

Accident Compensation Corporation exercise of discretion found to be misleading and deficient

Legislation	Ombudsmen Act 1975, Accident Rehabilitation and Compensation Insurance (Experience Rating) Regulations 1993, Accident Rehabilitation and Compensation Insurance Act 1992
Agency	Accident Compensation Corporation
Ombudsman	Sir Brian Elwood
Case number(s)	C4868
Date	1999

Exercise of ministerial discretion—effect of advice to Minister fettered exercise of discretion—matter resubmitted to Minister for reconsideration—complaint deemed resolved—Accident Rehabilitation and Compensation Insurance (Experience Rating) Regulations 1993, regulation 7

Section 104 of the Accident Rehabilitation and Compensation Insurance Act provided for the adjustment of a premium paid by an employer by reference to the accident experience of or attributed to that employer. The formulae for assessing the level of the adjustment were set out in the Accident Rehabilitation and Compensation Insurance (Experience Rating) Regulations 1993. The Accident Rehabilitation and Compensation Insurance Corporation (ACC) is required to apply the loading based on the employer's claims experience, subject only to the exercise of a discretion by the Minister under regulation 7 which provides:

A qualifying claim shall not be attributable, or deemed to be attributable, to an employer if the qualifying claim resulted, directly or indirectly, from any event, happening, or cause which is declared by the Minister to be an adverse event for the purpose of this regulation, unless an employer, by any prior or contemporaneous act or omission of the employer, materially contributed to the personal injury by accident or work injury which gave rise to the qualifying claim.

An employer complained that ACC had acted unfairly or unjustly in imposing a loading on the premium he was required to pay. This loading had been imposed as a result of a work related accident in which one of his employees had been fatally injured, even though an investigation by the Occupational Safety and Health Service (OSH) had relieved the employer of responsibility

for the accident. OSH had issued proceedings against a third party in respect of the accident. The employer considered that the Minister should have exercised his discretion and declared the circumstances of the accident to be “an adverse event”, but he had declined to do so. The investigation focused on the nature of the advice provided to the Minister on the exercise of the discretion.

Practical Shooting Institute (NZ) Inc v Commissioner of Police [1992] 1 NZLR 709 reviewed a number of decisions relating to the fettering of discretion, including the case of *British Oxygen Co Ltd v Minister of Technology* [1970] 3 All ER 165. The general principle derived from that case was that although a judicial or administrative entity exercising a discretion can adopt a policy for dealing with the cases that come before it, in doing so, it cannot ignore representations from interested parties that the policy should not apply to them or, alternatively, that it should be modified either generally or in the particular case.

The advice submitted to the Minister regarding the application of the discretion under regulation 7 of appeared to be deficient and misleading, although unintentionally so. It did not address the issues involved in the exercise of the discretion, nor did it address the purpose of the discretion, or whether exercising the discretion in the circumstances of this particular case would be consistent or inconsistent with that purpose. The view was put to the ACC that:

1. regulation 7 conferred a discretion on the Minister to declare an event, happening or cause to be an adverse event;
2. that discretion is not limited to special or extraordinary circumstances;
3. the discretion must be exercised on the merits of the case, irrespective of any general policy; and
4. the discretion must be exercised for the purpose for which it was given.

Having regard to the advice given, the Minister may have been fettered in the exercise of his discretion. The ACC accepted those views and agreed to resubmit the matter to the Minister. The revised advice addressed the relevant issues in such a way as to enable the Minister to exercise his discretion unfettered by irrelevant considerations. On this basis, the investigation was discontinued on the grounds that the cause of the complaint had effectively been resolved.

Comment

The well-known Lord Wrenbury observation ‘*a discretion does not empower a man to do what he likes ... he must ... do not what he likes but what he ought*’ (*Roberts v Hopwood* [1925] AC 578, 615) is reflected in *CREEDNZ v Governor General* [1981] NZLR 172, 196 where it was said: ‘*anyone exercising a statutory discretion must apply themselves properly in law. They must call their attention to the matters they are by statute expressly or impliedly to consider and they must exclude considerations which are on the same test extraneous*’.

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