IN THE COURT OF APPEAL OF NEW ZEALAND

CA597/2015
[2016] NZCA 577

BETWEEN	DONNA MICHELLE RITCHIE Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing:	24 May 2016 (further submissions received 23 June 2016)
Court:	Cooper, Clifford and Katz JJ
Counsel:	A C Beck for Appellant C J Hlavac and A L Keir for Respondent
Judgment:	2 December 2016 at 4 pm

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The appeal is dismissed.

C We make no order as to costs.

REASONS

Cooper and Katz JJ [1]

Clifford J (dissenting) [75]

COOPER AND KATZ JJ

(Given by Cooper J)

[1] The appellant, Donna Ritchie, appeals against a decision of the High Court declining an application for review under the Judicature Amendment Act 1972.[1] Ms Ritchie's application to the High Court sought review of a decision by the Accident Compensation Corporation (the Corporation) to give notice under s 110 of the Accident Compensation Act 2001 (the Act) thereby requiring her to participate in an assessment of her vocational independence.

[2] Section 110(3) of the Act provides that:

> (3) The Corporation must not require the claimant to participate in an assessment—
>
> (a) unless the claimant is likely to achieve vocational independence; and
>
> (b) until the claimant has completed any vocational rehabilitation that the Corporation was liable to provide under his or her individual rehabilitation plan.

Ms Ritchie complained that the Corporation could not properly have been of the opinion that she was likely to achieve vocational independence or that she had completed the vocational rehabilitation that the Corporation was liable to provide under her individual rehabilitation plan (IRP).

[3] It is clear law that the Corporation must be satisfied of those matters before requiring a claimant to participate in the vocational independence assessment process and that the Corporation's decision to make the requirement is able to be challenged in an application for review under the Judicature Amendment Act.[2]

Factual background

[4] We take the facts from the judgment of Williams J, supplemented where appropriate from the affidavits filed in the High Court. We note that we rejected an application made by Ms Richie to adduce further evidence at the outset of the

---

1 *Ritchie v Accident Compensation Corporation* [2015] NZHC 2305.

2 *McGrath v Accident Compensation Corporation* [2011] NZSC 77, [2011] 3 NZLR 733.

hearing of the appeal. As the evidence dealt with matters arising subsequent to the impugned decision, we did not consider it relevant to the issues raised by the appeal.

[5] Ms Ritchie had been employed in full-time work as an occupational therapist. On 26 May 2007, she tore a muscle in her leg while dancing. She was granted cover for her injury under the Act. She was diagnosed as having suffered a hernia and underwent surgery to repair it in December 2007. Following the surgery, she developed chronic pain. A neurologist, Dr Lodewicus du Plessis assessed her. He concluded that she suffered from neuritic pain as a result of the surgery.

[6] In February 2011, a comprehensive pain assessment was carried out by Dr Michael Anderson. He considered that she had a regional pain syndrome involving her left leg from the knee to the groin, and around the groin region. He concluded that the pain was "predominantly of neuropathic origin, with a marked myofascial component around the left hip".

[7] From that time onwards, Ms Ritchie was regularly assessed by her own general practitioner, who evidently consulted with Dr Anderson from time to time. In July 2012, Dr Anderson provided a further report in which he recorded Ms Ritchie's advice that she continued to experience pain from the original injury, and that the pain was exacerbated by "excess sitting and standing and general activities". While Ms Ritchie was able to sit for up to an hour, at about that point the pain reached a level requiring her to stand and move about. She was continuing with university studies she had undertaken since the injury and was close to gaining qualifications. Dr Anderson wrote:

> Employment where she can get up and walk around and change positions regularly while still completing work tasks such as is available while preparing lectures and other activities such as grading papers, would be ideal.

[8] However, because of the pain she was suffering, it was unlikely she would be able to maintain concentration for periods of more than an hour. He wrote:

> It is unlikely Donna would have the ability to work a six hour day when experiencing pain. A position where there is the ability to work a small number of fixed hours, for example 1–2 hours a day with an additional

> component of flexible work that is able to be completed in her own time, and at her own pace, could be sustainable.
>
> The problem that arises with persistent neuropathic pain is it is activity dependent. As the activity increases so does the pain level until the patient is forced to cease the activity and rest. When the activity is resumed the pain comes on sooner (or it takes less activity to reach the previous level of pain).

[9] In December 2012, a "Pain Management Psychological Services Completion Report" was prepared by Ms Jeni Blezard. Amongst other things, Ms Blezard reported:

> Donna continues to hold firm with her belief that resuming a full time employment position is not going to be sustainable for her. Given the dealings I have had with Donna over a significant time period, and having observed the way in which her coping continues to be significantly compromised when her pain becomes heightened, I am inclined to agree with her. This being the case, Donna also continues to have a problem with ACC's return to work agenda — that resumption of a full-time position is possible. She plans to continue to seek the ability to maintain her ACC support whilst she completes the qualifications which will enable her to undertake the employment role she believes is viable for her and one from which she will be able to derive a part-time income which is financially sufficient for her. …
>
> There is no plan for further intervention at this time, however should Donna's coping decline for some reason or she comes to a point in her rehabilitation where she is preparing to take a significant step forward and would benefit from reviewing her coping in facilitate [sic] such, then re-referral for assistance [may] be indicated.

[10] The Corporation's case manager for Ms Ritchie, Ms Leanne Winnington, arranged for Ms Ritchie to be further assessed for the purposes of an "initial medical assessment" under s 95 of the Act. Dr Nick Yarnall carried out the assessment and reported as follows on 18 January 2013:

> **Work ability assessment**
>
> I assess Ms Ritchie as being capable of undertaking work within the sedentary to light range initially on a part-time basis with appropriate flexibility of movement.
>
> Due to the potential for exacerbation of her symptoms due to prolonged physical activities, walking, sitting, standing etc, a significant degree of flexibility with limitations on these exacerbating activities will be necessary in order to maximise her employability on a part-time basis.

