NZLR

IN THE HIGH COURT OF NEW ZEALAND
ADMINISTRATIVE DIVISION
WELLINGTON REGISTRY

6/2

AP No. 113/89

MEDIUM PRIORITY

2658

UNDER the Accident Compensation Act 1982

IN THE MATTER of a determination of the Accident Compensation Appeal Authority

BETWEEN GRAEME JOHN BUCKLER

Appellant

A N D THE ACCIDENT COMPENSATION CORPORATION

Respondent

AP No. 122/90

UNDER the Accident Compensation Act 1982

IN THE MATTER of a determination of the Accident Compensation Appeal Authority

BETWEEN KEITH GODDEN WALTON

Appellant

A N D THE ACCIDENT COMPENSATION CORPORATION

Respondent

Hearing: 25 March and 18 December 1991

Counsel: H R Grayson for appellant Buckler
G D S Taylor for appellant Walton
J O Upton QC and M J Mercier for Respondent

Judgment: 18 December 1991

ORAL JUDGMENT OF GREIG J

These are two separate appeals against decisions of the Accident Compensation Appeal Authority confirming the rejection of the appellants' claims that their incapacities result from disease due to the nature of their employment under the terms of s 28 of the Accident Compensation Act 1982. There are two separate claims and appeals which were, for convenience, joined together because they both raise similar questions as to the interpretation of s 28. Both appellants challenge the application of that section by the Corporation and the Appeal Authority.

The appeals hearings took place some considerable time ago, as is noted from the heading of this judgment. Before I had delivered a judgment the Court of Appeal in *West v Firestone Tire and Rubber Co. of New Zealand Ltd & ors* (unreported, CA No. 154/91, 12 September 1991) and *McKenzie v Attorney-General & anor* (unreported, CA No. 340/90, 12 September 1990) made a number of pronouncements about the meaning of s 28 in the circumstances of those particular cases. These were drawn to my attention and I asked for further submissions to be made in light of those later pronouncements. I have now received these and in the course of them it has been indicated that no further submissions or opposition is made to the Buckler appeal. I think it is, however, appropriate nonetheless that I should say something about that as well as the appeal which still remains.

THE WALTON APPEAL

Mr Walton made his claim in February 1988 arising out of back pain which had caused him to give up employment. He was then aged about 57.

He has a history of back pain. In 1970 he underwent a laminectomy and spinal fusion which was apparently successful and allowed the appellant to work full time as a farm manager on a sheep farm in the Wairarapa carrying some 3,200 breeding ewes. He was fully capable of performing all the usual operations of the farm manager and farm worker, including the hard manual tasks involved in sheep-farming. In 1980 the appellant gave up farm work and commenced employment as a storeman/driver in a woolstore. That involved the manual loading of bales and fadges of considerable weight and the lifting of wool in the blending process. In or about February 1987 he suffered some back pain and there was increasing deterioration of that until he gave up work, finally, about one year later in February 1988. The evidence was therefore that he had no problems in his working life between 1970 and 1987 but then suffered increasing pain which finally incapacitated him from work.

He consulted Mr P C Grayson, an orthopaedic surgeon, who had undertaken the spinal operation in 1970. In Mr Grayson's opinion of 10 December 1987 he stated that the appellant "has developed degenerative changes as a result of the work that he has been doing over the years, ...". In a further opinion of 29 April 1988 he stated, among other things:

> " I would certainly confirm that the degenerative changes now present in Mr Walton's spine would have been less likely to occur had Mr Walton not been engaged in heavy work since the operation in 1970. "

and in that opinion repeated comment made earlier by him that -

> " ... because his heavy work in the wool store caused these changes, his claim should be considered under the 'occupational' rather than 'traumatic' clauses of the Act. "

