

**IN THE DISTRICT COURT
AT DUNEDIN**

[2018] NZACC 36

ACR 347/15

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPEAL UNDER SECTION 149 OF
THE ACT

BETWEEN SARAH DICKSON-JOHANSEN
Appellant

AND ACCIDENT COMPENSATION
CORPORATION
Respondent

Hearing: On the papers at Auckland

Judgment: 16 February 2018

**JUDGMENT OF JUDGE L G POWELL
Costs on Appeal**

[1] In a judgment dated 30 November 2016 I allowed Ms Dickson-Johansen's appeal,¹ concluding she was "entitled to weekly compensation for the periods of incapacity caused by her lumbar disc prolapse with radiculopathy for which she has cover".² As a result I also determined Ms Dickson-Johansen was entitled to costs, and gave the parties leave to come back to the Court if costs could not be agreed, which has in fact now occurred.

[2] In addition to the outstanding issue with regard to costs on the appeal Mr Forster, for Ms Dickson-Johansen also brought to my attention the fact that I omitted to deal with an issue of disbursements not granted to Ms Dickson-Johansen at review which had been part of Ms Dickson-Johansen's appeal. Since then Mr Light for the Corporation has confirmed that the Corporation accepts that the \$50 claimed as disbursements on behalf of Ms Dickson-Johansen at review was in fact

¹ [2016] NZACC 314

² At [42]

reasonably occurred, and as a result I allow by consent that additional part of Ms Dickson-Johansen's appeal and note that she is entitled to \$50 for disbursements incurred preparing the case for review.

Ms Dickson-Johansen's Application for Costs at Appeal

[3] It is no exaggeration to say that rather than simply submitting what would be a reasonable award of costs in the circumstances of this appeal, Mr Forster through this specific appeal seeks a far broader principled reassessment of costs in the jurisdiction generally. In particular Mr Forster poses the following central question with regard to costs:

According to the purpose of the scheme as indicated by Parliament and the interests of justice as determined by the Court, did Parliament intend that a claimant should bear the financial cost of bringing a District Court dispute in a situation where ACC issues a decision that is clearly wrong?

[4] In this vein Mr Forster went on to comment that:

20. The question is how to ensure that the negative consequences of issuing a meritless decision are borne by the appropriate party.
21. There is a risk that, if a robust approach to costs is not taken, ACC – deliberately or unwittingly – externalises the financial burden of flawed decision-making processes onto claimants and the wider community. The effect is that the true administrative cost of disputes is obscured to political and commercial decision-makers responsible for administering the scheme.

[5] Mr Forster supported his overall submissions with reference to Article 13 of the United Nations Convention on the Rights of People with Disabilities, recent authority that a civil litigation approach was not appropriate for the Human Rights Review Tribunal, as well as the particular purpose and function of the Accident Compensation appeal jurisdiction. In relation to this appeal in particular Mr Forster noted that Ms Dickson-Johansen was at the time of her accident a student and part time worker of limited resources. In his submission the dispute arose because of the Corporation system failures, that the issues in the appeal were straight forward albeit rendered more complex by the issues raised by the Corporation shortly before hearing and the Corporation's unreasonable refusal to settle. Taking these matters into consideration Mr Forster submitted that a reasonable contribution to Ms Dickson-Johansen's costs would be \$7,500 against costs actually incurred of

\$8,797.50 noting that his calculation of approximate scale costs at a 2B or 3B level would result in costs of \$8,633-\$18,957 (although accepting that any award of costs should not exceed the costs actually incurred).³

The Corporation's Response

[6] Mr Light submitted that the amount offered by the Corporation in the sum of \$3,500 plus disbursements was reasonable in the circumstances. In particular by Mr Light's calculation that sum was in fact close to the scale costs payable on a 2B basis and was consistent with the applicable principles for the award of costs in this jurisdiction, given the length and complexity of Ms Dickson-Johansen's appeal. More broadly it was Mr Light's submission:

48. The overall submission for ACC is that there is nothing wrong with the Court's approach to costs awards, and there is therefore no need for the Court to take a more expansive approach, as appears to be the submission for Ms Dickson-Johansen.

[7] Specifically Mr Light did not accept that the cases cited by Mr Forster were relevant to the award of costs in this jurisdiction.