[11] He recorded Ms Ritchie's plan, as conveyed to him, to work as a university lecturer on a part-time basis, for between five to 20 hours per week. She did not

expect that she would be able to manage work on more than a part-time basis. Under a heading "Fitness for pre-injury role", Dr Yarnall wrote:

> Ms Ritchie told me that she has considered the possibility of being able to do limited amounts of occupational therapy on a part-time, contract, basis within the limits of her symptoms.
>
> I consider that she would be fit to undertake such work on a part-time basis; however, I would not consider that she would be able to sustain full-time work as in her pre-injury role. In addition she will require greater flexibility of tasking than many jobs are likely to allow.

[12] Dr Yarnall discussed potential work types that had been identified in an initial occupational assessment which had been carried out. While rejecting one of those ("disability services officer"), he identified the others as possible work types in which Ms Ritchie might be engaged, on the basis that they were all "medically sustainable", a term used to connote the "physical ability of the Client to sustain work for 30 hours per week".[3] These included work as a rehabilitation counsellor, a case worker, a community worker, a family support worker, an employment consultant, a diversional therapist, an occupational therapist, a receptionist, a survey interviewer and a university tutor. In the case of each of the identified work types, Dr Yarnall wrote:

> I assess Ms Ritchie as being capable of undertaking work within the sedentary to light range initially on a part-time basis with appropriate flexibility of movement.
>
> Due to the potential for exacerbation of her symptoms due to prolonged physical activities, walking, sitting, standing etc, a significant degree of flexibility with limitations on these exacerbating activities will be necessary in order to maximise her employability on a part-time basis.

[13] In an addendum dated 28 January, Dr Yarnall referred to a further request that had been made by the case manager, to assess Ms Ritchie's suitability for work as a "University & Higher Education Lecturer and/or Tutor". He noted that he had not included such an assessment in his previous report because Ms Ritchie had not finished her Master's Degree. Nevertheless, he gave his opinion that work in such a role would be suitable for Ms Ritchie, using the same language he had used in respect of the work types earlier identified as medically sustainable. After recording

---

[3] This was the definition of the term in the Service Schedule Dr Yarnall was obliged to apply in carrying out the assessment under the Corporation's processes.

Ms Ritchie's own comments about her ability to take on such a role, Dr Yarnall wrote that he concurred with her assessment, observing:

> … the flexibility of working allowed in this type of role is likely to be highly suitable and likely to maximise the amount of part-time working that Ms Ritchie can sustain. I would not discount the possibility for sustaining vocational independence in this type of role in the longer term.

[14] As to vocational rehabilitation, a series of IRPs had been prepared by Ms Ritchie's case manager in accordance with s 75 of the Act. These included IRPs agreed with Ms Ritchie in August 2013 and April 2014. The former contained an acknowledgement by the Corporation that the vocational goal of "University and Higher Education Lecturer and/or Tutor" was a realistic option for her. The plan noted information from the Careers New Zealand website including a requirement that university lecturers would need to be studying towards, or have completed, a Master's Degree or Doctorate. There was also reference to the need for experience in research and teaching, while the publication of research was listed as an advantage. At that stage, it was expected that Ms Ritchie would complete her Master's Degree by "the second half of 2013". The August 2013 IRP provided that getting work that suited her ability was the "goal of rehabilitation" with an "estimated date of goal completion" of 11 March 2014.

[15] In the April 2014 IRP the same goal was established, but the estimated date for achieving the goal was extended to 30 September 2014. It was noted that Ms Ritchie was currently in the process of completing her Master's Degree in health science and that she would gain teaching experience in the next semester. She was also recorded as being "on the process/working towards publishing research".

[16] The draft IRP that was subsequently prepared in October 2014 extended the estimated date when Ms Ritchie's goal (to "get work that suits my ability") would be completed to 31 August 2015.

[17] The draft October IRP was forwarded to Ms Ritchie by Ms Ginette McConnochie, who had taken over as Ms Ritchie's case manager in late

September 2014.[4] Ms Ritchie responded to the draft IRP by noting in an email to Ms McConnochie on 20 October that there was no mention in the plan that the Corporation was supporting her to work towards becoming a university lecturer. She noted that this had been in her previous plans and said that, given it is not a goal yet achieved, it would need to appear in the new IRP. Ms Ritchie also advised that she would have finished writing for publication by 30 June 2015 enabling the date in the draft IRP to be brought forward.

[18] In an affidavit, Ms McConnochie said that when she took over the file it was apparent to her that a new IRP needed to be negotiated. Ms Ritchie was about to submit her thesis and that meant what Ms McConnochie described as "the major component" of the earlier IRP had been completed. In the circumstances it was appropriate to consider what steps Ms Ritchie might need to take next. This led to the preparation of the draft IRP which Ms McConnochie sent to Ms Ritchie.

[19] When she received Ms Ritchie's response to the draft, Ms McConnochie responded by email dated 29 October and thanked her for bringing to her attention the vocational goal for the IRP and stated: "[I] would like to look into this a bit further before I amend your current draft Rehabilitation Plan". Ms McConnochie said that in the course of considering the matter further, she had come to the conclusion that the Corporation had actually provided Ms Ritchie with all of the vocational rehabilitation to which she was entitled and that, while there might still be a need for some help to support her re-entering the workplace, she could see no further vocational rehabilitation which the Corporation could usefully provide.

[20] That being the case, Ms McConnochie sent a further email to Ms Ritchie on 14 November. In that email she recorded her belief that rehabilitation was then complete, adding:

> I intend to discuss with my Team Manager, the Technical Claims Manager and the Branch Medical Advisor, but wanted to give you an opportunity to comment on the rehabilitation you have received from ACC and if there is anything further you would like me to consider.

---

[4] There had been another case manager, Ms Jane Harding, appointed after Ms Winnington left for a period of extended leave.

[21] She noted that the Corporation would be considering whether Ms Ritchie was ready to proceed to the vocational independence assessments, apparently a reference to the process of determining vocational independence that would commence by the Corporation forming a view under s 110(3)(a) and (b) of the Act. She emphasised that she was still reviewing the position and was yet to approach the Team Manager, Technical Claims Manager and Branch Medical Advisor to ensure they agreed that rehabilitation was complete. She observed: "It's only then that ACC will refer for the Vocational Independence Assessments."

