IN THE SUPREME COURT OF NEW ZEALAND

SC 127/2010
[2011] NZSC 77

BETWEEN	KAREN MCGRATH Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 2 June 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: A C Beck for Appellant
P J Radich and L I van Dam for Respondent

Judgment: 7 July 2011

JUDGMENT OF THE COURT

A The appeal is allowed and the notice given on 9 September 2008 by the Accident Compensation Corporation is quashed.

B Costs are reserved. Counsel may file memoranda if necessary.

REASONS

(Given by Elias CJ)

[1] Under s 107 of the Accident Compensation Act 2001, claimants who are receiving weekly compensation may be required by the Accident Compensation Corporation, "at such reasonable intervals as the Corporation considers appropriate",[1] to be assessed as to their "vocational independence". A determination that a claimant has achieved vocational independence results in the loss of weekly compensation three months after notification to the claimant.[2] "Vocational

1 Accident Compensation Act 2001, s 109(1).
2 Section 112.

independence" is achieved under the current legislation when a claimant is determined by assessment to have the capacity to engage for 30 hours or more a week in work for which he or she is suited.[3] At the time of the events in issue on the appeal, vocational independence was defined as attained when the claimant had the capacity to work 35 hours or more a week.[4] The assessment provided for by the legislation consists of an occupational assessment (which identifies the types of work suitable for the claimant) and a medical assessment (which provides an opinion as to whether the claimant has the capacity to undertake any of the types of work identified in the occupational assessment).[5]

[2] The general power of the Corporation to obtain an assessment of the claimant's vocational independence is restricted by s 110(3) of the Act. As is relevant, s 110 provides:

> **110 Notice to claimant in relation to assessment of vocational independence**
>
> (1) The Corporation must give written notice to a claimant required by the Corporation to participate in an assessment of his or her vocational independence.
>
> (2) ...
>
> (3) The Corporation must not require the claimant to participate in an assessment–
>
> (a) unless the claimant is likely to achieve vocational independence; and
>
> (b) until the claimant has completed any vocational rehabilitation that the Corporation was liable to provide under his or her individual rehabilitation plan.

[3] The appellant, Karen McGrath, has received weekly compensation from the Corporation since she suffered a severely broken ankle in an accident in 2002. After surgery entailing a bone graft and the insertion of screws in her ankle, Ms McGrath was left with mobility limitations (which have been accepted to date as restricting her capacity for employment to sedentary occupations) and with chronic pain for

---

3 See the definition of "vocational independence" in s 6(1).

4 The definition was amended, on 1 July 2010, by s 6(2) of the Accident Compensation Amendment Act 2010. Only assessments commenced after 1 July are to be determined on the basis of the new definition: s 57.

5 Section 108.

which she has received and continues to receive medical treatment. She has limited her hours of employment to 15 hours a week, which she reports to be as much as she can cope with and is an assessment with which agreement is expressed by Dr Muir, her general practitioner, and Dr Acland, a specialist in pain management at Mercy Pain Service to whom she was first referred in 2005 and from whom opinions were further obtained in 2008.

[4] Ms McGrath first saw Dr Acland with the approval of the Corporation for pain management in 2005. In December 2005 he considered she was "coping with her current work hours" of 15 a week while indicating that "[i]f further recovery occurs a graduated increase in work hours could be considered in the distant future with assistance from an occupational health clinician". In follow-up reports on 3 June 2008 and 22 July 2008, provided to the Corporation following funded referrals within the individual rehabilitation plan agreed upon for Ms McGrath, Dr Acland was pleased to find that Ms McGrath had been able to undertake clerical work of 15 hours a week. He considered her ongoing "significant pain symptoms" (with "features consistent with Complex Regional Pain Syndrome following the ankle fracture") had not to that date been sufficiently contained by analgesic treatment to enable Ms McGrath to work longer than the 15 hours a week she was managing. In the letter of 22 July 2008 Dr Acland confirmed his opinion that 15 hours a week appeared to be Ms McGrath's "limit" and expressed the view that "her work capacity will always be pain contingent". He expressed regret that he had "no more to offer, particularly in regard to pharmacological approaches".

[5] The Corporation gave notice to Ms McGrath on 9 September 2008 that she was required to undertake vocational independence assessment. At that time it did not have any current medical information or opinion contrary to the assessments of Dr Acland and Dr Muir to suggest that Ms McGrath could sustain longer hours than the 15 hours a week she was working.

[6] In subsequent correspondence addressed to Ms McGrath's solicitor on 19 August 2008 and 2 September 2008 (not available to the Corporation at the time it gave notice of vocational independence assessment to Ms McGrath on 9 September but in evidence in the High Court), Dr Acland expressed the view that "[s]adly it

does not look as though Karen will be able to return to any vocational pursuit" and expressed support for Ms McGrath's efforts to "obviat[e] the need for her to participate in a vocational independence process" on the basis of his view that she could not sustain working for 35 hours a week.

