IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA689/2021
[2022] NZCA 407

BETWEEN	THE BOARD OF TRUSTEES OF MELVILLE HIGH SCHOOL Appellant
AND	KATHLEEN CRONIN-LAMPE First Respondent
	RONALD CRONIN-LAMPE Second Respondent

Hearing:	16 March 2022
Court:	Kós P, Gilbert and Collins JJ
Counsel:	P N White and A C Challis for Appellant T M Braun for Respondents S M Bisley and E L Donnelly for Accident Compensation Corporation as Intervener
Judgment:	29 August 2022 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B We answer the question of law on which leave to appeal was granted by this Court:

Whether the Employment Court has jurisdiction to hear a proceeding in which a claimant has made claims under the Accident Compensation Act 2001 but review and appeal rights under that Act have not been exhausted?

Yes, in the circumstances of this case.

C The appellant must pay costs to the respondents for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Gilbert J)

[1] Two employees suffer post-traumatic stress disorder in the course of their employment. They make claims for cover under the Accident Compensation Act 2001 (the Act). After pursuing these claims for over two years, including by way of review, they ultimately accept the correctness of the Accident Compensation Corporation's (the Corporation) decision. The Corporation determined that their work-related mental injuries were not caused by a single event within the terms of s 21B of the Act and, accordingly, the employees are not entitled to cover.

[2] The employees now seek to pursue claims in the Employment Court alleging their employer breached its health and safety obligations. The employer argues that the Employment Court has no jurisdiction; the employees are "locked into" the Act's procedures and must first exhaust their rights of review and appeal under the Act. Even though the employees no longer dispute the Corporation's decision to decline cover, the employer claims they must press on and pursue further rights of review and appeal. The employer contends this course is mandated by s 133(5) of the Act:

> **133 Effect of review or appeal on decisions**
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> …
>
> (5) If a person has a claim under this Act, and has a right of review or appeal in relation to that claim, no court, Employment Relations Authority, Disputes Tribunal, or other body may consider or grant remedies in relation to that matter if it is covered by this Act, unless this Act otherwise provides.

[3] The Employment Court rejected the employer's contention.[1] The Court could not discern any "obvious reason as to why needless litigation within the ACC regime

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[1] *Cronin-Lampe v The Board of Trustees of Melville High School* [2021] NZEmpC 201 [Employment Court decision].

would be intended" by Parliament.[2] The employer was not persuaded and now appeals to this Court, with leave, on the following question of law:[3]

> Whether the Employment Court has jurisdiction to hear a proceeding in which a claimant has made claims under the Accident Compensation Act 2001 but review and appeal rights under that Act have not been exhausted?

[4] We explain in this judgment why we agree with the Employment Court that the answer to this question is "yes" in the circumstances we have described.

The facts

[5] From 1996 to 2012, Mr and Mrs Cronin-Lampe were employed as guidance counsellors by the Board of Trustees of Melville High School (the Board). They claim the Board failed to meet its health and safety obligations and, as a consequence, they both suffered post-traumatic stress disorder from dealing with multiple student suicides.

[6] In July 2013, Mr and Mrs Cronin-Lampe commenced proceedings against the Board in the Employment Court challenging a determination by the Employment Relations Authority. Three related challenges were commenced in the Employment Court later in 2013 and in 2014. Concurrent proceedings were also commenced in the High Court due to jurisdictional limitations of the Employment Court under the Employment Relations Act 2000. These proceedings have been stayed pending the outcome of the Employment Court proceedings.

[7] In August 2017, the parties consented to directions adjourning the Employment Court proceedings "to allow the ACC process to be resolved" — a reference to the ACC claims Mr and Mrs Cronin-Lampe had commenced in the meantime, in December 2016.

[8] The Corporation declined Mr and Mrs Cronin-Lampe's claims for cover in September 2017. Mr and Mrs Cronin-Lampe were dissatisfied with this outcome and applied for review in December 2017. Following a hearing in June 2018, at which

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2 At [51].
3 *Board of Trustees of Melville High School v Cronin-Lampe* [2021] NZCA 686 at [4].

the Board was represented, the review was allowed. The decision declining cover was set aside and the Corporation was directed to reconsider the applications for cover in accordance with the reviewer's directions.

[9] In December 2018, the Corporation again declined cover. Mr and Mrs Cronin-Lampe each made a second application for review, in April 2019. The reviews were scheduled to be heard in February 2020. However, following consultation with their legal counsel, Mr and Mrs Cronin-Lampe ultimately agreed with the Corporation that they were not eligible for cover because their mental state was not linked to a single event as required under s 21B of the Act. They therefore discontinued their applications for review before the hearing in February 2020.