[22] On 16 November 2014, Ms Ritchie replied. Her tone was confrontational, questioning Ms McConnochie's ability to read and drawing her attention to s 110(3) of the Act. She referred to the previous reports that had been prepared, all of which she characterised as saying, "in one manner or another", that the pain will not go away and that she was not able to work for 30 hours or more in any job. In her view, this meant that she was not likely to achieve vocational independence and she could not be required to undergo vocational independence assessment having regard to the provisions of s 110(3). She referred to the Supreme Court's decision in *McGrath v Accident Compensation Corporation*.[5] She reiterated that she would never be able to work for 30 hours or more, and asserted that Ms McConnochie had not read the specialist reports. Ms McConnochie responded later that day. After thanking Ms Ritchie for her email she said: "If you believe that there is further rehabilitation that ACC can provide for you prior to these assessments, please let me know." She repeated her earlier advice that she was yet to consult with the Team Manager, Technical Claims Manager and the Branch Medical Advisor. She added: "However, if there is no further rehabilitation that ACC can provide you with, then I believe that proceeding to these assessments is the right step."

[23] On 19 November Ms Ritchie responded, advising that she had received an A grade for her thesis and observing this put her in a good position to continue with her current IRP. She would now pursue publication of parts of her thesis, a process that might take until May or June 2015. She mentioned further study in which she might engage (a paper in biostatistics), as this might better qualify her for a lecturer's

---

5 *McGrath*, above n 2.

position in the future. She said these were the tasks that should be included in an updated IRP.

[24] That same day, the Corporation completed an internal document headed "Vocational independence assessment: summary, review and quality check." The wording underneath that heading on the form was an instruction to:

> [c]omplete this form to summarise a client's rehabilitation and outline the Case Manager, Team Manager and Branch Medical Advisor's recommendations.
>
> This form also acts as a quality check before the client enters the vocational independence (VI) process.

[25] In the form, among the matters that Ms McConnochie confirmed was a statement that Ms Ritchie had completed her IRP on 30 September 2014. She also included the following:

> All interventions in the Rehabilitation Plan have been met. There are no outstanding rehabilitation recommendations.
>
> The client began a Bachelor of Arts degree at Otago University. The client advised in 2012 that she was one paper from completing this degree.
>
> In 2010 the client enrolled at Canterbury University to complete a post grad diploma in Health Sciences. This full time course was successfully completed and the client has gone on to complete her masters preparation. She is currently waiting for grading on her thesis which has been submitted.
>
> The client has also maintained 9 hours per week tutoring and guest lecturing at Otago University on top of her study.
>
> [Ms McConnochie] believes that the client has demonstrated an ability to work for 30 [hours] or more per week based on her study and working abilities.
>
> [Ms McConnochie] believes the client is work ready and ready to enter the VI assessments.

[26] After Ms McConnochie completed her section of the form, other parts of it were completed by the Team Manager, Mr Gary Clancy, who recommended it be referred to the Branch Medical Advisor, Dr William Taine. Dr Taine also signed the form in the appropriate place. He expressed his opinion, "from a medical perspective" that Ms Ritchie was likely to be able to sustain 30 hours of work per week.

[27] Dr Taine had been employed by the South Canterbury District Health Board and its predecessors as an orthopaedic surgeon for some 24 years, while involved in private surgical practice in Timaru. He had for a period of two and a half years been the Chief Medical Officer for the South Canterbury District Health Board and in that position had provided medical advice to the Executive Officer and Board.

[28] In an affidavit, Dr Taine explained that he had met with Ms McConnochie and others on 19 November 2014 for the purpose of providing any necessary medical comment and advice on existing medical reports to assist in the discussion of whether vocational independence assessments were appropriate. He had not had dealings with Ms Ritchie or examined her in any way and he based his opinion on information on the Corporation's file. He thought that the most important report was that of Dr Yarnall, a report nearly two years old at the time of the meeting on 19 November. He listed six factors which formed the basis of his opinion that Ms Ritchie was likely to be able to sustain 30 hours per week of work:

> (a) Although [Dr] Yarnall's report indicates that Ms Ritchie should consider a return to work initially on a part time basis, it is very common for work on a part time basis to be necessary as part of the process of returning to work. That is because a long period out of the workforce can require a period of "work hardening" before a full time return to work. The physical and mental discipline required to maintain full time work can take a while to develop in any person, regardless of injuries etc. This does not mean that 30 hours of work is not medically sustainable.
>
> (b) Added to that, Ms Ritchie's condition (chronic pain) is the sort of condition which varies over time. Improvement is at least as likely as deterioration and functional improvement is a reasonable expectation. Noting that Dr Yarnall did not consider any further rehabilitation interventions to be necessary, I concluded that Ms Ritchie is likely to have improved in her abilities from the time of [Dr] Yarnall's report.
>
> (c) I noted that Ms Ritchie was working part time as well as studying, a good indicator … that she would be able to transition to work.
>
> (d) The work types recommended required the type of function similar to her current activities (part time work and study) and therefore likely to be compatible with an ability to work 30 hours per week.
>
> (e) Her pain appeared to be largely under control and well managed, with Dr Yarnall noting that she was occasionally pain free.

(f) Some of the barriers earlier identified appeared to have been resolved — for example her previous negative relationship with ACC had apparently improved.

[29] On 21 November 2014, Ms McConnochie wrote formally advising Ms Ritchie:

> ACC has reviewed your claim and the vocational rehabilitation that you have been undertaking. We now consider that your individual rehabilitation programme is complete and we plan to assess your vocational independence. As you are receiving weekly compensation you are obliged to undergo an assessment when ACC asks you to do so.

The law

[30] Section 3 of the Act sets out its purpose. Amongst the matters referred to is rehabilitation. Thus, by s 3(c):

> … where injuries occur, the Corporation's primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation[.]

[31] "Rehabilitation" is defined in s 6 of the Act. The definition provides that it:

> (a) means a process of active change and support with the goal of restoring, to the extent provided under section 70, a claimant's health, independence, and participation; and
>
> (b) comprises treatment, social rehabilitation, and vocational rehabilitation[.]

[32] Part 1 of sch 1 of the Act sets out detailed provisions in relation to rehabilitation dealing with treatment, IRPs, social rehabilitation, and vocational rehabilitation.

