

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV-2012-485-000381
[2012] NZHC 2703**

IN THE MATTER OF an appeal pursuant to s 162 of the Accident
 Compensation Act 2001

BETWEEN BRUCE FARQUHAR
 Appellant

AND ACCIDENT COMPENSATION
 CORPORATION
 Respondent

Hearing: 15 October 2012

Counsel: A C Beck for Appellant
 I G Hunt for Respondent

Judgment: 16 October 2012

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 3.45pm on the 16th day of October 2012.

RESERVED JUDGMENT OF COLLINS J

Introduction

[1] On 16 May 2012 Clifford J granted Mr Farquhar special leave to appeal to this Court. The question posed by Clifford J was whether:¹

... in the circumstances of his case – having regard in particular to any relevant transitional provisions, the Corporation was entitled as a matter of law to require him to undergo an updated Initial Occupational Assessment in the manner that it did in its letter of 27 August 2009, given that Mr Farquhar had previously been the subject of an Initial Occupational Assessment in December 2004.

¹ *Farquhar v Accident Compensation Corporation* [2012] NZHC 1038 at [1].

[2] The parties agree that there are no relevant transitional provisions. The question I am required to answer involves the application of the provisions of the Accident Compensation Act 2001 (the Act) to the facts of this case.

Legislative provisions

[3] Section 70 of the Act provides that a claimant who has suffered personal injury by accident for which they have cover is entitled to be provided with rehabilitation by the Accident Compensation Corporation (ACC), to the extent provided for by the Act.

[4] Section 75 of the Act requires ACC to determine whether or not a claimant is likely to need vocational rehabilitation within 13 weeks of the claimant being accepted as having cover under the Act.

[5] Under ss 76 and 77 of the Act before an individual rehabilitation plan is agreed to, ACC must identify a claimant's needs for rehabilitation. That assessment may include a claimant's needs for vocational rehabilitation.

[6] Section 78 of the Act provides that an individual rehabilitation plan must be updated "from time to time to reflect the outcomes of assessments done and programmes made under the plan".

[7] Section 89 provides:

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.

[8] Section 72 of the Act relevantly provides:

72 Responsibilities of claimant who receives entitlement

(1) A claimant who receives any entitlement must, when reasonably required to do so by the Corporation,—

...

- (e) undergo assessment, at the Corporation's expense:
- (f) co-operate with the Corporation in the development and implementation of an individual rehabilitation plan:
- (g) undergo assessment of present and likely capabilities for the purposes of rehabilitation, at the Corporation's expense:
- (h) participate in rehabilitation.

...

Background facts

[9] Mr Farquhar suffered a back injury on 3 December 1994. He has received ACC cover and entitlements since December 1994.

[10] On 7 December 2004 an “initial occupational assessment report” was completed by an occupational assessor. In that report the occupational assessor noted that:

- (1) Mr Farquhar had left high school after completing the fourth form.
- (2) Mr Farquhar had started a university course and found that he “could keep up” with university studies.
- (3) Mr Farquhar was interested in pursuing occupational opportunities as:
 - (a) a builder;
 - (b) a lawyer;
 - (c) a financial adviser.

- (4) Four work type occupations were identified and evaluated. Those work type options were primarily labouring roles which Mr Farquhar said he could not undertake because of the physical limitations he suffered from.
- (5) Mr Farquhar was interested in pursuing studies to become either a lawyer, an accountant, or a financial adviser. The occupational assessor said Mr Farquhar needed to show a willingness to move in this direction and develop a sense of trust with ACC to enable a plan of support for him for this to happen. The occupational assessor referred in his report to enclosing job descriptions for a lawyer and an accountant so that those options could be considered in the initial medical assessment.
- (6) That it would be advisable for Mr Farquhar to attend a foundation course at university or similar programme to demonstrate his ability to pursue an academic programme.

[11] On 22 December 2004 ACC made further inquiries of the occupational assessor about other vocational options for Mr Farquhar, such as budgetary advisory work. I have not been shown any response to this inquiry.

[12] On 11 September 2006 an initial medical assessment was completed. In his report, Dr Wright specifically assessed Mr Farquhar's suitability to undertake four labouring type jobs identified by the occupational assessor, as well as his physical and medical ability to be an accountant and/or financial adviser. In relation to training to become a barrister and solicitor Dr Wright said:

... The work would not strain his back and is suitable to consider in terms of an injury perspective. In view of his convictions for violence and imprisonment, there are likely to be problems in this type of work that may make it inappropriate for him to even begin trying. However, expert advice would be needed for this and I am not able to comment with any degree of expertise other than the suitability on an injury related basis.

[13] On 22 September 2007 ACC sent copies of Dr Wright's initial medical assessment report to Mr Farquhar. Mr Farquhar was asked to let ACC know if he agreed with Dr Wright's assessment.

[14] On 29 November 2006 Mr Farquhar returned to ACC an individual rehabilitation plan that ACC had sent him. Mr Farquhar modified the terms of the plan so as to record that his vocational plan would be for him to "attend law school for as long as it takes to graduate ...".