[10] The parties turned their attention to the Employment Court proceedings. Interlocutory steps were completed, and the pleadings were finalised. The Board pleaded numerous affirmative defences, including that the claims were for damages arising directly or indirectly through personal injury covered by the Act and therefore barred by s 317 of the Act. By August 2021, it was agreed by all parties, including the Corporation which had been given permission to intervene, that there should be a preliminary determination of the jurisdictional question arising under s 133(5) of the Act. It is from the determination of this question that the present appeal is brought.

Employment Court decision

[11] Judge Corkill considered that Parliament's purpose was for the Corporation to be the primary decision-maker as to cover and entitlements under the Act, with any disputes to be dealt with under the statutory processes of review and appeal. The intention was to provide an efficient and specialist regime for resolution of ACC claims.[4] However, the Judge did not consider that claimants were required to pursue all review and appeal rights "ad infinitum".[5] He could not see why "needless litigation within the ACC regime" could have been intended.[6] This would be "inherently unlikely, illogical and contrary to the interests of justice".[7] It could require

4 Employment Court decision, above n 1, at [50].
5 At [51].
6 At [51].
7 At [51].

the parties to incur time and expense dealing with pro forma reviews and appeals.[8] The Judge therefore concluded that s 133(5) had no application in the present circumstances.[9]

Submissions

[12] Mr White, for the Board, submits that the present case is indistinguishable from that considered by the Supreme Court in *Austin v Roche (New Zealand) Ltd*.[10] Mr Austin's claim for cover under the Act was accepted by the Corporation but he subsequently changed his position and commenced proceedings against the respondent in the High Court.[11] The Supreme Court held that the "effect of s 133(5) is … that once a person lodges a claim, they are locked into the Act's procedures".[12] The Supreme Court found that unless Mr Austin brought a review application out of time within one month, his proceeding would be struck out.[13]

[13] In reliance on this decision, Mr White submits that the making of a claim for ACC cover triggers the operation of s 133(5). Once triggered, the claimant is "required to pursue that process to the end before pursuing a claim outside of the Act's process[es] for the same matters" — meaning the claimant is required to "exhaust" the Act's processes irrespective of whether they dispute the Corporation's decision on cover. He says it is clear from the Supreme Court's decision that it does not matter whether a review or appeal has been initiated. The statutory bar continues to have effect for so long as any right of review or appeal remains.

[14] Mr White submits that the Employment Court erred in suggesting that the interpretation he contends for would mean that reviews and appeals would have to be pursued "ad infinitum". He says s 133(5) contemplates only an application for review or an appeal to the District Court. Other possibilities, such as an appeal to this Court on a question of law, require leave and do not constitute "a right of review or appeal" in terms of s 133(5).

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8 At [51].
9 At [60].
10 *Austin v Roche Products (New Zealand) Ltd* [2021] NZSC 30, [2021] 1 NZLR 294.
11 At [3]–[4].
12 At [20].
13 At [36]–[37].

[15] Mr White points out that in a case such as the present where the Corporation and the claimant agree there is no cover, the employer has no right to challenge the decision through the Act's processes by initiating a review or an appeal. For this reason also, he submits that his interpretation is consistent with Parliament's intention that the investigative regime under the Act should be utilised to resolve questions of cover once the process has been triggered by the claimant making a claim for cover.

[16] Mr Braun, for Mr and Mrs Cronin-Lampe, submits that *Austin* is clearly distinguishable. Mr Austin was granted cover by the Corporation but then brought proceedings in the High Court on the basis he was not covered. Here, the claims for cover were declined, twice. Mr Braun supports the Employment Court's analysis and conclusion.

[17] Mr Bisley, for the Corporation, also supports the Employment Court decision. He submits that the primary purpose of s 133(5) is to channel disputes as to cover or entitlement between the Corporation and a claimant into the procedures set out in pt 5 of the Act. Thereafter, their disputes can be quickly and efficiently resolved by specialist tribunals. He argues that s 133(5) was not intended to create a procedural hurdle for intending plaintiffs by requiring them to exercise and exhaust the dispute resolution processes provided in pt 5 when they accept the Corporation's decision. However, he says the provision was not intended to displace the fundamental presumption that a person's rights can only be determined in a proceeding to which they are a party. Because the Board was not party to the pt 5 process, it is not bound by it and is free to argue in the Employment Court that Mr and Mrs Cronin-Lampe's claims are barred by s 317 of the Act.