[33] Section 70 of the Act provides:

> **70 Claimant's and Corporation's obligations in relation to rehabilitation**
>
> A claimant who has suffered personal injury for which he or she has cover—
>
> (a) is entitled to be provided by the Corporation with rehabilitation, to the extent provided by this Act, to assist in

restoring the claimant's health, independence, and participation to the maximum extent practicable; but

(b) is responsible for his or her own rehabilitation to the extent practicable having regard to the consequences of his or her personal injury.

[34] Within 13 weeks after the Corporation accepts a claimant's claim for cover, it must determine whether the claimant is likely to need social or vocational rehabilitation and, if so, it must prepare an IRP in consultation with the claimant.[6]

[35] Once an IRP has been agreed, the Corporation is liable to provide the claimant with rehabilitation in accordance with the IRP, and sch 1, "but only to the extent that the Corporation has specified which services it will provide under the plan".[7]

[36] Section 80 deals with vocational rehabilitation. It provides:

80 Purpose of vocational rehabilitation

(1) The purpose of vocational rehabilitation is to help a claimant to, as appropriate,—

(a) maintain employment; or

(b) obtain employment; or

(c) regain or acquire vocational independence.

(2) Without limiting subsection (1), the provision of vocational rehabilitation includes the provision of activities for the purpose of maintaining or obtaining employment that is—

(a) suitable for the claimant; and

(b) appropriate for the claimant's levels of training and experience.

[37] The Corporation must follow strict statutory requirements in deciding whether to provide vocational rehabilitation. Section 86 lists matters to be considered, and s 87 further matters to be considered. Section 89 provides:

---

6 Accident Compensation Act 2001, s 75.

7 Section 76(4).

89 Assessment of claimant's vocational rehabilitation needs

An assessment of a claimant's vocational rehabilitation needs must consist of—

(a) an initial occupational assessment to identify the types of work that may be appropriate for the claimant; and

(b) an initial medical assessment to determine whether the types of work identified under paragraph (a) are, or are likely to be, medically sustainable for the claimant.

[38] Section 107 provides for the Corporation to determine the vocational independence of claimants receiving weekly compensation, or those who may be entitled to do so. It provides:

107 Corporation to determine vocational independence

(1) The Corporation may determine the vocational independence of—

(a) a claimant who is receiving weekly compensation:

(b) a claimant who may have an entitlement to weekly compensation.

(2) The Corporation determines a claimant's vocational independence by requiring the claimant to participate in an assessment carried out—

(a) for the purpose in subsection (3); and

(b) in accordance with sections 108 to 110 and clauses 24 to 29 of Schedule 1; and

(c) at the Corporation's expense.

(3) The purpose of the assessment is to ensure that comprehensive vocational rehabilitation, as identified in a claimant's individual rehabilitation plan, has been completed and that it has focused on the claimant's needs, and addressed any injury-related barriers, to enable the claimant—

(a) to maintain or obtain employment; or

(b) to regain or acquire vocational independence.

[39] Mr Beck, for Ms Ritchie, noted in referring to that provision that determination of whether a claimant has achieved vocational independence is not a mandatory requirement, being rather something that the Corporation may do. Clearly, there will be cases where it is not possible to reach a conclusion that

vocational independence has been achieved. However, it is clear, given the stated purpose of vocational rehabilitation in s 80, that in cases where vocational independence has been achieved, a determination to that effect will be appropriate.

[40] It will be noted that, under s 107, the Corporation determines vocational independence in accordance with the process set out in s 107(2) and ss 108–110. This Court has recently discussed the interrelationship of those provisions.[8] For present purposes it is sufficient to note that, although the decision as to vocational independence is made under s 107, the decision cannot be made unless the Corporation has first given written notice of the requirement to participate in an assessment of vocational independence under s 110(1). It is equally clear that a written notice requiring participation in the assessment of vocational independence cannot be given unless the Corporation has first satisfied itself as to the matters set out in s 110(3)(a) and (b). Those requirements have been authoritatively interpreted by the Supreme Court in *McGrath*.[9] Mr Beck appropriately emphasised that the Supreme Court in *McGrath* identified the purpose of s 110(3): "to protect claimants from unnecessary assessments where there is no real prospect of vocational independence. Such assessments are intrusive and may be upsetting."[10] Further:[11]

> The effect of s 110(3) is that the Corporation can require a claimant to undergo vocational independence assessment only when the claimant is likely to be assessed as vocationally independent.

[41] It is also relevant to note what the Supreme Court said about judicial review in the context of s 110(3) of the Act:[12]

> [31] It is inappropriate to suggest, as the respondent's submissions do and as the reasons in the High Court and Court of Appeal appear to allow, that the "standard" of scrutiny imposed by the court "cannot be a high one". The responsibility of the court on judicial review is to ensure that the legislative condition is fulfilled. Since the condition turns on a judgment (that the claimant is "likely to achieve vocational independence"), its fulfilment may not be susceptible to exact demonstration. But to succeed the plaintiff must bring the court to the conclusion that the condition was not fulfilled. That assessment is one of substance. It is not enough that there is information available to the Corporation upon which it acted, if that information does not

---

8 *Splite v Accident Compensation Corporation* [2016] NZCA 302, [2016] NZAR 947.
9 *McGrath*, above n 2.
10 At [32].
11 At [36].
12 At [31].

> reasonably support the conclusion that the statutory condition is fulfilled. It is not clear that the High Court or the Court of Appeal intended to suggest anything different. But the incorporation into the reasoning of a low standard of review was an erroneous approach. The court was obliged to assess the objective reasonableness of the view that vocational independence was likely to be achieved. In the Court of Appeal the view taken was that it was open to the Corporation to rely on information on its files and the experience of the case officer. That was effectively treated in itself as determinative, without further consideration of whether the information and the experience supported the conclusion that the s 110(3) requirement was met. Nor did the Court of Appeal examine the reasons why Miller J was brought to that conclusion in the High Court. It appears that the High Court and Court of Appeal did not properly consider whether the condition in s 110(3) was substantively fulfilled because of the mistaken view that the supervisory jurisdiction did not call for such assessment. If so, that approach may explain why we come to a different conclusion on the merits of the appeal in the reasons that follow.