Finally, in an opinion on 26 September 1988, after commenting that, particularly in the Wairarapa, work in farming and in woolstores must be classified as "heavy", referred to a publication described as a Symposium on the Spine by the American Academy of Orthopaedic Surgeons which included

the observations that, "very heavy work does speed up the process of disc degeneration" and that the heavy worker "if he continues in his job, would have considerable discomfort and would probably begin having real lumbago to the point where he would have to quit work or change jobs". Those observations Mr Grayson confirmed as in accordance with his own opinion on the matter. Finally, in a final report of 30 September 1988, Mr Grayson commented:

> " I believe that if he [the appellant] had had a sedentary type life following his laminectomy and fusion, his present condition would not have eventuated. "

These various reports were furnished for the appellant's use in the various applications, hearings and the appeal in the pursuit of his claim for recognition of his incapacity under s 28.

The Appeal Authority in his decision made a finding in this form:

> " I infer from the tenor of Mr Grayson's reports that the degeneration which has occurred in Mr Walton's spine, becoming noticeable as it did in his mid-fifties, was beyond the normal range of degenerative change for his age group. While I would have preferred more specific evidence, I am prepared to accept in this case that Mr Walton is suffering from a disease to his spine. "

There was a further finding or conclusion in these terms:

> " In no way does the evidence establish that Mr Walton, in either his farming work or his wool store work, faced a special risk of contracting a diseased back, a risk which he did not similarly face in other forms of employment involving heavy manual work. "

Although there is no express finding on this it seems to have been assumed throughout that the injury and incapacity were not caused exclusively by disease but were in part caused by the work and the labour which he had performed over his working life.

THE BUCKLER APPEAL

Mr Buckler was a Police officer. He first made his claim in March 1987 when he was aged about 34. At that stage he made a claim based on an alleged accident on 10 June 1982 but a medical report provided to the Corporation indicated that his condition could not be attributed to any particular incident. It was only some time later that a further review was undertaken and the application of s 28 was pressed as being relevant in his case.

Mr Buckler, like Mr Walton, had a history of some problems to his right leg which, in the end, incapacitated him from his work and which required him to leave the service. It began in 1968 when he was then aged about 15, for which he underwent medial and lateral meniscectomies which were carried out by Mr Grayson, as a matter of coincidence. The appellant became a Police Constable in December 1972 and transferred to dog handling and became a fully fledged dog handler from about late 1976. In or about November 1982 he was having some trouble with the knee and examination by another orthopaedic surgeon, Mr Elliott, at that time showed degenerative changes in both compartments of the right knee. In November 1986 he had some further and increasing pain and disability in the knee and there was, under the supervision of Mr Elliott, surgical exploration which indicated gross osteoarthritic changes in the medial and lateral compartments of that knee. It was indicated then that he would be unable to continue his occupation as a dog handler and in due course he was disengaged from the Police.

The opinion that was then provided by Mr Elliott was as follows:

> " He has advanced osteoarthritic changes involving all compartments of his right knee. These changes are not specifically due to the

> stated accident on the 10th June, 1982 but are a reflection of the earlier injury that required removal of both his menisci at the age of fifteen. There is no doubt however that his subsequent career playing rugby and his activities in the Police as a dog handler have contributed to the accelerated destruction of this joint. "

It was stated that no further surgical treatment was likely to be helpful, and in summary that he has -

> " ... gross post traumatic arthritis of his right knee. This has developed over a lengthy period of time and cannot be attributed to any particular incident. He is substantially disabled by this problem but not incapacitated. "

Following the review there was some further enquiry made and a further opinion was furnished by Mr Elliott on 18 October 1988. In the course of that he reiterated his belief that the appellant's occupation as a dog handler had brought about the advanced degeneration in his right knee and he referred to the severe demands made on the appellant as a Police dog handler having had, then, the advantage of reading the reports of two Police officers describing the duties and the obligations of a dog handler in the course of his Police operations which had enlightened him as to the extent of the demands. Reference was made to the fact that dog handlers may face over three hundred operational callouts each year, often at night, and may be required to pursue alleged wrongdoers at speed over rough terrain in night visibility and in clothing and footwear which was not entirely suitable. As the surgeon suggested, "the risk to limbs and joints under these circumstances is extreme". He then went on to say:

> " ... I am prepared to state that I believe the condition of Mr Buckler's right knee can be attributed to the excessive physical demands of his occupation which are greatly in excess of those experienced by someone even in an active labouring job. "

And a little later he said that he thought that the "osteoarthritis occurring as it did in his late 20s is due to his duties as a Police Dog handler and has not merely been aggravated by those duties".