[7] Ms McGrath applied by way of judicial review to the High Court seeking to have the Corporation's notice requiring her to participate in vocational independence assessment declared unlawful. She claimed that she had not yet completed vocational rehabilitation under her individual rehabilitation plan (which included referral to the Mercy Pain Service) and that the Corporation "had no reasonable basis on which to assert that the plaintiff is likely to achieve vocational independence" when "[t]he specialist to whom the plaintiff was referred reported that she was unlikely to be able to achieve vocational independence".

[8] The claim for judicial review was unsuccessful in the High Court[6] and on appeal to the Court of Appeal.[7] Ms McGrath now appeals to this Court. The appeal turns on whether the Corporation could reasonably have been of the view required by s 110(3)(a) that Ms McGrath was "likely" to achieve vocational independence when it gave notice on 9 September 2008 requiring her to undergo assessment.

Background

[9] The September 2008 requirement of vocational independence assessment was the third initiated by the Corporation in respect of Ms McGrath. Since the Corporation relied in part on information obtained in respect of the earlier attempts to assess Ms McGrath's vocational independence, it is necessary to set out the context in which the information was obtained.

[10] Ms McGrath's claim for earnings related compensation was accepted by the Corporation in June 2002. Initial occupational and medical assessments for the purpose of assessing her vocational rehabilitation needs and formulating an

---

6 *McGrath v Accident Compensation Corporation* HC Wellington CIV 2008-485-2436, 1 May 2009.

7 *McGrath v Accident Compensation Corporation* [2010] NZCA 535.

individual rehabilitation plan under Part 4 of the Act were carried out in early 2003. In the initial medical assessment Ms McGrath was medically assessed by Dr Porteous in May 2003 as capable of undertaking a "sedentary job with the ability to put her foot up as required". The individual rehabilitation plan subsequently prepared included work programmes and a pain management programme. On pain management assessment in November 2003 it was reported that Ms McGrath still had screws in place in her ankle and that "[u]ntil the screws are removed her pain is such that she is unlikely to be ready for more work than a few hours a week". The Corporation sought advice in November 2003 from Ms McGrath's orthopaedic specialist, Mr Matheson, on the removal of the screws and his opinion as to whether vocational independence assessment was appropriate. But the request to Mr Matheson does not appear to have been followed up and did not result in any further report on Ms McGrath's unresolved pain issues before the Corporation initiated vocational independence assessment in early 2004.

[11] In February 2004 Ms McGrath was assessed for occupational capacity and 15 job-types were identified by the reporter as being within her skill capacity. In March 2004 Ms McGrath was then medically assessed as vocationally independent by Dr Antoniadis. While acknowledging the pain suffered by Ms McGrath, Dr Antoniadis expressed the view that additional medication could help modify her pain and could be introduced at the same time as she undertook employment. Dr Antoniadis recommended referral for specialist pain treatment if Ms McGrath's general practitioner, Dr Muir, was not happy with changing her medication for pain relief. On the basis that the introduction of different medication "could help in further modifying her periods of pain", Dr Antoniadis considered Ms McGrath was capable of undertaking five types of work for periods of 35 hours or more per week.

[12] As a result of the positive vocational independence assessment, the Corporation advised Ms McGrath on 31 March 2004 that her entitlement to weekly compensation would end. This determination was quashed on review under the provisions of Part 5 of the Act on 18 February 2005. The Reviewer took the view that the Corporation should have first obtained the opinion of Ms McGrath's orthopaedic surgeon, Mr Matheson, as to whether the screws in her ankle (which had been suggested to be a possible cause of her continuing pain) were able yet to be

removed and whether he was happy for the vocational independence process to be undertaken. A referral for that purpose in November 2003 had not been followed up. The Reviewer referred to a pain management assessment, "correctly" obtained by the Corporation in November 2003, which had given rise to the Corporation's attempt to obtain an opinion from Mr Matheson:

> When the assessor, Ms Berry, reported to ACC on 19 November 2003 she noted:
>
> > Karen has a very good attitude to pain management and life in general. Her personal coping style is excellent and she manages her pain as well as can be expected with the screws still being in place in her ankle.
>
> The assessor continued:
>
> > The specialists have told Karen that the hardware cannot be removed until her bones strengthen. This will take a long time but is steadily progressing. Until the screws are removed her pain is such that she is unlikely to be ready for more work than a few hours a week. She paces herself and challenges herself at a manageable level.