[42] Mr Beck emphasised the need for there to be information available to the Corporation which reasonably supported the conclusion that the statutory condition in s 110(3) had been fulfilled. Further, it was inappropriate to suggest that the "standard" of scrutiny was not high, noting that the Supreme Court had emphasised the need to ensure fulfilment of the legislative condition. Mr Beck also submitted that the Supreme Court rejected, in the passage just quoted, the suggestion that it was open to the Corporation to rely on information on its files and the experience of the case manager.

High Court decision

[43] After setting out the factual background and discussing relevant provisions of the Act, Williams J referred to the Supreme Court's decision in *McGrath*. He then discussed the reports that were available to the Corporation for the purposes of s 110(3).[13] He considered there was a key point of difference between the facts of the present case and those that were before the Supreme Court in *McGrath*. That was the opinion of Dr Taine.[14] He concluded that there was evidence that reasonably supported Dr Taine's conclusion that vocational independence was an outcome reasonably in prospect so that a full assessment under s 107 should be taken.

---

13 *Ritchie*, above n 1, at [36].
14 At [38].

He considered that Dr Taine's opinion provided a reasonable basis for the Corporation's conclusion under s 110.[15]

[44] The Judge also expressed the view that a personal examination of Ms Ritchie was not required in the circumstances of the case.[16] Further, it was open to Dr Taine to interpret Dr Yarnall's comments about Ms Ritchie being capable of working "initially on a part-time basis" as suggesting that part-time work was intended to prepare Ms Ritchie for a transition to full-time employment.[17] It was also legitimate for Dr Taine to take into account the fact that no further rehabilitative interventions had been proposed by Dr Yarnall and that Ms Ritchie had in fact been working and studying. The Judge acknowledged on that issue that the extent to which she was capable of undertaking combined work and study was in question and Ms Ritchie claimed in her affidavit that Dr Taine had misunderstood the situation. The Judge considered that if Ms Ritchie was right about that, then the correct position could be ascertained in the full assessment under s 107 carried out following the s 110(3) decision.[18]

[45] The Judge considered that Parliament was unlikely to have intended the assessment made for the purposes of s 110(3) to usurp the full assessment under s 107.[19] The Court ought not to interfere on judicial review so long as the evidence showed "some reasonable and rational clinical and evidential basis for the necessary conclusion" under s 110(3).[20] This was not a case where it could be said, as it could be in *McGrath*, that the claimant needed to be protected from an unnecessary s 107 assessment.[21] He concluded that there was reasonable evidential support for the Corporation's conclusion that Ms Ritchie was likely to achieve vocational independence in terms of s 110(3)(a).[22]

[46] As to completion of rehabilitation, the Judge again reviewed the relevant statutory provisions and referred to the IRPs. In essence, he held that the question

---

15 At [47].
16 At [48].
17 At [49].
18 At [50].
19 At [50].
20 At [51].
21 At [51].
22 At [52].

raised by s 110(3)(b) should be answered in terms of the vocational rehabilitation the Corporation was liable to provide under the last agreed or finalised IRP.[23] In that respect, he noted that under s 77(2)(d) of the Act, an IRP must specify the services that the Corporation will provide, pay for or contribute to under the IRP.[24] Further, the Corporation's obligation under cl 8(3) of pt 1 of sch 1 of the Act is to implement the IRP when it is "agreed or finalised".[25] The Corporation's liability, set out in cl 8(4) is to "fund the provision to the claimant of the services it has specified under section 77(2)(d)".

[47] These provisions meant, in the Judge's view, that it is only services the Corporation had specifically accepted it would fund as "vocational rehabilitation" which were required to have been completed for the purposes of s 110(3)(b).[26] In this respect, Ms Ritchie's aspiration to be a university lecturer or tutor created "no vocational rehabilitation obligation".[27] There were only two services that had been specified in the IRP. They were first that a home help service would be provided for Ms Ritchie until the end of August 2014, and second that her registration as an occupational therapist for the 2014/2015 year would be paid. The Judge found that both specified services had been completed to the extent specified in terms of s 76(4).[28]

[48] On the basis of this reasoning, the Corporation had been properly satisfied that any relevant vocational rehabilitation had been completed, under s 110(3)(b).[29]

[49] Consequently, he dismissed the application for review.[30]

The appeal

[50] Mr Beck submitted that the High Court failed to correctly apply the law stated by the Supreme Court in *McGrath*.[31] It had wrongly concluded that the

---

23 At [73].
24 At [55].
25 At [56].
26 At [75].
27 At [76].
28 At [77].
29 At [79].
30 At [80].
31 *McGrath*, above n 2.

statutory requirements of s 110(3) of the Act had been fulfilled. On a correct assessment of the evidence, Ms Ritchie was not likely to achieve vocational independence, nor had she completed vocational rehabilitation, at the time the Corporation made its decision to give notice under s 110.

[51] Mr Beck contended that the High Court had fallen into the same error as had occurred in *McGrath*. He submitted Williams J had effectively taken the position that the Court had a limited power to intervene and that judicial review should be refused because there was "some reasonable basis" on which the Corporation's decision could be justified. This was an incorrect approach.

[52] As to vocational independence, Mr Beck argued that the approach required by the Supreme Court's decision in *McGrath* was that there needed to be a substantive answer to relevant medical opinion expressing the view that a claimant was not able to work 30 hours per week. The proper means to obtain the appropriate evidence was to invoke s 72 of the Act. Under that section, the Corporation can require a claimant receiving any entitlement to obtain a certificate by a registered health professional or treatment provider dealing with information the Corporation requires and to undergo any assessment by such a registered health professional.[32] It was inappropriate here for the Corporation to have relied on the report of Dr Taine, who had looked at the file and merely made comments on the basis of historical material without any new information or an examination of Ms Ritchie. He submitted that Dr Taine had no objective basis for the opinions he expressed, noting in particular:

(a) He had not examined Ms Ritchie, merely conducting a file review.