In this case it is recorded in the Appeal Authority's decision that Mr Mercier, on behalf of the Corporation, conceded that it could not be disputed that the appellant suffered incapacity, that a causal relationship existed between the appellant's condition and his employment, and that it could not seriously be disputed on the basis of all the evidence that employment as a Police dog handler had an inherent tendency to aggravate or accelerate osteoarthritic changes.

The Appeal Authority in his decision found, at p 14:

> " It is well established in this particular case that from 1968 when the appellant had operations to his right knee there has been existent a weakness in that knee. There can be no doubt that the appellant's condition was aggravated by his employment and that thereby a causal relationship exists. "

But he went on, at the top of p 15, to say:

> " I find it difficult to accept that Police work has a recognised special risk of contracting osteoarthritis even when a Police officer is operating as a dog handler. "

Again, as with Mr Walton, it seems to be assumed and necessarily follows indeed from the concessions and the findings, that the incapacity was not caused exclusively by disease but was in part caused by the work and the exertions and the risks inherent in that.

THE LAW

What was put to the Court at the earlier hearing and what is the pivotal point in the two decisions of the Appeal Authority is expressed in the synopsis of the argument on behalf of the respondents as follows:

> " ... before a claim can succeed under s 28 of the 1982 Act (and earlier under s 67 of the 1972 Act) there must be a disease caused by some feature in the employment peculiar to that employment and not found in employment generally.
>
> In other words, that there must be a disease due to something inherent in the employment, and that it is not sufficient to merely establish a causal link or cause and effect. "

This has been a consistently applied policy of the Corporation as it has been expressed in what have been described as circulars or technical information, Bulletins No. 469 and an earlier one issued on 22 April 1976.

There are a number of decisions of the Appeal Authority which have dealt with the meaning and effect of s 28. Likewise there are some decisions in the High Court earlier arising out of the Workers' Compensation legislation which clearly have a close applicability to the construction of s 28. For the first time, however, the matter has come before the Court of Appeal and in *West's* case, as I have said, there have been pronouncements made about it which, as the Court itself said, has required it to commit itself on some of the matters which arise out of the interpretation of the section. Of course, the circumstances of *West's* case and *McKenzie's* case are very far indeed from these two appeals but the principles clearly must be applicable to both. It is always dangerous to attempt to summarise a judgment and the relevant part of the judgment in *West's* case has to be read as a whole. But I am bold enough to attempt to summarise it to extract the principles which are applicable in these appeals.

The Court begins by saying that "On the plain language of s 28 (1), cover will not exist thereunder unless the disease was or is due to the nature of any employment. Causation always has to be proved: ...." and there is a reference there to *Clements v The Queen* [1953] NZLR 857, a judgment of the Compensation Court. It then proceeds to discuss *Blatchford v Staddon* [1927] AC 461, a case much discussed in the appeal before me and one which is clearly of great importance, at least in the Workers' Compensation legislation, on this topic. After reference to these and to the decision of Judge Willis as the Accident Compensation Appeal Authority in *Leitch v Accident*

Compensation Corporation [1990] NZAR 26 and with a reference to the circular, the technical information circular 469, the Court says this:

> " ... we are disposed to think (the present appeal does not require a more definite opinion) that in all cases under s 28 the question as to causation is simply whether the work had in fact some particular quality or characteristic or incident which distinguished it from work generally and which was a substantial cause of the disease.
>
> Certainly, in our opinion, it is not necessary in New Zealand that the disease be a recognised or inherent risk of the particular trade or occupation or the particular *type* of activity in which the worker was engaged. "

