12 February 2019, Mr Savage made a fresh request to the Corporation for an additional lump sum payment regarding the 1983 left hip injury under sections 78 and 79 of the 1982 Act.

[15] On 1 March 2019, the Corporation issued the decision stating that it could not consider his request because:

> All these Acts and their corresponding entitlements have been repealed. ACC are unable to consider your request. As such, this has been declined.

[16] Mr Savage filed an application to review the Corporation's decision.

[17] On 2 July 2019, the Reviewer decided that he did not have jurisdiction to consider the correctness of the Corporation's decision.

[18] On 19 June 2020, the Reviewer's decision was quashed by Judge Mathers in a judicial Minute. Her Honour directed that another review hearing take place.

[19] On 31 March 2021, the Reviewer (Mr Thomson) issued a decision upholding the Corporation's decision of 1 March 2019 declining Mr Savage's claim for an additional lump sum payment.

[20] On 23 April 2021, Mr Savage filed a notice of appeal against the decision of the Reviewer.

[21] On 30 September 2022, the appeal proceedings were held before Judge McGuire. On 30 November 2022, Judge McGuire dismissed Mr Savage's appeal against the decision of the Reviewer.

[22] On 19 December 2022, Mr Savage filed an application for leave to appeal Judge McGuire's judgment.

[23] On 30 January 2023, Mr Savage provided submissions in support of his application for leave to appeal, and on 13 March, Ms Ifwerson provided submissions on behalf of the Corporation opposing leave to appeal.

[24] On 21 March 2023, Mr Savage provided additional submissions in response to the Corporation's submissions. Ms Savage also requested an adjournment of the proceedings to obtain a copy of the transcripts of the proceedings on 30 September 2022.

[25] This Court declines Mr Savage's request for an adjournment of the proceedings to obtain a copy of the transcripts of the appeal proceedings. Mr Savage has had ample opportunity, since Judge McGuire delivered his judgment nearly four months ago, of providing submissions in support of an application for leave to appeal. Furthermore, the issue for the Court is whether leave to appeal should be granted on a question of law in respect of Judge McGuire's judgment itself, rather than on what may have transpired at the appeal hearing.

Relevant law

[26] 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.

[27] In *O'Neill*,[4] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:
>
> (i) The issue must arise squarely from 'the decision' challenged: ... Leave cannot for instance properly be granted in respect of *obiter* comment in a judgment …;
>
> (ii) The contended point of law must be *"capable of bona fide and serious argument"* to qualify for the grant of leave …;
>
> (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed …;
>
> (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law …;
>
> (v) A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision …;

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

> (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law … .
>
> [25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law … .

The Court's judgment of 30 November 2022

[28] Judge McGuire noted at the outset of his judgment that the issue in the appeal was the correctness of a decision made by the Accident Compensation Corporation on 1 March 2019 declining the appellant's claim for an additional lump sum payment under sections 78 and 79 of the Accident Compensation Act 1982.

[29] In his findings, Judge McGuire noted that the Corporation acknowledged that the lump sum compensation earlier awarded to Mr Savage in respect of his right hip injury of 1 July 1983 was incorrectly calculated.

[30] However, His Honour noted that this error was corrected by the Reviewer in a review decision dated 11 August 2016. The Reviewer concluded that Mr Savage's impairment for all covered injuries was 32 per cent, and what was not correct was the amount of lump sum compensation that the Corporation deducted from Mr Savage's assessed level of impairment. The Reviewer modified the Corporation's decision of 20 November 2015 to reflect that lump sum compensation was reduced from 31 per cent to 20.5 per cent, being the deduction of 10.5 per cent, which the Corporation originally revoked in 1988. This, according to the Reviewer, left a balance of 11.5 per cent, and she directed that the Corporation provide Mr Savage with the equivalent independence allowance of an impairment of 11.5 per cent from the date of the application.

[31] Judge McGuire further noted that, on 1 March 2019, the Corporation declined Mr Savage's claim for an additional lump sum payment under the Accident Compensation Act 1982. The Corporation's position was that there was no legislative basis for granting the relief sought by Mr Savage, as lump sum compensation was repealed by the Accident Compensation Act 1992. Furthermore,

it was noted on behalf of the Corporation that Mr Savage had made no late application to review the 1988 decision.

[32] Judge McGuire observed that, in the Accident Compensation Act 2001, s 377 provides that persons who suffered personal injury before 1 July 1999 are entitled to be assessed for an independence allowance under Part 4 of Schedule 1 of the Accident Insurance Act 1998, irrespective of when the claim for cover for personal injury was lodged.

[33] Judge McGuire accepted the Corporation's submission that the legislative intent behind section 377 of the 2001 Act was to address directly the impact of lump sum compensation under repealed Acts and capture cases like Mr Savage's. His Honour stated that Parliament plainly wished to replace lump sum compensation with an independence allowance, and did so when it enacted the Accident Insurance Act 1998. However, to be fair to those injured who had lodged claims for lump sum compensation before 1 October 1992, they could continue with such a claim if the criteria of section 380 were met. That did not change the clear will of Parliament in the 1998 Act that an independence allowance regime would replace the lump sum compensation regime.

[34] Judge McGuire added, as noted in *Pearson*,[5] that any determination by the Corporation in regard to exercising its discretion under section 390 was not a decision in terms of s 6 of the Act (and thus not amenable to review and appeal).