(b) His view was based chiefly on the report by Dr Yarnall, which had referred only to the possibility of part-time work. It was inappropriate for the High Court to interpret Dr Yarnall's report as contemplating a transition to full-time work, especially since Dr Anderson had rejected that possibility and there was nothing to refute his opinion.

---

[32] Accident Compensation Act, s 72(1)(a) and (d).

(c) He apparently assumed that Ms Ritchie had been working part time and studying, which in terms of her own uncontradicted evidence was incorrect.

(d) Dr Taine had no claimed expertise in pain management and did not deal with or provide any response to what Ms Blezard or Dr Anderson had said. Mr Beck complained that the High Court had not dealt with this issue, which was fundamental and was the basis on which the Supreme Court had made its decision in *McGrath.*

[53] As to vocational rehabilitation, Mr Beck criticised the High Court's reliance on the IRP of April 2014, that being the last signed IRP, when a draft new IRP had been provided in October 2014 and been the subject of discussion with a view to updating the existing plan. Mr Beck submitted the High Court erred in failing to consider the ongoing discussions between the parties as well as what was continuing to be provided by way of rehabilitation. In the latter category was the Corporation's agreement to continue to provide a home help service for Ms Ritchie and pay for her registration as an occupational therapist for the 2014/2015 year beyond the term of the existing IRP. In this respect, Mr Beck referred to an email dated 18 February 2015 from Ms McConnochie to Ms Ritchie offering to continue to fund the practising certificate and suggesting that the contribution be referred to in Ms Ritchie's IRP. Mr Beck said this was clear evidence that there was ongoing rehabilitation that had been agreed and consequently rehabilitation cannot have been complete in November 2014.

[54] Mr Beck also relied on the fact that Ms Ritchie's existing IRP had stated her goal of becoming a higher education lecturer or tutor. He noted that the Corporation had agreed that the goal was a realistic one. To achieve it, Ms Ritchie needed to obtain a higher degree and publish journal articles. The Corporation had actively supported her in this aim by paying her weekly compensation while she was studying part time and had assisted her by paying the costs of her practising certificate and providing home help. However, that goal had not been achieved and the draft IRP forwarded to Ms Ritchie in October 2014 had anticipated that

rehabilitation would not be completed until September 2015. Mr Beck submitted it was significant that that proposal had emanated from the Corporation.

[55] For the Corporation, Mr Hlavac submitted that, in considering whether a claimant is likely to achieve vocational independence for the purposes of s 110(3)(a) of the Act, it is necessary to make a broad objective assessment of the evidence available to the Corporation at the time it required the claimant to participate in an assessment of her vocational independence. The question is whether it was reasonable for the Corporation to conclude that vocational independence was likely to be achieved, in the sense that it was reasonably in prospect. In this case, the reports and other information available to the Corporation at the relevant time, if viewed objectively, provided sufficient basis for the Corporation's conclusion.

[56] Mr Hlavac further submitted that, at the time of making its referral, the Corporation had provided Ms Ritchie with all of the vocational rehabilitation it was liable to provide under Ms Ritchie's individual IRP. While the Corporation had acknowledged Ms Ritchie's goal of attaining a position as a university lecturer and had provided some vocational rehabilitation to assist in achieving the requirements for such a position, the Corporation had never agreed to continue to provide vocational rehabilitation until that goal was achieved. Further, it had no liability to do so under the IRP.

Decision

[57] Since the Supreme Court's decision in *McGrath*, it is clear that the Corporation must not give notice under s 110 of the Act requiring a claimant to participate in an assessment unless there is information available to the Corporation that reasonably supports the conclusion that the claimant is likely to achieve vocational independence.[33] On an application for review, the High Court must assess the objective reasonableness of the view formed by the Corporation. It is insufficient to form the view that it was open to the Corporation to form the view; rather, the Court must itself be satisfied that the information available to the Corporation reasonably supported the conclusion that the statutory condition has been fulfilled.

---

[33] *McGrath*, above n 2, at [31].

[58] A similar approach will be appropriate in assessing whether, for the purposes of s 110(3)(b), vocational rehabilitation that the Corporation was liable to provide under an IRP has been completed. We see that decision as one of mixed fact and law but inherently less dependent on matters of opinion than might arise under s 110(3)(a).

Vocational independence

[59] The issues must also be approached on the basis that the purpose of s 110(3) is to protect claimants from unnecessary assessment, which may be intrusive and upsetting, when there is no real prospect of vocational independence.[34] But it must also be borne in mind that the Corporation determines vocational independence in a process which is initiated by the notice issued under s 110(1) and after an assessment is carried out as contemplated by s 107. Once the full statutory process has been completed and occupational and medical assessments considered, the determination made by the Corporation may be that vocational independence has not been achieved. The decision made for the purposes of s 110(3) is therefore preliminary in nature, albeit that the requirement to participate in an assessment can only be made under the statutory preconditions set out in s 110(3).

[60] In the present case, there is little doubt that the Corporation could not reasonably have come to the conclusion that Ms Ritchie was likely to achieve vocational independence on the basis of the reports of Dr Anderson or Ms Blezard. Dr Yarnall, in January 2013, assessed Ms Ritchie as being capable of undertaking work in a variety of occupations "initially on a part-time basis". We have already referred to those occupations, noting also that Dr Yarnall considered they were all "medically sustainable". Under the service schedule, which sets out the basis on which Dr Yarnall carried out his assessment, the term "medically sustainable" was used to refer to work that could be sustained for 30 hours per week. However, notwithstanding that and Dr Yarnall's use of the phrase "initially on a part-time basis", the Corporation could not have concluded solely on the basis of his report that vocational independence was likely.

---

[34] At [32].

[61] This issue really turns on Dr Taine's evidence in which he explained the basis for the advice he gave to Ms McConnochie and others who attended the meeting held on 19 November 2014. He was the only person present that was medically qualified to give advice on the question of whether Ms Ritchie was likely to be able to sustain 30 hours of work per week.