And there is reference there to what the Court described as the convincing judgment of Judge Archer in *Lynch v Attorney-General* [1959] NZLR 445. The Court then goes on to say:

> " In other words, that the risk is a recognised or inherent feature of the kind of work facilitates proof of causation, but is not an essential condition of cover. It is enough that the particular employment had something in it which caused or contributed to the disease, no matter whether or not other employments of the same class have a tendency to do so. "

The Court then refers to a number of Australian cases which are of importance, at least in Australia, in settling principles which have been applied there on this topic. These are important, too, because they are expressed to found the principles set out in the Corporation's circulars that I have already mentioned. It is on this point in particular that, as the Court said, it behoves it to commit itself on this matter in face of the distinctions or the differences between counsel and between the tenor of the Australian and New Zealand decisions.

There then is a clear departure from the Australian position and an adoption, an affirmation of *Lynch's* case in these words:

> " *Lynch*, being in accordance with the natural and ordinary meaning and the purpose of the New Zealand section, should be affirmed as representing the law of New Zealand. "

I turn then to *Lynch's* case. It again is a factual situation far away from the present. It was concerned with a miner who was asked to work in a particular section of a mine where he developed a rash in the crooks of his arms and on his elbows, forehead and back of his neck. He had never suffered skin trouble before but did so after only a week in this section of the mine. The section was found to be hot and dusty with a high humidity; probably, it was said, the worst part of the mine. At p 448 the Judge said:

> " I think the Workers' Compensation Amendment Act 1947 was intended, in general terms, to permit a claim to be made in respect of any disease which could be shown by appropriate evidence to have resulted from the claimant's employment. I do not believe the Legislature intended to make the task of a claimant more difficult than before by requiring him now to prove that the disease was an inherent risk of the occupation within which he was employed. "

He went on to refuse to be "coerced", as he had been invited to, to accept the contrary view by the decision in *Blatchford's* case. He summed up his decision of the principle at p 451 in this way, after distinguishing *Blatchford*:

> " ... I hold, on the analogy of the other authorities I have cited, that the plaintiff is entitled to succeed if he can show that his incapacity was the result of dermatitis which was due to the conditions of his employment. "

In light of all that I find it difficult to see that there remains any real basis to support the principles and the expressions of those contained in the

Corporation's circulars or, indeed, in the way in which for some time now the Appeal Authority has dealt with these matters. The basis, in my judgment, has been to follow the Australian principles and to attempt to extract something particular, something special, something specific from the employment which has caused the incapacity. That, I think, is not what the Court of Appeal has said. The distinction is between the particular employment and general work. It is not a matter of finding some special characteristic in the employment, some inherent specific feature of it which distinguishes it from other work.

Clearly enough, in light of the decisions in *West*, the Corporation has accepted that Mr Buckler is clearly within the terms of s 28. In my judgment he was within the terms of that even if the Australian authorities and principles were to be applied. I think Mr Walton also comes within the terms of the interpretation now made certain and to which there is an inclination on the part of the Court of Appeal. There is no question but that there is a causal link between the employment and Mr Walton's back. In my opinion that is certainly employment which is to be distinguished from work generally and I believe that that must mean manual work generally. I think there was in his employment particular features in his duties in carrying and lifting heavy weights which particularise that employment in the terms of the Act and the law and so he is, like Mr Buckler, entitled to be considered as having suffered an accident and be entitled to compensation accordingly.

In the result then both appeals are allowed and there will be an order that Keith Godden Walton and Graeme John Buckler are each entitled to compensation under the Act.

I will make an order in favour of Mr Walton as to costs in the sum of $2,000 together with disbursements to be fixed by the Registrar and I will declare that I would have made a similar order in respect of Mr Buckler if he had not been on legal aid.

Goddard J

Solicitors: Gresson Grayson & Calver, HASTINGS, for Appellant Buckler

Gold Walsh & Co., MASTERTON, for Appellant Walton

Chief Legal Adviser, Accident Compensation Corporation, WELLINGTON, for Respondent

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