IN THE COURT OF APPEAL OF NEW ZEALAND

CA230/2008
[2009] NZCA 34

BETWEEN	PETER WILDBORE Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 10 February 2009

Court: Hammond, Chambers and Ellen France JJ

Counsel: A C Beck for Appellant
A D Barnett and M M Ahern for Respondent

Judgment: 27 February 2009 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There will be no order for costs.

REASONS OF THE COURT

(Given by Hammond J)

Introduction

[1] This is an appeal by way of case stated, with the leave of the High Court, on the following questions of law:

(a) What is the correct approach for the District Court to follow in determining an appeal under s 145 [s 149] of the Injury Prevention, Rehabilitation, and Compensation Act 2001 ("the Act") against a determination of vocational independence?

(b) Did the District Court follow the correct approach in its decision on Mr Wildbore's appeal?

[2] The question as framed erroneously referred to s 145. The correct provision is s 149.

Background facts

[3] In 2002, Mr Wildbore, the appellant, sustained injury to his left shoulder when he fell from a house bus he was working on.

[4] The respondent, the Accident Compensation Corporation ("the Corporation"), accepted Mr Wildbore's claim for cover. Detailed specialist investigations were carried out and surgical intervention was undertaken in May 2003.

[5] In August 2003, as part of his individual rehabilitation programme, the Corporation referred Mr Wildbore to an appropriate specialist for an initial occupational assessment. She identified eight job options which, in her view, were suitable for Mr Wildbore.

[6] In November 2003, Mr Wildbore underwent an initial medical assessment by Dr Bell, who did not consider that any of the eight identified job options were suitable for Mr Wildbore.

[7] In February 2004, the Corporation referred Mr Wildbore to a different assessor, for a further occupational assessment. The new specialist identified 14 job options as being suitable for Mr Wildbore.

[8] In March 2004, Dr Xiong undertook a further medical assessment. He found that nine of the identified job options were suitable for Mr Wildbore from a medical point of view. However, Dr Xiong noted that Mr Wildbore was "nevertheless still suffering from a significant chronic pain syndrome" arising out of his injuries.

[9] In August 2004, Mr Wildbore completed a work trial programme at a travel and tour guide company, where he worked part-time for up to five hours a day for three weeks. The work trial report which was filed in September noted that Mr Wildbore was "quiet and did not communicate freely with visitors and staff".

[10] A further work trial was recommended. Mr Wildbore completed this at a hotel as a barman. The work trial report on this programme, prepared in November 2004, indicated that Mr Wildbore's pain increased significantly as he increased his hours to more than 25 hours per week. He required more rest, and stronger and more frequent pain relief to manage his pain.

[11] The compiler of the report, Ms Inglis, noted that:

> The repetition of tasks completed together with the ranges Peter has to work in, do compromise his ability to perform the tasks ... Peter has reported to pain driving home from work, he reports to discomfort that he has had to get stronger painkillers for since working in this trial. This would suggest that he is being compromised in this particular environment and although it is my professional opinion that he completes the work trial the length of his shifts in this environment is too long for the range he has to repetitively work in.

[12] In November 2004, the Corporation advised Mr Wildbore that it considered his individual rehabilitation programme to be complete, and that it planned to assess his vocational independence. Under s 108(1) of the Act, an assessment of a claimant's vocational independence must consist of an occupational assessment and a medical assessment.

[13] Later that month, a vocational independence occupational assessment was carried out, which identified 21 job options as being suitable for Mr Wildbore.

[14] In January 2005, Dr Kerr, an occupational physician, undertook a vocational independence medical assessment. He considered that seven of the job options so identified were suitable for Mr Wildbore, from a medical perspective. Dr Kerr noted Dr Xiong's earlier diagnosis of chronic pain syndrome of the left shoulder. However, he concluded that Mr Wildbore could work for 35 hours or more per week in the seven identified jobs.

[15] It was in this context that, in February 2005, the Corporation advised Mr Wildbore that his entitlement to weekly compensation would cease on 15 May 2005. This was because he had been assessed as having vocational independence in relation to the seven identified types of work.

[16] Mr Wildbore was dissatisfied with this action. In July 2005, he obtained an opinion from Dr Hancock, an occupational physician, whose report supported the view that Mr Wildbore was not yet vocationally independent. On the basis of the work trials, Dr Hancock accepted that Mr Wildbore could work, but also that he was unable to work for more than three or four hours a day before his pain became unmanageable. He noted that Mr Wildbore had worked up to five hours per day, but that he could only sustain this for a three week period.

[17] The heart of Dr Hancock's evidence – and, indeed, the heart of Mr Wildbore's case – was Dr Hancock's observation that:

> When the effects of Mr Wildbore's chronic pain condition are considered along with the evidence from his work trials, his inability to work for 35 hours per week in any job type becomes clear.
>
> Dr Kerr's [report] is flawed in that while he considered Mr Wildbore's ability to carry out the various tasks involved in the listed jobs, he did not give due consideration to his ability to work for 35 hours per week in those jobs within the constraints of his chronic pain condition.