[62] We have earlier set out the six factors that formed the basis of Dr Taine's opinion.[35] In essence, he reasoned on the basis of Dr Yarnall's report and his own expertise that Ms Ritchie's condition was likely to have improved over time. A contributing consideration was Dr Yarnall's opinion that no further rehabilitation interventions were necessary; this made it likely that Ms Ritchie would have improved in her abilities since the report was written. Further, the work types that Dr Yarnall had recommended required similar functioning to those of Ms Ritchie's "current activities", described as part-time work and study, and were therefore likely to be compatible with an ability to work for 30 hours per week.

[63] As we have seen, Mr Beck was critical of the fact that no further examination had been carried out or directed and that Dr Taine had reached his conclusions without seeing Ms Ritchie and on the basis of factual errors. These included the suggestion that she may have been both studying and lecturing at the same time, when that was not the case. However, in the end we do not think those criticisms are sufficient to reject Dr Taine's evidence. He was well qualified to form the opinion that he did based on a combination of his expertise and experience, and what he inferred from the reports on the Corporation's file. Mr Beck essentially invited us to discount his opinion, but in the absence of expert evidence challenging it or the basis upon which it was formed, that would not be an appropriate response.

[64] While the Supreme Court's decision in *McGrath* requires the Court to form its own view as to whether there was sufficient information for the Corporation reasonably to conclude that the requirements of s 110(3)(a) had been met, that cannot mean that the Court can substitute its own opinion on matters of medical expertise. The crucial difference between this case and *McGrath*, as Williams J recognised, was

---

[35] At [28] above.

in fact the existence of Dr Taine's opinion.[36] He advised the Corporation, as an appropriately qualified medical adviser, that he considered Ms Ritchie was likely to obtain vocational independence. We are satisfied there was information available to the Corporation that reasonably supported the conclusion that Ms Ritchie was likely to achieve vocational independence.

[65] In the circumstances, we do not consider that there is any proper basis upon which the High Court could have reached a different view and we are satisfied that the approach it took was correct.

Completion of vocational rehabilitation

[66] As has been seen, under s 110(3)(b) of the Act, the Corporation must be satisfied that the claimant has completed any vocational rehabilitation that it was required to provide under an IRP. Mr Beck was critical of the High Court's approach that the requirement was to be construed by reference to an existing IRP, not an IRP in draft form such as that provided to Ms Ritchie in October 2014. However, we do not see how the Act could be applied so as to create an obligation derived from a draft. The fact that the statutory language refers to rehabilitation that the Corporation was required to provide inevitably connotes fixed obligations and it is unclear how they could arise other than pursuant to an agreed IRP.

[67] In this respect we think it is significant that s 76 of the Act distinguishes between vocational rehabilitation that the Corporation provides before an IRP is agreed and rehabilitation that is provided after an IRP is agreed. Under s 76(1), before the IRP is agreed, the Corporation's obligation is to provide vocational rehabilitation that it considers "suitable for the claimant and appropriate in the circumstances" having regard to the purpose set out in s 80. After an IRP is agreed, the obligation set out in s 76(4) is to provide rehabilitation in accordance with the IRP and sch 1, "but only to the extent that the Corporation has specified which services it will provide under the plan". The purpose set out in s 80, as discussed above, embraces maintenance of and obtaining employment, and regaining or acquiring vocational independence. But it is clear that, once an IRP is agreed, the

---

[36] *Ritchie*, above n 1, at [38].

Corporation's obligation is in relation to the services it has agreed to provide under the IRP. The obligation would extend, by means of cl 8(3) of sch 1, to agreed changes to the IRP. But it is not appropriate to regard the statutory scheme as giving rise to obligations in a draft IRP or draft amended IRP.

[68] We think it is also clear that once an IRP is agreed, further iterations of it are not new IRPs but rather modifications of the agreed IRP. This follows from s 78, which provides that the IRP must be updated from time to time to reflect the outcome of assessments made and the progress made under the IRP. This reinforces the conclusion that the question raised by s 110(3)(b) must be addressed in relation to an existing IRP, or one which has been subject to agreed modifications.

[69] It is relevant, as Williams J noted, that under s 77(2)(d) of the Act, the IRP must specify the services that the Corporation will provide, pay for or contribute to.[37] This then links to cl 8(4) of sch 1, which obliges the Corporation to fund the provision to the claimant of services specified in the IRP under s 77(2)(d). We think the Judge was right to conclude that, for the purposes of s 110(3)(b), the relevant question is whether the vocational rehabilitation that the Corporation has agreed to provide under the IRP has been completed.

[70] On that basis, we consider the Judge correctly found that the vocational rehabilitation the Corporation was required to provide under the IRP had been completed. We have summarised his reasoning above: funding for the practising certificate and the provision of home help under the existing IRP had been provided for the period envisaged by it. The fact that there were discussions about the continuance of those payments in the context of a new, amended IRP is not germane to the statutory precondition in s 110(3)(b). Those discussions were overtaken by the decision reached that the precondition had been met and that a notice should be issued under s 110(1) requiring Ms Ritchie to participate in an assessment of her vocational independence. Further, the fact that Ms Ritchie had not achieved her goal of becoming a university lecturer was not a matter for which the Corporation had a relevant responsibility within the contemplation of the precondition.

---

[37] At [73].

[71] These conclusions do not of course preclude the possibility that, once a full assessment was made as envisaged by the Act after issue of the s 110(1) notice, a different conclusion might be reached about the need for ongoing vocational rehabilitation. However, that is an issue for the future.

[72] For these reasons we reject Ms Ritchie's argument on this issue.

Result

[73] The appeal is dismissed.

[74] As the appellant is legally aided, we make no order as to costs.

CLIFFORD J

[75] As the majority conclude, there is little doubt that the Corporation could not reasonably have come to the conclusion that Ms Ritchie was likely to achieve vocational independence on the basis of the reports of Dr Anderson or Ms Blezard. Similarly, Dr Yarnall's January 2013 assessment would not reasonably support that conclusion. Again, as the majority say, the issue in this appeal turns on Dr Taine's advice to the Corporation and the basis of that advice. Central to the majority's reasoning is its conclusion that, while *McGrath* requires the Court to form its own view as to whether there was sufficient information for the Corporation reasonably to conclude the requirements of s 110(3)(a) had been met,[38] "that cannot mean that the Court can substitute its own opinion on matters of medical expertise".[39]

[76] I would allow this appeal. I would do so because the appeal turns so crucially on Dr Taine's opinion. The Court must therefore be satisfied that opinion reasonably supports the conclusion that Ms Ritchie was likely to achieve vocational independence. I am of the view that Dr Taine's opinion does not do that.