[13] The Reviewer noted that it was as a result of the pain management report that the Corporation had written to Mr Matheson on 25 November 2003 asking him whether Ms McGrath's "hardware" was at a stage when it could be removed and whether he was happy for the Corporation to proceed with the vocational independence assessment. He accepted the submission of the Corporation that its failure to follow up on the report with Mr Matheson did "not demonstrat[e] a flaw in the assessments". He considered, however, that "it demonstrated a flaw in the process":

> In my view, having sought Mr Matheson's opinion on the advice of its Branch Medical Advisor, ACC should have obtained the opinion prior to commencing the vocational independence process.

As a result, the decision was premature:

> [T]he pain issues – which appear to be significant – have not been properly addressed.

[14] The Reviewer concluded:

> I find ACC prematurely commenced the assessment of Ms McGrath's vocational independence. Having sought Mr Matheson's opinion both

> concerning Ms McGrath's pain problem and the removal of the hardware from her ankle, ACC should have obtained that opinion in fact prior to commencing the assessment process.

[15] Further report from Mr Matheson was not obtained.[8] Instead, following the setting aside of the vocational independence determination, the Corporation agreed to Ms McGrath's referral to the Mercy Pain Service for pain management and opinion. A report from Dr Acland of the Mercy Pain Service was received in December 2005. As indicated at [4] above, Dr Acland advised that Ms McGrath was coping with employment of 15 hours a week at that stage but considered that "a graduated increase in work hours" could be considered "in the distant future" if there was "further recovery".

[16] In September and again in November 2007 the Corporation advised Ms McGrath that it was appropriate to undertake a fresh vocational independence assessment. Her solicitor responded that Ms McGrath was working only 15 hours per week. Her general practitioner Dr Muir confirmed that she had significant pain which had not improved and which limited the hours she could work. He reported in December 2007 that "she is in major pain after she has done the current hours". In a certificate supplied to the Corporation in February 2008, Dr Muir certified that Ms McGrath was capable of working only three hours a day, five days a week, a certificate he later repeated in April.

[17] On 9 May 2008, with the approval of the Corporation (which had included funding for such referral in the individual rehabilitation plan for Ms McGrath), Dr Muir referred her for review again to Dr Acland. Despite this referral and without waiting for a report from Dr Acland, the Corporation sought to initiate a fresh vocational independence assessment of Ms McGrath. It obtained an occupational assessment report on 16 May, which reported no "vocational barriers" to Ms McGrath working 35 hours a week. The report writer identified the "vocational rehabilitation activities" undertaken by Ms McGrath since 2003, including the "15 hours per week" worked by her as a clerical worker from 2005 to May 2008. The report assessed Ms McGrath as being vocationally capable of undertaking some 15

---

[8] There is no material available to the Court to indicate whether the screws in Ms McGrath's ankle remain in place, but in the absence of a report from Mr Matheson, that seems likely.

occupation types. That the occupational assessment did not purport to address Ms McGrath's medical limitations is indicated by the fact that the occupation types included several clearly unsuitable for someone with her mobility restrictions.[9] The matching of Ms McGrath's vocational capability to her medical condition was the function of the medical assessment which was the second part of the vocational independence assessment. It should be noted that there has never been any real dispute about Ms McGrath's occupational capacity; the initial assessment made in 2003 identified similar occupations as suitable for her. Although the occupational assessment correctly recorded that the clerical work Ms McGrath had undertaken at a school since 2005 was confined to 15 hours per week, it contained the additional information that "for a month [she] took on temporary additional hours as a receptionist" at the school. It is not clear whether a subsequent notation in relation to the employment at King's High School (that her part-time work at the school was "current[ly] 22½ hours") referred to the month in which additional hours were worked or was in error. A letter from Dr Muir dated July 2008 refers to Ms McGrath having "recently trialled a few more hours because of other staff shortages", an experiment from which she reported she had to withdraw because of pain. It was not suggested in the proceedings that Ms McGrath had in fact worked longer hours than 15 per week other than on the temporary basis so explained.

[18] In June 2008 an individual rehabilitation plan was entered into between Ms McGrath and the Corporation. Only one objective remained: an agreement that "ACC will fund a referral to Mercy Pain Clinic for medical treatment including pain management and recommendations in relation to Mrs McGrath's work hours and duties". Ms McGrath issued proceedings for judicial review challenging the notice requiring her to participate in medical assessment of her vocational independence on the grounds that the assessment was premature since the Mercy Pain Service had not yet reported. The judicial review proceedings were discontinued when the Corporation agreed to withdraw the notice to undertake vocational independence assessment pending receipt of the report from the Mercy Pain Service.

---

[9] Among them commercial cleaner, domestic cleaner, aged or disabled carer, personal care assistant, waiter, and sales assistant.

[19] The reports of 3 June and 22 July by Dr Acland of the Mercy Pain Service (referred to at [4]) were that Ms McGrath's pain had not improved, that she was at the limit of the hours she could manage, and that there were no further treatment options. The Corporation also received a copy of a letter of 8 July 2008 from Dr Muir to Dr Acland advising that Ms McGrath "just barely copes" with 15 hours of work per week.