[35] Judge McGuire concluded that ultimately, in this case, the error that occurred in the 1988 payment to Mr Savage, as identified by the Reviewer in 2016, had now been remediated by the Corporation by the payment of an independence allowance to Mr Savage. Accordingly, there was nothing further for this Court to decide. On that basis, the appeal was dismissed.

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5 *Pearson v Accident Compensation Corporation* [2017] NZAC 58.

Discussion on the appellant's submissions

Decision on matter at issue

[36] Mr Savage submits that the Judge did not decide on a matter in issue, namely the correctness of the Corporation's decision on 1 March 2019 declining additional lump sum compensation under s 79 of the 1982 Act.

[37] This Court notes that, at paragraph [1] of Judge McGuire's judgment, His Honour noted that the issue in the appeal was "the correctness of a decision made by the Accident Compensation Corporation on 1 March 2019 declining the appellant's claim for an additional lump sum payment under sections 78 and 79 of the Accident Compensation Act 1982". His Honour's ensuing judgment explained why, in his view, the decision made by the Corporation on 1 March 2019 was correct.

Revision of the Corporation's decision under section 390

[38] Mr Savage submits that the Corporation should have revised its decision under section 390 of the Act because the medical evidence supports his case for an additional lump sum compensation payment. Mr Savage submits that the Court has jurisdiction to consider the exercise of the Corporation's discretion not to review its original decision under section 390 (or section 65) of the 2001 Act.

[39] Section 390(1) of the 2001 Act provides that the Corporation may revise any decision made by the Corporation before the commencement of this Act, if it appears to the Corporation that the decision was made in error. In *Pearson*,[6] the District Court held that any determination by the Corporation in regard to exercising its discretion under section 390 was not a decision in terms of s 6 of the Act (and thus not amenable to review and appeal). This finding was confirmed by the District Court in *Thirring*.[7] Section 65(1) of the 2001 Act provides that, if the Corporation considers it made a decision in error, it may revise the decision at any time. This section appears to be directed at decisions made by the Corporation since the commencement of the Act, but, in any event, the Corporation would once again be exercising its discretion which was not amenable to review and appeal.

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6 *Pearson v Accident Compensation Corporation* [2017] NZAC 58, at [42].
7 *Thirring v Accident Compensation Corporation* [2017] NZACC 99, at [18].

[40] Judge McGuire referred to the precedent in *Pearson*, and so correctly found that the Corporation's decision not to exercise its discretion to revise Mr Savage's original lump sum payment decision under section 390 could not be taken on review and appeal.

Remediation of the Corporation's error

[41] Mr Savage submits that an independence allowance payment under s 377 of the 2001 Act did not remediate the Corporation's error.

[42] Section 377(3)(c)(i) of the Act indicates a clear intention of this Act for independence allowance to replace lump sum compensation under previous legislation. Judge McGuire's finding that the Corporation has now remediated its previous error through adequate compensation is a finding of fact. This Court is not satisfied that there is no evidence to support Judge McGuire's decision, that the evidence is inconsistent with, and contradictory of, the decision, or that the true and only reasonable conclusion on the evidence contradicts the decision.

Alleged error of fact

[43] Mr Savage submits that Judge McGuire made an error of fact in relation to the payments made to Mr Savage. He claims that Judge McGuire misinterpreted the Corporation's $500 payment in 1986 under section 79 of the 1982 Act for the Corporation's $1,785.00 payment in 1988 under section 78 of this Act, confusing sections 78 and 79 lodgement and payment dates in the Corporation's "Lump Sums/Independence Allowance Payment Report.

[44] This Court notes that any mistakes that Judge McGuire may have made as to sections 78 and 79, lodgement and payment dates are matters of detail which are immaterial to the central issue in this appeal, namely, the correctness of a decision made by the Accident Compensation Corporation on 1 March 2019 declining the appellant's claim for an additional lump sum payment.

Need to file a valid late review application under section 380

[45] Mr Savage submits that, to seek an additional lump sum compensation, he does not need to file a valid late review application under s 380 of the 2001 Act.

[46] This Court notes that the need to file a late review application under s 380 of the 2001 Act was not directly at issue in this appeal, although this issue was noted by Judge McGuire in passing. In any event, the need for such an application is clearly evident in s 380(1)(b)(ii).

Independence and appointment of a Reviewer

[47] Mr Savage submits that the Reviewer who decided, on 11 August 2016, on issues of independence allowance (and made an *obiter* comment to the effect that Mr Savage could not seek additional lump sum compensation under repealed legislation) was not sufficiently independent and not appropriately appointed as a Reviewer.

[48] This Court notes that the present appeal relates to Judge McGuire's dismissal of Mr Savage's appeal against the decision of a Reviewer (Mr Thomson) on 31 March 2021. The decision and comments of the Reviewer (Ms Hill), who gave the review decision on 11 August 2016, are not relevant to the present appeal.

The Decision

[49] In light of the above considerations, the Court finds that Mr Savage has not established sufficient grounds, as a matter of law, to sustain his application for leave to appeal, which is accordingly dismissed. Mr Savage has not established that Judge McGuire made an error of law capable of *bona fide* and serious argument. This Court finds that, as a matter of law, Judge McGuire correctly dismissed the appeal against the Reviewer's decision of 31 March 2021 confirming the Corporation's decision of 1 March 2019.

[50] This Court further finds that, 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.

[51] There are no issues as to costs.

Judge P R Spiller,
District Court Judge

Solicitors: H Ifwersen and EM Watt for the Respondent.