The District Court decision

[18] Mr Wildbore applied for a review of the Corporation's decision to terminate his entitlement to weekly compensation. A review was conducted, but the Corporation's decision was not disturbed.

[19] Mr Wildbore then appealed to the District Court, under s 149 of the Act.

[20] After a hearing in March 2006, Judge Cadenhead delivered a full decision: DC WN 94/200 11 April 2006.

[21] From the outset, the Judge was squarely appraised of the central issue before him. He said (at [1]):

> The issue on appeal is whether ACC's decision, ceasing the appellant's entitlement to weekly compensation on the basis that he was vocationally independent, was correct. *The core issue will be the extent of the pain suffered by the appellant and whether that prevents him from working 35 hours per week in one of the nominated suitable occupations.*
>
> (Emphasis added.)

[22] After traversing the history of the matter and the relevant medical evidence in relatively extensive detail, the Judge dismissed the appeal thus:

> [99] After considering all the exhibits in this case including the extensive medical reports, I have reached a view that the thorough and detailed review decision should not be disturbed. The only issue of consequence that I have with the review decision is that I do not agree that all the occupations nominated were not qualified. However, a substantial number of those occupations were not qualified and were of a generic nature and were such that the appellant could perform, in my view, after working a 35 hour week. In particular, I have regard to the medical reports of Dr Swan and Dr Bentley, and I am of the opinion that they corroborate the position of the medical assessor Dr Kerr. I am of the view that Dr Kerr properly addressed the pain issue, and took that into account addressing the nominated occupations.
>
> [100] As I have previously stated, a holistic view must be taken of the process, and I accept at once that the object of the process is rehabilitation, and that the process must be fairly applied.
>
> [101] The appellant received adequate and proper rehabilitation. The work trials essentially did not fail as a result of any pain syndrome. As the pain issue was central to this appeal, I would have thought that at the review hearing the appellant would have given evidence on this issue. However, after viewing the medical reports objectively, apart from Dr Hancock, the evidence realistically is all one way.

The High Court appeal

[23] Mr Wildbore was still dissatisfied. Leave was granted by the District Court to appeal to the High Court on a question of law under s 162 of the Act. Although Mr Wildbore sought to raise several questions in the High Court, which could fairly be described as evidence points, leave to appeal was granted only on the issue of whether the District Court Judge had erred by holding that the mandatory requirements of the Act should not be examined in a "mechanical and rigid" way, but rather that they should be applied in a "common sense" and "holistic" way.

[24] Clifford J re-framed this issue as follows: what approach should the District Court Judge have taken in assessing the correctness of the reviewer's decision? See HC WN CIV-2007-485-496 22 November 2007 at [18]. In dismissing Mr Wildbore's appeal, Clifford J articulated the following approach for the District Court to follow in determining an appeal (at [26]):

> I am satisfied that the District Court in an appeal from the Reviewer should follow the appellate principles set out in *May v May* [(1982) 1 NZFLR 165], and that the impact of any fresh evidence produced should be considered according to the principles in *Fletcher Metals Ltd* [*v Commerce Commission* (1986) 6 NZAR 33] ... The correct threshold was whether the Reviewer had exercised his discretion to uphold the decision of ACC on a wrong principle or had not taken account of relevant considerations, or had come to a decision that was plainly wrong.

[25] In granting leave for a further appeal to this Court by way of case stated under s 163 of the Act, Clifford J recognised that his approach was "very much one capable of bona fide and serious argument": HC WN CIV 2007-485-496 9 April 2008 at [9]. Further, he acknowledged that the question of the approach to be taken by the District Court to appeals against reviewers' decisions was one of distinct importance to the accident compensation scheme (at [10]). The questions of law which were reserved for the opinion of this Court are set out at [1] above.

The correct approach for the District Court to follow in determining s 149 appeals

[26] Clifford J granted leave to appeal on what the correct approach for the District Court to follow is in determining an appeal under what was incorrectly said to be s 145 of the Act. That section explicitly deals with decisions made on first-instance review of decisions made by the Corporation. The correct provision that applies to appeals to the District Court is s 149.

[27] Mr Beck, counsel for the appellant, argues that an appeal to the District Court against a determination of vocational independence under the Act is a general appeal by way of rehearing. The District Court is therefore required to reach its own conclusions as to whether the decision in question was correct, following the decision of the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141, admittedly delivered after Clifford J's judgment in the High Court. Mr Beck contends that Clifford J was in error when he approached the appeal as one from the exercise of a discretion, on the authority of *May v May*.