[20] On receipt of this advice and on the basis that, since the report from Mercy Pain Service envisaged by the individual rehabilitation plan had then been received, it was no longer premature to obtain a vocational independence assessment, the Corporation again gave notice to Ms McGrath on 9 September 2008 that she was required to undertake a vocational independence assessment. The upshot was that Ms McGrath issued the current proceedings for judicial review in the High Court challenging the referral for assessment on the grounds that the Corporation had "no reasonable basis on which to assert that the plaintiff is likely to achieve vocational independence".[10]

The basis on which the Corporation acted

[21] The Corporation in its pleadings in the High Court denied that it had no reasonable basis on which to assert that Ms McGrath was likely to achieve vocational independence. In answer to a request for further particulars of this assertion, the Corporation answered that its assessment that Ms McGrath was likely to achieve vocational independence was "based upon the nature and extent of rehabilitation provided ... and upon the contents of the vocational independence occupational assessment report of 16 May 2008". Mr Hurring, the case officer for Ms McGrath at the Corporation, expanded upon this explanation in his affidavit evidence in the High Court. He referred to the medical treatment and rehabilitative measures provided by the Corporation to Ms McGrath, her completion of the individual rehabilitation plan, and her completion of the occupational assessment component of the vocational independence assessment. He explained that it was only after both the occupational assessment and the medical assessment (which

[10] An additional ground, that the vocational rehabilitation set out in Ms McGrath's individual rehabilitation plan had not been completed, as s 110(3)(b) required, is no longer live.

"considers whether it is feasible for the claimant to engage in any of the roles identified during the occupational assessment for 35 hours per week, having regard to the nature and ongoing effects of the claimant's injury") that "ACC is in a position properly to assess and determine whether the claimant requires further rehabilitation, or whether the claimant is vocationally independent".

[22] Mr Hurring explained the basis for his view that it was appropriate to assess Ms McGrath's vocational independence:

> 21. My assessment that VI [vocational independence] assessment was appropriate was based on the following information contained in Mrs McGrath's file:
>
> (a) The initial medical assessment indicated that Mrs McGrath was medically capable of undertaking three different jobs ...
>
> (b) A VI medical assessment undertaken on 4 March 2004 concluded that she was capable of sustaining five specified jobs for 35 hours or more per week ...
>
> (c) The VI medical assessor's subsequent report of 3 December 2004 reiterated that a job which allowed Mrs McGrath predominantly to sit, but to stand intermittently, would be appropriate and suitable for her ... Notwithstanding the VI medical assessor's determination that Mrs McGrath was medically capable of working 35 hours per week, and his subsequent report reiterating this view, ACC's determination that Mrs McGrath was vocationally independent was ultimately overturned on review. The determination was overturned because ACC failed to consult Mrs McGrath's orthopaedic surgeon as to whether the screws in her ankle ought to be removed before referring her for VI assessment, and this was said to constitute a flaw in the VI assessment process. The reviewer was satisfied, however, that the assessments themselves were not flawed ...
>
> (d) The physiotherapist report of 4 January 2007 indicated that there had been a significant and steady improvement in Mrs McGrath's ability to perform physical activities ...
>
> 22. Furthermore, I considered that VI assessment was appropriate because of my experience with other clients with similar or greater physical impairment, who have been able to return to work, or continue working, in a full-time capacity.
>
> 23. Also, by this stage, ACC had provided Mrs McGrath all the vocational rehabilitation measures due to be provided under the IRP.
>
> 24. At the time of referring Mrs McGrath for VI assessment I was aware of Dr Acland's opinion that Mrs McGrath would not be able to return to any

> vocational pursuit ... However, I felt that Dr Acland's opinion was at odds with the fact that Mrs McGrath had in fact been working around 15 hours a week ... For instance, Mrs McGrath worked 18.45 hours on the week beginning 21 May 2008 ...

[23] Mr Hurring further explained that the judicial review proceedings in July 2008 (compromised by withdrawal of the vocational independence assessment) had been brought on the basis that the referral was premature because the Mercy Pain Service "had not yet been afforded the opportunity to make recommendations to ACC as to her capacity for work hours and duties, in terms of the IRP." After Dr Acland had made his further reports and concluded in his letter of 22 July that "there was nothing more that the Mercy Pain Service could do to assist with Mrs McGrath's treatment for pain and rehabilitation", Mr Hurring considered that the reason for the earlier objection had been overcome and that it was appropriate for the assessment to "recommence".