[8] Mr Light concluded by observing:

50. It is important that a claimant should have a fair opportunity to challenge ACC's decision, but the principle of fairness, in the sense of even-handedness, also applies to ACC. ACC should not be in a worse position than a claimant by having to pay a higher costs award than a reasonable contribution to the claimant's costs, if ACC is unsuccessful.

Discussion and Analysis

[9] There is no specific provision for the determination of appeal costs contained in the Accident Compensation Act 2001. Instead s 150 of the Act provides that an appeal under s 149:

... is dealt with in accordance with the District Court Rules made under s 228 of the District Court Act 2016, as modified by this Act and any regulations made under it.

[10] Rules 14.1 and 14.2 of the District Court Rules 2014 ("the Rules") provide:

³ District Court Rules 2014, Rule 14.2(f)

Part 14 Costs

14.1 Costs at discretion of court

- (1) All matters are at the discretion of the court if they relate to costs—
 - (a) of a proceeding; or
 - (b) incidental to a proceeding; or
 - (c) of a step in a proceeding.
- (2) Rules 14.2 to 14.10 are subject to subclause (1).
- (3) The provisions of any Act override subclauses (1) and (2).

14.2 Principles applying to determination of costs

The following general principles apply to the determination of costs:

- (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
- (b) an award of costs should reflect the complexity and significance of the proceeding:
- (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
- (d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
- (e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
- (f) an award of costs should not exceed the costs incurred by the party claiming costs:
- (g) so far as possible the determination of costs should be predictable and expeditious.

[11] Beyond the broad discretion set out above, Rules 14.3 through to 14.19 provide for a detailed framework for costs in the District Court built around set bands of appropriate daily recovery rates (from 1A – 3C) and reasonable times for undertaking different steps in a proceeding detailed in Schedule 4 and 5 of the Rules. Rule 14.6 goes on to provide for costs above the scale (increased costs) and the actual costs and disbursements of a party (indemnity costs) and when those can be paid, subject to the overriding principle that costs are at the discretion of the Court.

[12] Notwithstanding the approach set out in the Rules, the conventional starting point for determination of costs in this jurisdiction is as set out by Judge Barber in *P v Accident Compensation Corporation*⁴ which in summary provided:

- The Court has a complete discretion in respect of costs.

⁴ [2008] NZACC 152 at paragraphs 15-21 and 39

- Each case must be determined on its own particular facts.
- An award for costs on appeal was confined to costs that are incurred in that appeal proceeding.
- The normal award for a successful appellant for a fully argued appeal in this jurisdiction is the range of \$2,000-\$2,500 (“*although I add that it could rise to \$3,000 or more if there has been more extensive evidence or submissions which were warranted*”).
- Although a party may incur legal expenses considerably greater than the range normally awarded, a higher award will not be made unless there is something exceptional or unusual that warrants a higher award.
- Where an appeal has been settled prior the hearing, an award should not exceed the normal award of costs for successful appellants following a full hearing unless, again there is something exceptional or unusual that warrants such an award.

[13] In giving effect to these principles the judges in this jurisdiction have generally not applied scale costs although on occasion they have been found to be helpful in determining an appropriate award in particular appeals.⁵ The scale has not generally applied for a variety of reasons, including because it was not seen as necessarily a good fit with the process adopted in accident compensation appeals, noting in particular the need for flexibility. The historic reluctance to rigidly apply the Rules must also be seen in a context where, in recognition of the nature of the jurisdiction, the Corporation does not generally seek nor is it generally awarded costs against unsuccessful claimants when it is successful in an appeal. As a result in most cases the Court will indicate that there is no issue of costs arising if a claimant is unsuccessful or if the Corporation otherwise succeeds at appeal. There are exceptions to this, either signalled well in advance by the Corporation or where the Court indicates the Corporation has leave to apply for costs given the particular circumstances of an appeal.⁶ The recent practice of this Court has accordingly been to indicate in a judgment on an appeal whether costs are payable by either (or any) party, and if so, to give the parties a period to attempt to reach agreement on those costs, reserving leave for the parties to have costs determined if, as in the present appeal, no agreement is able to be reached.

⁵ See for example two cost judgments of Judge Spiller in *Sutherland v Accident Compensation Corporation* [2013] NZACC 185 and *Burns v Accident Compensation Corporation* [2013] NZACC 233.

