



[2] Under the ACC Act, Alliance is an Accredited Employer (AE)<sup>1</sup> and contracts a Third-Party Provider (TPP)<sup>2</sup> to represent it in relation to its role as an AE.

[3] Mr Scott was declined cover for both issues, shoulder and neck, based on a medical assessment saying that the symptoms and subsequent diagnoses were degenerative and not related to Mr Scott's work. Mr Scott was informed of these decisions by the TPP and then filed two reviews about these decisions under the ACC dispute resolution procedure. Mr Scott then obtained an expert report that supported his claim for cover for his shoulder but not the neck (R Report). The TPP for the AE (Alliance) then obtained an expert report (W Report) that also supported the shoulder issues were likely related to Mr Scott's work. Alliance as the AE received the W report about 10 weeks before Mr Scott did and acknowledges there was a delay. It says the delay was inadvertent. Mr Scott disagrees.

[4] The procedure for the reviews then went to a phone conference stage. The next day ACC, through the TPP, notified Mr Scott in writing that it had reversed its earlier decision declining cover for his shoulder but leaving in place the decline for cover for his neck.

[5] After this, Mr Scott withdrew both of his review claims which meant that the review process ceased and the hearing that had been scheduled was vacated. Mr Scott's legal representative sought payment of her costs as incurred by Mr Scott for her services. The TPP sought instructions from the AE and those costs were paid as requested by Mr Scott's legal representative.

[6] Mr Scott through his representative raised a personal grievance in a letter dated 17 January 2022. The respondent agreed it could be raised outside of the 90-day time frame.

[7] Mr Scott claims he was disadvantaged in his employment because he alleges that:

- a. Alliance delayed obtaining an additional medical assessment during its investigation into his initial claims for cover;
- b. a cover decline letter from the TPP declined cover because the problem was degenerative when Mr Scott had not claimed for degeneration, and this would affect his ability to claim for degeneration in the future;

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<sup>1</sup> Refer legislation

<sup>2</sup> Refer legislation

- c. after he lodged his reviews of the decisions to decline cover Alliance did not disclose it already had the W Report supporting his claim for cover for his shoulder and then withheld this report causing a delay in the review process;
- d. that Alliance insisted during the phone conference prehearing through the TPP that Mr Scott's applications for review should still go ahead to a full hearing when the parties' respective reports (the R and W Reports) were consistent and supported that Mr Scott's shoulder injury was likely the result of work-related use.

[8] Mr Scott claims that Alliance breached its duty of good faith and its common law duty of trust and confidence to him, based on the same set of circumstances set out above.

[9] Mr Scott seeks compensation for the disadvantage grievances and for a breach of trust and confidence; a penalty for breach of good faith; any "other monies" in lost wages as a result; and costs.

[10] Alliance says in reply that there is no jurisdiction to hear Mr Scott's claim because it is based on things that happened in the dispute resolution process under the ACC Act. It says that s133(5) of the ACC Act specifically excludes this jurisdiction dealing with these types of matters and granting remedies. In the alternative, if the matter proceeds, Alliance denies Mr Scott's substantive claims.

[11] This determination deals with the preliminary issue of jurisdiction, the outcome of which will determine whether the substantive matter will proceed.

### **The Authority's investigation**

[12] The parties provided written submissions and material to support their positions. I then held an Investigation meeting on 12 September 2022 and heard from counsel for the parties on their submissions.

[13] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders made. It does not record all submissions received.

## **The issue**

[14] The issue to determine is whether the Authority has jurisdiction to hear Mr Scott's claims about his employment relationship problem.

## **Relevant legislation**

[15] Section 161 of the Employment Relations Act 2000 (ER Act) provides that it has exclusive jurisdiction to make determinations about 'employment relationship problems'.

[16] Section 5 of the ER Act provides a definition of an 'employment relationship problem' as:

Includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship but does not include any problem with the fixing of new terms and conditions of employment.

[17] The ACC Act provides for a Dispute Resolution procedure at Part 5 under which is included:

### **Effect of review or appeal on decisions**

s133

...

(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. [Italics added for emphasis]

### **Who may apply for review**

S 134(1)

1) A claimant may apply to the Corporation for a review of—

- (a) any of its decisions on the claim:
- (b) any delay in processing the claim for entitlement that the claimant believes is an unreasonable delay:
- (c) any of its decisions under the Code on a complaint by the claimant.

(2) An employer may apply to the Corporation for a review of its decision that a claimant's injury is a work-related personal injury suffered during employment with that employer.

(3) An employer may not apply to the Corporation for a review of a decision about the entitlements that have been or are to be provided to a claimant who has cover for a work-related personal injury.