The decisions in the High Court and Court of Appeal

[24] In the High Court it was accepted, contrary to the submission on behalf of the Corporation, that the decision to require a vocational independence assessment was amenable to judicial review if the condition contained in s 110(3) was not met. Miller J considered the restriction contained in the subsection "recognises that the assessment is of an intrusive and practically compulsory nature, and further that it may lead to adverse consequences, in that it is a prerequisite to a determination that the claimant has vocational independence".[11] He also accepted the submission on behalf of Ms McGrath that s 110(3) required the Corporation to have reasonable grounds, rather than merely a subjective belief, that the claimant is likely to achieve vocational independence, while expressing the view:[12]

> The decision is that of ACC, and the standard cannot be a high one.

---

11 At [23].
12 At [27].

[25] It was not, he thought, necessary for the Corporation to accept the opinion of a claimant's general practitioner, "or a given expert to whom she has been referred under her individual rehabilitation plan":[13]

> The statute does not limit the information that may be taken into account or preclude the exercise of judgement by the case manager, whose decision need not be preceded by any independent medical or other expert assessment.

[26] In the present case, Miller J considered that the Corporation did have reasonable grounds for requiring Ms McGrath to participate in a vocational independence assessment:[14]

> (a) Doctor Acland had completed the report contemplated by the individual rehabilitation plan.
>
> (b) Doctor Acland's opinion appeared, on the face of it, to rest on Dr Muir's assessment that Ms McGrath was unable to work more than 15 hours a week. That in turn appeared to rest on Ms McGrath's self-report, which ACC need not accept at face value. As mentioned, there is evidence that she had recently worked longer hours.
>
> (c) ACC had on file earlier assessments by two occupational health medical practitioners, who had separately concluded that Ms McGrath is able to work in positions that do not require her to stand for significant periods. Dr Porteous had concluded that because Ms McGrath had indications of chronic pain she needed to be in a sedentary job with the ability to put her foot up as required. He recorded that Ms McGrath acknowledged that she could work as a cashier, ticket seller, receptionist, or information clerk. Dr Antoniadis considered that Ms McGrath could sustain up to 35 hours or more per week in a role as a cashier. She could also work as a ticket seller, telemarketer, patient receptionist, information clerk or other receptionist. Again, Ms McGrath had agreed with this assessment.

[27] Since the Corporation had reasonable grounds to conclude that vocational independence was likely, Miller J concluded that the requirements of s 110(3) had been met and the requirement of assessment was lawful.

[28] On Ms McGrath's appeal to the Court of Appeal, the Corporation accepted that the power to require claimants to participate in a vocational independence assessment is amenable to judicial review if unreasonably exercised. The Court of

---

13 At [29].
14 At [30].

Appeal held that s 110(3) made it necessary for the Corporation to have a reasonable basis for its view that a claimant is likely to achieve vocational independence before it can require vocational independence assessment. In this conclusion, it affirmed the decision in the High Court, while apparently approving the view of Miller J that the standard of scrutiny on judicial review could not be "high". Certainly it quoted Miller J's opinion as to such standard without expressing any disagreement.[15] And in dismissing Ms McGrath's argument on the appeal that, in the light of Dr Acland's report, the Corporation had no reasonable grounds for concluding that vocational independence was likely to be achieved, it considered it was "open to ACC" to consider that s 110(3) was fulfilled if it could point to any basis for the view:

> [38] As to whether the prerequisites in s 110(3) were met in this case, we consider that it was open to ACC to take into account all of the information on the file, including information preceding Dr Acland's opinion and also to rely on the case manager's experience of similar injuries when deciding whether to order a vocational independence assessment. While it is clear that, under s 110(3), Parliament has put constraints on the ability of ACC to undertake vocational independence assessments it is hard to imagine a court intervening if there is some reasonable basis, whether only in terms of a case manager's experience or otherwise, for considering that vocational independence is likely to be achieved within a reasonable timeframe and thus that a vocational independence assessment is appropriate.
>
> [39] In the course of undertaking the vocational independence assessment and deciding on the next steps, however, ACC will have to take into account Dr Acland's opinion, including the basis for it, and also Ms McGrath's chronic pain. [footnote omitted].

[29] As is implicit in this conclusion, the Court of Appeal considered that there was no "set timeframe" indicated by the language of s 110(3)(a). It took the view that, although the phrase "is likely to achieve vocational independence" did "appear to require assessment of a claimant's current and immediate ability to achieve vocational independence", it did not "[h]owever, ... necessarily have a set timeframe".[16] In this connection, the Court suggested, "[f]urther", that the result of the vocational independence assessment "could simply be that further rehabilitative steps are recommended":[17]

> Thus a vocational independence assessment can be undertaken with a view to assessing what those steps should be. As ACC submits, the whole point

---

15 At [34].
16 At [35].
17 At [36].

> of an assessment is to obtain information on the basis of which a decision can be reasonably made. It is merely a process commenced to obtain an outcome, which is not necessarily that of immediate vocational independence.