⁶ For example see *O’Neill v Accident Compensation Corporation* [2014] NZACC 161 at [22] and *Brennan v Accident Compensation Corporation* [2015] NZACC 124 at [128]

[14] Despite this, recent research⁷ has confirmed that the complexity of the jurisdiction means legal representation is important to claimants, and, given a claimant cannot by definition obtain more than the statutory entitlement under the accident compensation regime even if successful, there is much merit in Mr Forster's submission that a successful claimant should not be out of pocket at the conclusion of the appeal process. Instead such an outcome would be antithetical to the purpose of the 2001 Act which relevantly provides:

3 Purpose

The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs), through—

...

- (c) ensuring that, 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:
- (d) ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment:

...

[15] Having accepted this starting point it is obvious there are practical difficulties with this approach, not in the least because it presupposes that any costs rendered to a claimant are reasonable. It is clearly not appropriate for this Court to sanction the reimbursement of costs simply because they have been rendered to a claimant. In addition the Court is not only ill suited to determining what might be reasonable costs in a particular instance having regard to the economics of private legal practice, but any such attempt would impose a significant burden on judicial resources should every decision on costs require the careful consideration of this Court.

⁷ Understanding the Problem: An analysis of ACC appeals processes to identify barriers to access to justice for injured New Zealanders (Acclaim Otago (Inc) July 2015, and Independent Review of the Acclaim Otago (Inc) July 2016 Report into Accident Compensation Dispute Resolution Process (Miriam Dean QC May 2016).

[16] The solution in other jurisdictions, including the general civil jurisdiction of the District Court, has been the use of scale costs of the type set out in Schedule 4 and 5 of the Rules to provide for a reasonable contribution to the actual costs incurred by a party in a particular type of proceeding.

[17] Although these have not been generally used in this jurisdiction, as Mr Forster has noted, they are in fact easily adaptable to the steps required in accident compensation appeals in the District Court. In addition, while Mr Light in the present case has submitted on behalf of the Corporation, it is not necessary to apply scale to costs in this jurisdiction, that is not in fact the fixed position of the Corporation, noting that in at least one other cost application the Corporation has in fact advocated the use of scale costs in appropriate cases.⁸

[18] Taking these different threads together I am satisfied that the approach in *P v Accident Compensation Corporation* requires some adjustment, particularly with regard to the “normal award” referred to by Judge Barber, noting for example that even in the present case the Corporation has offered \$3500. In the circumstances and upon reflection I can see no reason why the scale set out in the Rules should not be used for the calculation of costs in accident compensation appeals. The Court will in fact continue to retain flexibility in appropriate cases, including where the costs sought are from advocates, nor will there be any reason to depart from the accepted principle that in general the Corporation will not be entitled to costs where a claimant is unsuccessful unless the Court specifically directs otherwise. On the other hand, not only is a broadly objective standard helpful to the Court, there can also be no reason why claimants in this jurisdiction should be required to recover less for costs incurred than is allowed for them in the general civil jurisdiction of the District Court, and having a more certain costs recovery framework for claimants may in turn make it easier for claimants to obtain legal representation on appeal.

[19] Notwithstanding these general comments, it must be recognised that the present application is ultimately concerned only with determining the appropriate cost award following Ms Dickson-Johansen’s successful appeal. Having considered carefully the circumstances of this case as set out in my judgment on the substantive

⁸ *Hensen v Accident Compensation Corporation* [2018] NZACC

issues, together with the submissions of counsel, and noting that the case was probably of average complexity in this jurisdiction, I am satisfied that costs should be awarded in the present case in favour of Ms Dickson-Johansen according to the scale set out in the Rules on a 2B basis. For avoidance of doubt in this case, I certify for the following steps, allowing in particular a single “preparation of written submissions” to cover all of the submissions filed on behalf of Ms Dickson-Johansen in the appeal:

Time Allocations

Commencement of appeal (20)	0.5
Case Management (23)	0.2
Preparation of case on appeal (24)	0.5
Preparation of written submissions (24A)	1.5
Preparation of bundle for hearing (9.13)	0.4
Appearance (25)	0.25
Time (days)	3.35

[20] Applying the daily rate of \$1,780 set out in Schedule 5 of the Rules, this gives a total of \$5,963.00 and I make an order for this amount, together with reasonable disbursements to be paid by the Corporation to Ms Dickson-Johansen in respect of her successful appeal.

Judge L G Powell
District Court Judge

Solicitors: P J Sara, Dunedin, for the appellant
Young Hunter, Christchurch, for the respondent