## **Discussion**

[18] Mr Scott submits that the provisions in the ACC Act do not prevent him from bringing the claims he makes in this jurisdiction.

[19] Mr Scott says that that an Employment Court decision supports his position<sup>3</sup>. The Court in that matter found two employees were still able to make claims against their employer for not keeping them safe despite having cover declined for PTSD related to events during their employment. This was after the employees had been declined for cover, sought ACC review and then after a resolution about the management of documentation, withdrew their applications for review. Alliance says this case appears to be continuing in the Courts but in any event that it is different to Mr Scott's situation and has marginal relevance. I agree. The actions that Mr Scott claims here are based on matters directly relating to the ACC process in investigating cover (delay in either obtaining or providing an expert report) and then reviewing his claim (delay in providing or withholding an expert report; wrongly categorising a decline decision as 'degeneration' affecting future claims; not immediately agreeing to not proceed to a hearing for the reviews when both reports supported cover for one part of the review). These are not things relating to the employment relationship between Alliance as employer and Mr Scott as employee, in that Alliance was at the time of these things happening in the AE role.

[20] Mr Scott submits that the things he bases his claims on are not contained under s 134 of the ACC Act because they relate to the process prior to any decisions being made on his claims. This submission extends to including that the first action claimed about the delay of the medical assessment report prior to the two decline letters cannot fall within s 134(1)(b) because the delay referred to relates to 'entitlements' and not 'cover'. He says there had been

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<sup>3</sup> *Cronin-Lampe v BOT of Melville High School* [2021] NZEmpC 201

no decision about cover at the time of this alleged delay hence it was not at the stage of the subsequent processing of entitlements.

[21] Alliance submits that s 134(1)(a) relates to a person having a right of review for any of its 'decisions' on the claim. It notes that the definition of 'decision' under s 6 of the Act includes 'a decision made under the Code<sup>4</sup> about a claimant's complaint' and refers me to s 40 of the ACC Act which sets out the purpose of the code including how the Corporation<sup>5</sup> should deal with claimants. The code places obligations relating to the Corporation giving access to information and keeping a claimant fully informed. Right 5 of the Code refers to a claimant having the right to 'effective communication' and that ACC will communicate with the employee 'openly, honestly, and effectively.' The rights are broadly stated, and I accept Alliance's submission that they cover the things that Mr Scott complain happened during his application for cover and applications for review. Alliance also refers me to the definition of 'Corporation' under the Code as including an 'accredited employer.'<sup>6</sup> I also note that under 'Application of the Code', 'accredited employers' ... 'must also comply with the code.'<sup>7</sup> This returns me to the point I referred to above. I accept that during the time that Mr Scott alleges all of the actions that form the basis of his claims Alliance could only have been in the AE role, hence part of the decision maker role under the ACC code.

[22] While it is submitted for Mr Scott that he did not make a complaint under the Code and could not be compelled to do so, s 133(5) refers to a person having the right to do so and does not refer to having had to have done so.

[23] Mr Scott submits that he is claiming remedies arising out of how his employer, Alliance, treated him and refers to an Employment Court<sup>8</sup> finding that an employee could bring employment claims despite being in an ACC process. Alliance says that case is different because it involved an employee required by his employer to fill in an ACC application form a certain way and who was suspended and terminated. I accept that this is different to Mr

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<sup>4</sup> Injury Prevention, Rehabilitation, and Compensation (Code of ACC Claimants' Rights) Notice 2002 originally given by the Minister for ACC under s 44 of the Injury Presentation, Rehabilitation, and Compensation Act 2001.

<sup>5</sup> Term used to describe ACC.

<sup>6</sup> Clause 1.5 of above at 3.

<sup>7</sup> Cluse 1.4 of above at 3.

<sup>8</sup> *Austin v Silver Fern Farms Limited* [2014] NZEmpC 30.

Scott's claims. In that case only the employer entity could take those actions of suspension and dismissal and not the AE.

[24] Standing back and considering the statutory restriction under s 133(5) of the ACC Act against the above, I am not satisfied Mr Scott can continue his claims in this jurisdiction.

### **Outcome**

[25] Mr Scott's claims are outside of the jurisdiction of the Authority and his claims cannot continue.

[26] The substantive investigation meeting dates previously scheduled for 20 and 21 February 2023 are vacated.

### **Costs**

[27] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[28] If they are not able to do so and an Authority determination on costs is needed then given the time of the year pending a summer break Alliance may lodge, and then should serve, a memorandum on costs by no later than 20 January 2023. From the date of service of that memorandum Mr Scott would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Antoinette Baker  
Member of the Employment Relations Authority