[28] Mr Barnett for the respondent responsibly accepts that a determination of vocational independence is not a discretionary decision and that an appeal to the District Court is a general appeal by way of rehearing. Thus, the Corporation accepts that Clifford J erred to the extent that he relied on principles applying to appeals from discretionary decisions.

[29] The correct approach to s 149 appeals is as follows. First, the District Court is required to come to its own conclusion on its assessment and evaluation of the evidence, and the merits generally. Where the District Court has a different opinion from that of the reviewer, it would be an error of law for it to defer to the reviewer's assessment of the acceptability of, and weight to be accorded to, the evidence rather than forming its own opinion, although the District Court is entitled to have regard to what the reviewer said and give it such weight as he or she thinks appropriate. This conforms with the approach to general appeals enunciated by Elias CJ, for the Court, in *Stichting Lodestar* (at [16]):

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances, it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[30] Secondly, the onus of establishing that the reviewer is wrong is on the applicant for review. To adopt the actual language of the Supreme Court in *Stichting Lodestar* (at [4]):

> ... the appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal. It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it.

Mr Wildbore's case

[31] The second question in the case stated was whether the District Court Judge followed the correct approach in his decision on Mr Wildbore's appeal.

[32] Mr Beck contends that Judge Cadenhead did not assess all the evidence for himself and that he failed to come to his own conclusion regarding the merits of the vocational independence determination. In particular, he suggested that Judge Cadenhead's view that "the thorough and detailed review decision should not be disturbed" (at [99]) indicated that the Judge was directing his attention to the wrong test.

[33] The essential question is whether it can be seen that the Judge turned his or her own mind objectively to all the relevant evidence, and came to an independent view. We are of the view that it is quite plain on the face of his judgment, when read as a whole rather than isolating phrases, that Judge Cadenhead did so.

[34] The key paragraph of Judge Cadenhead's decision is [101] (set out at [22] above). Although the critical paragraph is certainly concise, its brevity is hardly

problematic when read in the context of the judgment. A substantive judgment has to be read as a whole. The Judge had already traversed the evidence in this case at some length, primarily the conflict in medical assessments between Dr Kerr and Dr Hancock.

[35] Paragraph [101] comprises a series of specific propositions which seemed to be important to the District Court Judge, and which need to be broken down.

[36] First, the Judge accepted that the Corporation had discharged its obligation to afford Mr Wildbore adequate and proper rehabilitation. This was not in contention on appeal to the High Court or this Court.

[37] Secondly, in the Judge's view, the work trials had not failed as a result of any pain syndrome.

[38] Thirdly, and significantly, Mr Wildbore had chosen not to give evidence before the District Court Judge. Under s 155(2), an appeal is a rehearing, but evidence about a question of fact may be brought before the court under s 156(2).

[39] Under s 156 of the Act, the evidence which can be adduced on appeal is wider than would be permissible with respect to rehearings under many other statutes. Mr Wildbore chose not to give evidence, as he could have done. Given the nature of the issue which was before the District Court, the Judge could appropriately have expected to hear directly from Mr Wildbore in person on the central pain issue. The Judge could fairly comment on that, as he did.

[40] Fourthly, in the Judge's opinion, the evidence was "all one way", with the exception of Dr Hancock's evidence. Yet the Judge had hardly adopted a slavishly deferential stance to Dr Kerr as the "paramount medical assessor". Indeed, Dr Hancock's evidence had been considered in a deliberative fashion. For example (at [67]):

> ... when Dr Hancock's opinion is considered: (a) in the context of a different factual basis to that originally reported by the appellant himself; (b) against two treating physicians, who specifically dealt with the appellant's pain issues; and (c) against the objective available

evidence relating to the work trials – that his report cannot place any doubts on the appellant's ability to sustain work for more than 35 hours per week.

[41] The Judge had plainly reached the view that Mr Wildbore was now vocationally independent and that he should decline to overturn the decision initially made by the Corporation, and upheld on review.

[42] Given the correct approach to appeals against determinations of vocational independence under the Act, we answer the second question posed by the case stated in the affirmative.

Conclusion

[43] We answer the questions posed by the case stated as follows:

(a) Question One: On an appeal under s 149 of the Injury Prevention, Rehabilitation and Compensation Act 2001 the District Court is required to come to its own conclusion on its assessment and evaluation of the evidence, and the merits generally. Where the District Court has a different opinion from that of the reviewer, it would be an error of law for it to defer to the reviewer's assessment of the acceptability of, and weight to be accorded to, the evidence rather than forming its own opinion. The onus of establishing that the reviewer was wrong is on the applicant for review.

(b) Question Two: The District Court Judge correctly applied these principles to the decision under appeal before him.

[44] The appeal is dismissed. There will be no order for costs.

Solicitors:
Peter Sara, Dunedin for Appellant
Accident Compensation Corporation, Wellington for Respondent