Judicial supervision of fulfilment of the condition in s 110(3)

[30] Section 110(3) sets a threshold for exercise of the Corporation's power to require vocational independence assessment for a claimant receiving weekly compensation. Compliance with the threshold set by the legislation can be compelled through recourse to the supervisory jurisdiction of the court, as has been accepted by the Corporation since the judgment of the High Court.

[31] It is inappropriate to suggest, as the respondent's submissions do and as the reasons in the High Court and Court of Appeal appear to allow, that the "standard" of scrutiny imposed by the court "cannot be a high one". The responsibility of the court on judicial review is to ensure that the legislative condition is fulfilled. Since the condition turns on a judgment (that the claimant is "likely to achieve vocational independence"), its fulfilment may not be susceptible to exact demonstration. But to succeed the plaintiff must bring the court to the conclusion that the condition was not fulfilled. That assessment is one of substance. It is not enough that there is information available to the Corporation upon which it acted, if that information does not reasonably support the conclusion that the statutory condition is fulfilled. It is not clear that the High Court or the Court of Appeal intended to suggest anything different. But the incorporation into the reasoning of a low standard of review was an erroneous approach. The court was obliged to assess the objective reasonableness of the view that vocational independence was likely to be achieved. In the Court of Appeal the view taken was that it was open to the Corporation to rely on information on its files and the experience of the case officer. That was effectively treated in itself as determinative, without further consideration of whether the information and the experience supported the conclusion that the s 110(3) requirement was met. Nor did the Court of Appeal examine the reasons why Miller J was brought to that conclusion in the High Court. It appears that the High Court and Court of Appeal did not properly consider whether the condition in s 110(3) was substantively fulfilled because of the mistaken view that the supervisory jurisdiction did not call

for such assessment. If so, that approach may explain why we come to a different conclusion on the merits of the appeal in the reasons that follow.

The meaning and purpose of s 110(3)

[32] The legislative history of s 110(3) suggests that its purpose is to protect claimants from unnecessary assessments where there is no real prospect of vocational independence. Such assessments are intrusive and may be upsetting. The provision was inserted into the Injury Prevention and Rehabilitation Bill[18] on the recommendation of the Select Committee. In its report the Select Committee indicated that the change followed its acceptance of a submission by the Council of Trade Unions and others that the Corporation should "only refer a claimant to the capacity for work assessment procedure if it believes that the claimant has a likely capacity for full-time work".[19] The Select Committee explained this amendment and others concerned with the procedures for assessing capacity for work as being "to ensure that there is sufficient emphasis on targeted, realistic and achievable rehabilitation to meet the rehabilitation requirements of the bill".[20]

[33] The Select Committee proposal that a belief in "likely capacity for full-time work" should be required before assessment is the origin of the prohibition in s 110(3) on requiring a claimant to undertake vocational independence assessment "unless the claimant is likely to achieve vocational independence". Counsel accepted and we agree that "likely" in this context is an outcome reasonably in prospect.[21]

[34] The prospect to be considered is as at the time the assessment is required. That is consistent with the scheme of the legislation and the language of s 110(3). The legislation is built around rehabilitation. Vocational independence is achieved on successful rehabilitation. It is the end of the process, not part of the rehabilitation

---

18 The Bill was renamed and enacted as the Injury Prevention, Rehabilitation, and Compensation Act 2001. Its name has since been changed once more, with effect from 3 March 2010, to the Accident Compensation Act 2001.

19 Injury Prevention and Rehabilitation Bill 2000 (90-2) (select committee report) at 6.

20 Ibid, at 6 and 15.

21 The *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford, 2007) defines "likely" as "to be reasonably expected".

programme. Mr Beck was, in our view, right to maintain that the vocational independence assessment is "not in the nature of a 'progress report'" on rehabilitation. The medical assessment which is the last step in the vocational assessment is solely concerned with whether the claimant has the capacity to undertake the work identified as being occupationally acceptable for him.[22] Before the point when vocational independence is likely and requires assessment, the Corporation has the ability to obtain medical or occupational assessments that may assist in rehabilitation under responsibilities imposed upon the claimant under s 72. If read in isolation, s 110(3) could perhaps be taken to look to future attainment of vocational independence over a longer timeframe (as the Court of Appeal treated it). But it is clear from s 110 as a whole that vocational independence is achieved through and at the time of the required assessment. Indeed, the Corporation did not support the approach suggested by the Court of Appeal and takes the view, in agreement with the appellant, that vocational independence must be likely at the time of referral, rather than within a longer time frame.