[15] On 27 August 2009 ACC wrote to Mr Farquhar. In that letter ACC said:

- (1) That "due to a communication error" the referral for an updated initial occupational assessment was never completed.
- (2) That ACC now wanted to complete an "Updated Initial Occupational Assessment".
- (3) That under s 72 of the Act a claimant who receives entitlements under the Act must, when reasonably required to do so by ACC, undergo assessment at ACC's expense and authorise ACC to obtain medical and other records that are or may be relevant to this claim.

Mr Farquhar did not receive this letter.

[16] On 18 September 2009 ACC wrote to Mr Farquhar and told him he was at risk of losing his entitlements unless he consented to the disclosing of relevant information to the initial occupational and initial medical assessor.

[17] On 2 October 2009 Mr Farquhar wrote to ACC in which he said:

- (1) That he had not received ACC's letter of 27 August 2009;
- (2) He had already undergone both the initial occupational and initial medical assessments.

[18] On the same day (2 October 2009) ACC wrote to Mr Farquhar telling him that payment of his entitlements was to cease.

[19] On 13 December 2009 Mr Farquhar lodged an application to review ACC's decision.

[20] On 26 January 2010 ACC's counsel sent Mr Farquhar a copy of ACC's letter of 27 August 2009. ACC's counsel invited Mr Farquhar to reconsider his position in light of that letter.

[21] On 21 April 2010 a reviewer dismissed Mr Farquhar's application for review.

[22] Mr Farquhar's appeal to the District Court from the Reviewer's decision was allowed to a limited extent by Judge Ongley on 11 April 2011. The learned District Court Judge held that ACC's decision suspending Mr Farquhar's entitlement should only run from 26 January 2010 which was when Mr Farquhar was sent ACC's letter of 27 August 2009.

Analysis

[23] In this case ACC requested that Mr Farquhar participate in the preparation of a "Updated Initial Occupational Assessment". ACC wanted to ensure Mr Farquhar was a suitable candidate to commence studying to become a lawyer. ACC was concerned that Mr Farquhar might not be eligible to practise as a barrister and solicitor because of his previous criminal convictions. It was clearly in the interests of both ACC and Mr Farquhar to have this issue explored further prior to Mr Farquhar undertaking a long and expensive course of study.

[24] Mr Beck, counsel for Mr Farquhar, responsibly suggested that ACC did have the ability to undertake the relevant and necessary inquiries into Mr Farquhar's suitability to study law. Mr Beck submitted that s 72 of the Act gave ACC all of the powers that were needed to make these inquiries. However, in Mr Beck's submission, updating or re-undertaking the initial occupational assessment was not contemplated by the statutory regime.

[25] There are a number of aspects of the process followed by ACC in this case which cause concern. Those sources of concern are:

- (1) The occupational assessor identified the issues associated with Mr Farquhar undertaking study to become a lawyer. However, rather than address those issues as part of his initial occupational assessment report, the occupational assessor effectively referred the issues about Mr Farquhar's suitability to study law to the medical assessor, even though that issue was not a medical question.
- (2) The medical assessor identified the potential difficulties which Mr Farquhar might face if he wished to become a lawyer. The medical assessor noted his concerns even though those concerns were not relevant to Mr Farquhar's medical status.
- (3) There was then a very long delay (which appears to have been due to communication problems between ACC and its contracted occupational assessor) after which ACC attempted to have Mr Farquhar undergo an "updated" initial occupational assessment.
- (4) No new or changed conditions were identified by ACC that might, under other circumstances, justify ACC initiating a new initial occupational assessment.

[26] In my judgment, the correct approach was for ACC to require Mr Farquhar to participate in a further assessment of his suitability to study law. That was the only outstanding issue. It was not necessary for ACC to initiate a new or updated initial occupational assessment. ACC could have achieved its objectives by relying solely on s 72 of the Act. Unnecessary confusion was caused by ACC introducing the concept of an "Updated Initial Occupational Assessment".

[27] Mr Farquhar's reacted in an understandable manner when, on 2 October 2009 he reminded ACC that he had already participated in an initial occupational and an initial medical assessment.

[28] The approach taken by ACC in the circumstances of this case does not appear to be one that is strictly in accordance with the language of the Act. For this reason, I conclude that ACC was not entitled, as a matter of law, to require Mr Farquhar to undergo an updated initial occupational assessment in the manner that it did in its letter of 27 August 2009.

[29] ACC could have achieved all of its objectives by requiring Mr Farquhar to participate in a discreet process of inquiry aimed at determining whether or not Mr Farquhar was a suitable candidate to commence studying law.

Costs

[30] The parties are invited to make submissions on costs within 15 working days of the date of this judgment if they are unable to reach agreement between themselves on the question of costs.

D B Collins J

Solicitors:
Gault Mitchell, Wellington for Appellant
Young Hunter, Christchurch for Respondent