

Supreme Court reins in ACC

McGrath v ACC (SC 127/2010)

This case serves as a salient reminder to ACC that it can only make a claimant undergo the vocational independence process when he or she is “likely” to be assessed as vocationally independent; the process is not to be used as a mere investigative process.

The recent Supreme Court decision of *McGrath v ACC* brings long-awaited clarity to the requirement under section 110(3) of the Accident Compensation Act 2001. The section dictates that ACC must not require a claimant to participate in a vocational independence assessment unless the claimant *is likely to achieve vocational independence* and until the claimant has completed any vocational rehabilitation that ACC was liable to provide under his or her rehabilitation plan.

The Supreme Court emphasised that in order to commence the vocational independence process (consisting of a vocational independence occupational assessment and vocational independence medical assessment) ACC must have evidence that vocational independence is likely, at the date of referral for assessment. The Court agreed that *“likely”* in this context *“is an outcome reasonably in prospect”* (para 33)

Chief Justice Elias recognised that the purpose of section 110(3) is *“to protect claimants from unnecessary assessments where there is no real prospect of vocational independence”* and that *“such assessments are intrusive and upsetting”* (para 32)

In order for a claimant to be vocationally independent, they must be occupationally suited to a particular job and have the medical capacity to work in that job for 30 hours or more.

In this case, when ACC required the claimant to undergo the vocational independence assessments, it had evidence from the claimant’s treating medical practitioners (a specialist in pain management and her general practitioner), that she could only sustain 15 hours of work per week. It did not have any *current* medical information or opinion to suggest that she could sustain anything longer. ACC had previously commenced the vocational independence process and had a vocational independence medical assessment that was over four years old that said the claimant could work for periods of 35 hours or more¹. Ultimately, due to a flaw in the process, the claimant was not found to be vocationally independent. The Chief Justice stated that it was not *“reasonable to rely on an assessment that was four years out of date when supporting the view in September 2008 that vocational assessment was likely to lead to a conclusion of vocational independence when other medical opinions in the interim had expressed quite different views”* (para 37).

¹ At the relevant time, the requirement was that the claimant could work 35 hours or more per week. It is now 30 hours or more.

Further, the Court warned against case managers forming a view that the claimant is likely to be assessed as vocationally independent by extrapolating from experience with others with similar injuries, which is contrary to the claimant's reporting and the history of treatment and expert opinion. In other words, the case manager's assessment must be objective, rather than subjective (para 38).

The issue of the claimant's pain syndrome was also addressed. The Court recognised that notwithstanding the fact that the claimant had self reported pain symptoms, they were of long standing and had been accepted by all professional workers dealing with the claimant. The claimant's pain specialist had certified that her pain symptoms prevented her from working more than 15 hours a week. As such, the claimant's pain management should have been taken into account before a vocational independence assessment was undertaken (para 42).

In relation to Individual Rehabilitation Plans, the Court noted that completion of an individual rehabilitation plan does not in itself justify obtaining a vocational independence assessment, without further consideration of whether completion of the plan bore on whether vocational independence was likely. It cannot simply be seen as the next stage in an inexorable process (para 39).

The Chief Justice emphasised that the vocational independence process is the end of the process, not part of the rehabilitation programme (para 34).

This judgment serves as a pointed reminder to ACC not to use the vocational independence process as a mere investigative process; it must be *likely at the time of the vocational independence process* that the claimant is vocationally independent. It is the author's opinion that the court has effectively placed a burden on ACC to show that it has the evidence to reasonably support the conclusion that it is likely that the claimant will be vocationally independent (para 31).

The nature of these proceedings means that where a claimant does not believe they are likely to achieve vocational independence and/or the claimant has not completed the vocational rehabilitation as specified under the vocational rehabilitation plan, judicial review (rather than the more common ACC review) may need to be sought.

We are finding that the earlier we are involved in the vocational independence process, the fairer it is for the claimant, and the less likely it is that ACC will assess a claimant as vocationally independent.

For further information, please contact one of our team.

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