[35] That concession was properly made. The Corporation by s 110(1) gives notice to a claimant "to participate in an assessment of his or her vocational independence". "Vocational independence" is a defined term. It is capacity for work "as determined under section 107".[23] Section 107 provides that the Corporation determines vocational independence only "by requiring the claimant to participate in an assessment carried out ... in accordance with sections 108 to 110 ...". In this statutory context, the restriction of the requirement to participate in vocational independence assessments under s 110(3) to cases where "the claimant is likely to achieve vocational independence" can only sensibly be construed as a likelihood that the assessment itself will result in the outcome of vocational independence. No longer timeframe is envisaged by the statutory scheme. And a longer timeframe (which would enable assessments where there is no immediate prospect of vocational independence but where such outcome is likely in the future) would result in unnecessary assessments and would be inconsistent with the policy behind s 110(3) to be found in the statutory history.

---

22 Accident Compensation Act 2001, s 108(3).

23 Section 6(1).

[36] The Court of Appeal was in error both in looking to a longer timeframe than the time of assessment and in the suggestion that vocational assessment can be required with a view to identifying further rehabilitative steps that may be desirable. The effect of s 110(3) is that the Corporation can require a claimant to undergo vocational independence assessment only when the claimant is likely to be assessed as vocationally independent. The appeal therefore turns on whether it was reasonably in prospect that Ms McGrath would be assessed as vocationally independent when she was given notice under s 110(1) on 9 September 2008 – in other words, whether the condition was met.

Was it likely that Ms McGrath would achieve vocational independence on assessment in September 2008?

[37] Since early 2004 the only impediment to Ms McGrath's achieving vocational independence has been the chronic pain she suffers as a result of the injury to her ankle. Although she was assessed as vocationally independent for five types of sedentary occupation by Dr Antoniadis in March 2004, his opinion did not address the issue of pain beyond acknowledging it and suggesting additional pain medication or alternatively referral for specialist pain treatment. On the basis that issues of pain management had not been properly addressed and that the pain appeared to be "significant", the vocational independence assessment based on Dr Antoniadis's medical assessment was set aside on review in February 2005. In explaining why in September 2008 he nevertheless relied on Dr Antoniadis's March 2004 opinion, Mr Hurring, the case manager, stressed that the Reviewer had not criticised Dr Antoniadis's assessment when setting aside the vocational independence assessment. That approach strikes us as unduly formalistic. The Reviewer found in effect that the medical assessment was premature because the significant pain issues (also referred to in the pain management assessment by Ms Berry referred to in the decision and from which we have quoted in [12] above) had not first been addressed. If the assessment of vocational independence was "prematurely commenced", as the Reviewer found, then Dr Antoniadis's assessment should properly have been viewed in 2008 as largely irrelevant to the real matter in contention: whether Ms McGrath was suffering continued pain which affected her occupational capacity. It is clear from the terms of his own assessment that Dr Antoniadis did not purport to deal with

the dimension of pain and envisaged the potential need for specialist advice and treatment. Nor could it be reasonable to rely on an assessment that was then four years out of date as 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 (obtained as part of the individual rehabilitation plan and which had necessitated compromise of another premature attempt at vocational independence assessment) had expressed quite different views.

[38] Mr Hurring said in his affidavit that, in addition to the Dr Antoniadis assessment, he had relied on the report of a physiotherapist which reported improvement in Ms McGrath's "ability to perform physical activities", completion of all the individual rehabilitation plan and his own experience with other clients "with similar or greater physical impairment" who had been able to work full-time. This information and experience is concerned with physical disability. It does not meet the real impediment to full-time employment in the present case, which is with the significant pain (described by Dr Acland as "consistent with Complex Regional Pain Syndrome") and its effects. We do not suggest that case officers of the Corporation cannot rely on their own experience in forming a view as to the likelihood of vocational independence in a particular case. But the experience must be such as to provide sufficient basis for the judgment. Here, the pain described by the claimant, supported by her history of treatment and accepted by expert opinion, could not reasonably have been met by extrapolating from experience with others with similar physical injuries.

[39] The completion of the individual rehabilitation plan also relied on by Mr Hurring, occurred with the receipt of Dr Acland's reports of 3 June and 22 July 2008, which were supplemented by the letter from Dr Muir of 8 July 2008. Since these reports described Ms McGrath's inability to cope with more hours of work than 15 per week, their substance cannot have been relied upon in forming a view that vocational independence was reasonably in prospect. Rather, the formal completion of the plan seems to have been regarded as justifying the view that it was no longer premature to obtain vocational independence assessment, as if it were the next stage in an inexorable process, without further consideration of whether

completion of the plan bore on whether vocational independence was likely, as required by s 110(3)(a).

