PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001 THERE IS A SUPPRESSION ORDER FORBIDDING PUBLICATION OF THE APPELLANT'S NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE APPELLANT

IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 82 ACR 104/22

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

Hearing: On the papers

Judgment: 19 May 2023

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

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[1] This is an application for leave to appeal to the High Court against a judgment of His Honour Judge McGuire, delivered on 20 February 2023.

[2] The applicant lodged a claim for tuberculosis (TB) as a work injury. The Corporation's decision dated 5 June 2019 declined the claim on the basis the records did not suggest the applicant had suffered a personal injury, and even if a personal injury could be established there was insufficient evidence to show that such injury was caused by her work. This decision was upheld on appeal by His Honour.

[3] The parties filed submissions in writing, having been directed to do so, and being informed by Minute dated 22 February 2023 that the leave to appeal application would be determined on the papers.

[4] This Court notes while the applicant has filed her submissions identifying the correct file number *ACR 104/22* for this appeal, she has used the name identifier for other appeals in which she is the appellant. A separate suppression order lies in respect to those appeals.

[5] The name suppression order applying to the judgment dated 20 February 2023 of Judge McGuire which the applicant seeks leave to appeal to the High Court and her filed submissions relate, is *TR v Accident Compensation Corporation* [2023] NZACC 27. The applicant made this clear when she stated in her submissions that:

> I am challenging the decision made by Judge McGuire to reject my claim for cover and entitlements for Tuberculosis Infection, in his Judgment on the 20/02/2023.

[6] For the avoidance of doubt, this Court confirms that *TR v Accident Compensation Corporation [2023] NZACC 27* is the subject of a permanent suppression order under s160(1)(b) of the Accident Compensation Act 2001 (the Act) forbidding publication of the appellant's name, address and any particulars that might identify the appellant in that proceeding and the applicant's name, address and any particulars that might identify the applicant in this proceeding.

Background

[7] The applicant was employed by a District Health Board in New Zealand in 2013 and 2014. During 2014 she took time off work because she was unwell. Records confirm that there were significant work-related issues in play and, in addition to that, the applicant was the victim of abuse and marital issues as a result.

[8] In early 2015, the applicant left her job and relocated overseas.

[9] Records show that in or around September 2014 the applicant took a QuantiFERON gold test which was positive and therefore there was a suspected diagnosis of latent TB. The applicant received treatment in regard to that diagnosis during the final months of 2014.

[10] In September 2018 the applicant filed an ACC injury claim form for TB referring to the positive QuantiFERON gold test in September 2014 and indicating that she had contracted TB as a result of a workplace exposure.

[11] The claim was initially managed by a third-party provider, Well NZ, who declined it on 15 October 2018. Subsequently Well NZ reconsidered the claim and sought further information from the applicant in regard to the condition, her symptoms, and when she believed the exposure had occurred.

[12] Notes were sought from her former employer and the applicant's general practitioner which confirmed that:

(a) The applicant was unwell in June/July 2014 with a cough.

(b) She tested positive on a QuantiFERON gold test in September 2014 and was given prophylactic treatment by the Health Board, and

(c) A family member had visited her in 2014 from overseas and that family member was subsequently diagnosed with TB.

[13] Well NZ arranged for an assessment to be undertaken by Dr Antoniadis, Specialist Occupational Physician. He reported on 21 March 2019 that the probable diagnosis was latent TB. He did not consider there was any support for active TB at the time of presentation in 2014. He also did not think that there was a link between a possible respiratory tract infection during June and July 2014 and the latent TB diagnosis.

[14] The Corporation assumed management of the claim, and on 5 June 2019, it was declined again. The applicant applied for a review of that decision. The review proceeded in October 2019. The Reviewer concluded that latent TB was not a physical injury because it is an inactive condition, and therefore found the decision declining the claim was correct.

[15] A late appeal was filed against the review decision in June 2022 and leave to file the appeal out of time was granted by the District Court shortly thereafter.

[16] For the appeal, the Corporation filed additional evidence from Dr Obele, Occupational Specialist and Principal Medical Advisor, in which she questioned the diagnosis of even latent TB, and in which she concluded that, in any event, it was unlikely the applicant contracted TB at work.

The District Court's decision

[17] The Judge set out a comprehensive background and then set out the applicant's submissions at length,[1] noting 22 appendices were received referring to documents, medical records, medical articles, medical opinions and comments. His Honour noted two central issues from the applicant's submissions being "Did I contract TB infection in 2014?" and "Is it an injury?" His Honour detailed the submissions addressing these questions. Central to the applicant's argument is that she likely suffered from active TB during 2014, as evidenced by a cough recorded in medical notes in July 2014, and the only place that she could have contracted the infection was at work.

[18] His Honour noted the submissions for the Corporation.[2] First, the evidence did not establish the applicant had suffered a physical injury. The diagnosis of TB was not confirmed, but even if the correct diagnosis was latent TB, this is an inactive process and not one that is representative of actual bodily harm and is therefore not a physical injury. Secondly, there was insufficient evidence the condition was caused by a workplace exposure.