Assessment

[18] Section 133(5) is a privative provision that requires challenges to decisions made under the Act concerning rights to cover to be brought under the dispute resolution procedures in pt 5. The provision applies where "a person has a claim under

this Act, and has a right of review or appeal in relation to that claim".[14] A "claim" is defined as a claim under s 48 of the Act:[15]

> **48 Person to lodge claim for cover and entitlement**
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> A person who wishes to claim under this Act must lodge a claim with the Corporation for—
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> (a) cover for his or her personal injury; or
>
> (b) cover, and a specified entitlement, for his or her personal injury; or
>
> (c) a specified entitlement for his or her personal injury, once the Corporation has accepted the person has cover for the personal injury.

[19] Part 5 of the Act sets out the dispute resolution procedures. Section 133 sits within this part of the Act. A claimant may apply to the Corporation for a review of any of its decisions on the claim.[16] An employer may apply to the Corporation for a review, but only if the decision is that the claimant's injury is a work-related personal injury suffered during employment with that employer.[17] The application must state the grounds on which it is made.[18] The claimant's employer is entitled to be present at the hearing of a review if it relates to a decision as to cover for a work-related personal injury.[19] The reviewer must provide a reasoned decision.[20]

[20] A claimant may appeal to the District Court against a review decision.[21] The Corporation may also appeal to the District Court against a review decision.[22] The employer may only appeal to the District Court against a review decision that an injury is a work-related injury.[23] Any person who had a right to be present and heard at the hearing of the review is entitled to appear and be heard at the hearing of the appeal.[24]

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14 Accident Compensation Act 2001, s 133(5).
15 Section 6.
16 Section 134(1)(a).
17 Section 134(2).
18 Section 135(2)(d).
19 Section 142(d)(ii).
20 Section 144(2)(b).
21 Section 149(1)(a).
22 Section 149(2)(a).
23 Section 149(4).
24 Section 155(1)(b).

[21] In summary, the claimant and the Corporation have rights of review and appeal against decisions as to cover under the Act. The employer also has rights of review and appeal, but only in respect of a decision that an injury is a work-related personal injury.

[22] In the present case, the dispute between the claimants, Mr and Mrs Cronin-Lampe, and the Corporation as to cover was determined utilising the dispute resolution procedures in pt 5. No further process is contemplated. In particular, there is no provision for the employer to apply for review or appeal to challenge the Corporation's decision that Mr and Mrs Cronin-Lampe are not entitled to cover under the Act, a position they no longer dispute.

[23] In our view, the privative effect of s 133(5) was spent when Mr and Mrs Cronin-Lampe agreed with the Corporation in early 2020 that they have no right to cover under the Act. The dispute resolution process had run its course and the dispute had been resolved.

[24] We agree with Judge Corkill that it cannot have been Parliament's intention that a claimant who accepts the Corporation's decision that he or she is not entitled to cover, would nevertheless be required to "challenge" that decision, by way of review or appeal, before being able to pursue remedies in the Employment Court or elsewhere. We cannot see any useful purpose being served by requiring claimants to challenge by way of review or appeal decisions of the Corporation they agree with. It is unclear what grounds they would advance in their application for review or appeal and what point would be served by the hearing or the requirement for a reasoned decision. Parliament cannot have intended such a farce. The Board's argument overlooks the fundamental point that review and appeal rights are conferred for the benefit of parties seeking to disturb the challenged determination. A claimant cannot be expected to seek review or appeal against a decision he or she does not challenge, even assuming there was a right to do so.[25] Such a review or appeal would likely be regarded as frivolous and an abuse of process. It would be directly contrary to Parliament's intention for disputes about cover to be resolved speedily and efficiently.

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[25] *Dean v Chief Executive of the Accident Compensation Corporation* [2007] NZCA 462, [2008] NZAR 318 at [24]–[25].

[25] We see *Austin* as being distinguishable. The Corporation accepted his claim for cover, but he later disputed the correctness of that decision. He therefore had to utilise the pt 5 processes to resolve that dispute. As Mr Bisley says, Mr Austin was in precisely the opposite position to Mr and Mrs Cronin-Lampe.

Result

[26] The appeal is dismissed.

[27] We answer the question of law on which leave to appeal was granted by this Court:

> Whether the Employment Court has jurisdiction to hear a proceeding in which a claimant has made claims under the Accident Compensation Act 2001 but review and appeal rights under that Act have not been exhausted?
>
> Yes, in the circumstances of this case.

[28] The appellant must pay costs to the respondents for a standard appeal on a band A basis and usual disbursements.

Solicitors:
McElroys, Auckland for Appellant
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