[40] Mr Hurring acknowledged in his affidavit Dr Acland's opinion that Ms McGrath "would not be able to return to any vocational pursuit" because of her pain, but considered it was "at odds with the fact that Mrs McGrath had in fact been working around 15 hours a week" and, on occasion, for increased hours (although well short of the 35 hours required for vocational independence). It is quite clear from the July correspondence supplied to the Corporation (referred to at [4]) that Dr Acland knew and reported that Ms McGrath was working 15 hours a week. He expressed the view that those hours appeared to be "her limit". In subsequent correspondence in August, to which the Corporation did not refer in giving notice of vocational independence assessment on 9 September 2008, Dr Acland expressed the view (apparently relied upon by Mr Hurring in his affidavit) that "[s]adly it does not look as though Karen will be able to return to any vocational pursuit". That can only have been in context a reference to vocational pursuit at the level of 35 hours a week since it is clear that Dr Acland was well aware and pleased that Ms McGrath was working for 15 hours a week. It is not clear from the affidavit whether Dr Acland's perhaps incomplete reference to "any vocational pursuit" (a point he immediately clarified when Ms McGrath's solicitor asked him for clarification) was seriously relied upon by the Corporation as justifying putting his opinions aside. It seems unlikely, if only because the letter was not referred to at the time notice was given on 9 September (whereas Dr Acland's opinions of 3 June and 22 July were) and because at that time Dr Acland's received opinions had acknowledged the 15 hours and expressed the view that they were the limit Ms McGrath could undertake. If there was any confusion, it was readily cleared up. In fact Dr Acland has been consistent in the view that Ms McGrath is not likely to be vocationally independent because of the pain to which she is subject. No reasonable basis for rejecting that opinion is disclosed in Mr Hurring's affidavit. It is not to be found in the explanation that the opinion is "at odds" with the work being undertaken by Ms McGrath.

[41] In the High Court, in addition to the factors identified by Mr Hurring (which Miller J accepted), the Judge thought that a further basis on which it was reasonable

for the Corporation to require vocational independence assessment was the fact that Dr Acland's opinion appeared in the end "to rest on Ms McGrath's self-report" and that Ms McGrath herself had agreed with the earlier assessments of Dr Porteous (who did the initial assessment for the purposes of rehabilitation) and Dr Antoniadis as to the types of occupation she could perform.[24] As already indicated, the types of occupation considered suitable for Ms McGrath's continuing disability have not been in dispute. What has been in issue since her vocational rehabilitation got underway is the pain associated with her injury and its impact on her ability to attain vocational independence.

[42] In November 2003 pain management assessment by Ms Berry had found that work of more than "a few hours a week" was beyond Ms McGrath but that she had "a very good attitude to pain management". Dr Antoniadis's report in 2004 did not address the pain issues identified by Ms Berry (and the subsequent vocational independence assessment was overturned for that reason). In December 2005 Dr Acland considered that, although Ms McGrath was then coping with 15 hours of work a week, despite her pain, she might be assisted "if further recovery occurs" to gradually build up her work hours. In 2008 he expressed himself pleased that she had been able to take on employment of 15 hours a week but described continuing "significant pain symptoms". Dr Muir, who has been treating her for pain, has continued to certify that her pain symptoms prevent her working longer than 15 hours a week. If these are "self-reported" symptoms, they are of long standing and have been accepted by all professional workers dealing with Ms McGrath, including Dr Antoniadis (who suggested changes to pain medication or specialist referral for pain management, subsequently made to Dr Acland). Pain management was also accepted by the Reviewer in 2005 as needing to be addressed before vocational independence assessment was undertaken. It is in addressing the question of pain in accordance with the requirement of the Reviewer that Dr Acland's further opinion has been obtained. Since it is to the effect that vocational independence assessment should not be undertaken because Ms McGrath is at the limit of the hours she can work at 15 per week, there is no reasonable basis put forward to explain how the Corporation could take the view that vocational independence (the capacity to

---

[24] At [30].

engage in work for 35 hours or more a week) was likely on assessment in September 2008.

[43] If the Corporation was dissatisfied with the opinions of Dr Acland and Dr Muir (and the earlier report of Ms Berry) as to the severity and treatment of Ms McGrath's pain, or if it wanted a further opinion, it could properly have asked Ms McGrath to undergo further medical assessment under s 72. Such opinion might sensibly have been obtained from Ms McGrath's orthopaedic surgeon, as had been proposed in 2003 and as the Reviewer had suggested in 2005. The Corporation might then have obtained a basis upon which it could reasonably have formed the view that vocational independence was likely.

[44] As it was, we consider that there was no basis upon which the Corporation could reasonably have considered that vocational independence was likely to be found on assessment of Ms McGrath when it gave her notice of assessment in September 2008. The condition imposed by s 110(3)(a) is not met and we would quash the notice.

Solicitors:
Peter Sara, Dunedin for Appellant
Minter Ellison Rudd Watts, Wellington for Respondent