[19] In his decision, the Judge was not satisfied the positive QuantiFERON gold test was sufficient evidence of the applicant having the TB mycobacterium. His Honour concluded on balance that the positive test in September 2014 "was amongst the 3% of false positive tests and that she does not have the TB mycobacterium". He noted the evidence "that once a person has the TB mycobacterium, it cannot be eradicated". His Honour also noted there had been no further positive tests supporting a diagnosis of TB. In consequence, His Honour concluded the appeal failed on this ground. The Judge then went on to conclude that even if the applicant had latent TB in 2014, latent TB would not meet the requirements of a personal injury in terms of s26 of the Act.

[20] The Judge's final conclusion is:[3]

> "To summarise, I find on the balance of probabilities that the applicant has never contracted TB. All her tests, but for one in 2014, have indicated that she does not have the mycobacterium. There is no evidence she has sustained an injury as described by the Accident Compensation Act 2001. "

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1 At [30] to [47].
2 At [48] to[54].
3 At [81].

Legal principles governing Application for Leave

[21] 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.

[22] 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 …;
>
> (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.

Grounds of appeal

[23] The applicant submitted the Judge's findings of fact were unsupported by the evidence, as summarised in her submission on causation that:

> I believe that the Judge did not properly look into all the documents and thus failed to identify further physical injury linked to TB infection. This causal link was provided for by Dr Randhawa in his health report dated 26/9/22, received by the appeals district court prior to the hearing. It also appears the Judge has completely ignored everything the appellant mentioned during the appeals hearing pertaining to the mechanism of injury.

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

[24] The applicant referred to "about 300 pages of documents and health reports which appear to have been ignored" by the Judge.

[25] In consequence, the applicant submitted the Judge's conclusions regarding QuantiFERON-gold should not have been made and they are inaccurate.

Discussion

[26] The applicant submits the Judge's treatment of the facts amounts to an error of law. That is a high threshold. I accept Ms Becroft's submission on the effect of *Edwards v Bairstow*[5] that such threshold requires the Court to conclude the judgment was so clearly untenable that proper application of the law required a different answer.

[27] This Court finds the judgment was not untenable because the Judge referred to all the relevant considerations. They included the claim as filed which noted the diagnosis as "Tuberculosis-suspected", the weight of the evidence which questioned the diagnosis of latent TB, the submissions of the applicant which he detailed at length together with the submissions on behalf of the Corporation, the various test results and the reports and opinions on them, the 20 appendices he received from the applicant and the evidence relied on by the Corporation.

[28] His Honour applied the correct statutory requirements in support of the conclusions he reached that the evidence did not establish a physical injury. His Honour found the diagnosis of TB was not confirmed, but even if the correct diagnosis was latent TB, this is an inactive process and not one that is representative of actual bodily harm. Further, there was insufficient evidence the condition was caused by workplace exposure.

[29] The applicant referred to Dr Randhawa's report as being ignored together with other documents and reports before the Judge. That is not the case. The Judge considered Dr Randhawa's report in his decision together with other named reports, documents and articles which the applicant produced as part of the 20 appendices. His Honour having considered the evidence relied on by the applicant, placed more weight on other evidence before him, which he was entitled to do. His Honour evaluated the report of Dr Obele in which she provided further details regarding QuantiFERON gold tests and their accuracy and the medical

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5 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL), [1955] 3 All ER 48.

definition of latent TB which describes an inactive disease process. His Honour also considered the applicant's submissions regarding the report of Dr Obele.

[30] It was open to the Judge to conclude that the QuantiFERON gold test was not reliable evidence of an active disease process and to conclude on balance:

> To summarise, I find on the balance of probabilities that the appellant has never contracted TB. All her tests, but for the one in 2014, have indicated that she does not have the mycobacterium. There is no evidence she has sustained the injury as described by the Accident Compensation Act 2001."

[31] These are findings of fact which His Honour was entitled to make.

[32] This Court finds no error of law arises.

Decision

[33] "The contended point of law must be capable of bona fide and serious argument" to qualify for the grant of leave.[6] No question of law arises.

[34] "Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed."[7]

[35] These authorities confirm there must be a serious question of law to refer to the High Court and not issues of fact made to appear as questions of law.

[36] The Judge made factual findings that were open to him to make. The Judge's central conclusion reached on the weight of the evidence, is that the QuantiFERON gold test was not reliable evidence of an active disease process, and that the diagnosis of latent TB itself even if established, was not evidence of an active disease process.

[37] This Court finds the applicant has not established an error of law in Judge McGuire's judgment.

[38] Accordingly, the application for leave to appeal to the High Court is dismissed.

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6 *Impact Manufacturing* (Doogue J, HC Wellington, AP 266/00, 6 July 2001.
7 *Northern Co-operative Dairy Co Limited v Rapana* [1999] 1 ERNZ 361, 363.

[39] Costs are reserved.

D L Henare
District Court Judge