[77] In *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* this Court recently confirmed that it is open to a court to reject expert evidence even where it

---

38 *McGrath*, above n 2.
39 At [64] above.

goes unchallenged.[40] In the High Court there had been challenges to the admissibility of an expert's evidence, based on his partiality. The Judge had not directly ruled on the admissibility question, but rather recorded that she had placed little, if any, reliance on the challenged evidence. The Court of Appeal was invited to rely on the challenged evidence. It declined. In doing so it adopted the Judge's reasons for placing little, if any, weight on that evidence. It also observed that the Judge might have concluded the expert's evidence was not impartial and could not have been faulted if she had ruled it inadmissible in its entirety. In reaching that conclusion, the Court assessed the challenged evidence on the basis of whether it was "substantially helpful" that is, the relevant admissibility test.[41] In the course of that analysis, and referring to *Davie v Edinburgh Magistrates*[42] and *Van Mil v Fence Crete Ltd*,[43] it observed:

> [94] Substantial helpfulness is an amalgam of relevance, reliability and probative value.[44] The assessment is ultimately that of the trial judge, not the parties; *a court need not accept the opinion of an expert even where it is uncontradicted*.[45] Under s 25 the trial Judge serves as a gatekeeper.
>
> (Emphasis added.)

[78] In *Van Mil v Fence Crete Ltd*, Barker J described the position, as regards the status of an expert's evidence as follows:[46]

> More importantly, a Judge is not required to follow the evidence of experts even if there is no evidence to the contrary as there was here. I refer merely to *Cross on Evidence* (4th New Zealand Edition) page 431 where the learned author refers to *Davie v Edinburgh Magistrates* (1953) SC 34, 40; there the Court of Session repudiated the suggestion that a Judge is bound to adopt the views of an expert even if he or she is to be uncontradicted because "the parties have invoked the decision of a judicial tribunal not an oracular pronouncement by an expert". To similar effect is *R v Tobin*, [1978] 1 NZLR 423.

[79] *R v Tobin* was a jury trial where the defence produced experts saying the accused had schizophrenia and was incapable of relevantly telling right from wrong

---

40 See the discussion of *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] 2 NZLR 750 at [84]–[109].

41 Evidence Act 2006, s 25(1).

42 *Davie v Edinburgh Magistrates* 1953 SC 34, (1953) SLT 54 (IH (1 Div)).

43 *Van Mil v Fence Crete Ltd* HC Auckland CP128/95, 1 February 1996 at 7.

44 *Mahomed v R* [2010] NZCA 419 at [35]. The "amalgam" test was endorsed in *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 at [41].

45 *Davie v Edinburgh Magistrates*, above n 42; and *Van Mil v Fence Crete Ltd*, above n 43, at 7.

46 *Van Mil*, above n 43, at 7.

for the purposes of the insanity defence.[47] The Crown accepted he had schizophrenia but not that it affected him so as to give him the defence. The Crown offered no contrary expert evidence. The jury found him guilty. On appeal, the Court of Appeal held it was acceptable for the jury to reject the evidence of the doctors even though there was no medical evidence to the contrary.

[80] In this context, in my view it is not the fact of Dr Taine's conclusion alone that provides "reasonable grounds". Rather the opinion itself must meet that standard. It is therefore for the Court to determine whether, here, Dr Taine's opinion did provide those grounds for the Corporation's decision. To make that assessment is not to substitute the Court's view on matters of pure medical expertise (see [64] above).

[81] Against that background I comment on the six factors Dr Taine identified in his affidavit as supporting his conclusion Ms Ritchie was likely to achieve vocational independence.

(a) That it is "very common for work on a part time basis to be necessary as part of the process of returning to work", does not logically support a conclusion that full-time work is, at any given point, sustainable. Dr Taine in effect says the same thing in the negative, where he opines "This does not mean that 30 hours of work is not medically sustainable." By the same token, that it is common for work on a part-time basis (a work hardening period) to be part of the return to work process cannot mean that 30 hours work *is* medically sustainable or likely to be.

(b) If "[i]mprovement is at least as likely as deterioration", then deterioration is at least as likely as improvement. That Dr Yarnall did not consider any further rehabilitation, for a person able to undertake limited part-time work, and interventions to be necessary at an earlier date (when rehabilitation was ongoing), does not support a conclusion of vocational independence at a later time.

---

47 *R v Tobin* [1978] 1 NZLR 423 (CA).

(c) I fail to see, given the statutory distinction between employment and vocational independence, why "working part time" is a good indicator that Ms Ritchie would be able to transition to "work", assuming that to be a reference to full-time work.

(d) That a type of work is appropriate does not, again in light of the specific statutory scheme and its distinction between employment and full-time work, support a conclusion of "likely compatibility" with an ability to work 30 hours per week, that is, an ability to work full-time. Rather, the distinction between the two suggests that an ability to work part-time at a particular work type does not of itself say anything as to the achievement or otherwise of vocational independence.

(e) Dr Yarnall did note that Ms Ritchie's pain appeared to be largely under control and well-managed, and that she was occasionally pain free. But he made those observations whilst emphasising Ms Ritchie's inability to work other than on a part-time basis. I am not sure, therefore, what that consideration adds to the force of Dr Taine's conclusion.

(f) Likewise, I question the relevance of the removal of "barriers earlier identified".

[82] Looked at in the round, Dr Taine would appear to have based his conclusion that Ms Ritchie was likely to achieve vocational independence on the basis that she was working part-time and that for many people part-time work was part of the process of a return to full-time employment. In my assessment, that reasoning does not address Ms Ritchie's individual situation at all. If that is all that is required for an assessment of likely vocational independence, there would be little, if any, point in the requirement for such an assessment to be made before requiring a claimant to participate in a vocational independence assessment.

[83] It is for those reasons that I would allow this appeal.

Solicitors:
Peter Sara Lawyer, Dunedin for Appellant
Young Hunter, Christchurch for Respondent