

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 393/10  
5301547

BETWEEN                      GEORGE (JIANXIN) WANG  
   Applicant  
  
AND                                MCCONNELL DOWELL  
   CONSTRUCTORS LIMITED  
   Respondent

Member of Authority:        R A Monaghan  
  
Representatives:              George Wang in person  
   C Gordon, counsel for respondent  
  
Investigation meeting:        13 August 2010  
  
Determination:                31 August 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     George Wang is an employee of McConnell Dowell Constructors Limited (McConnell Dowell). In November 2009 he was seriously injured in an accident at work and is not expected to be able to return to his former occupation.

[2]     Mr Wang seeks compensation from McConnell Dowell under various heads including:

- . reimbursement of a proportion of his past earnings while he retrains and undertakes a course of study to that end, as well as reimbursement of the expected tuition fees;
- . compensation for the physical effect of some of his injuries;
- . compensation for the physical effect on him, and in particular the increased risk of cancer, of the X-rays and CT scans he has undergone or will undergo because of his injuries; and

. compensation for the mental harm suffered by himself and his family as a result of the injury, and from rude treatment accorded to him during the rehabilitation process.

[3] The grounds on which Mr Wang says he is entitled to this compensation include:

- . McConnell Dowell's failure to take adequate safety steps, including a concern about the adequacy of the warning lights and signalling in the construction tunnel where the accident occurred;
- . a disagreement about the application of the 'vocational independence' clause in the agreement between himself as claimant and Work Aon, his ACC case manager and McConnell Dowell's ACC service provider; and
- . a concern that the independence of his doctors was being compromised.

[4] Mr Wang has also raised a concern about redundancy. The project on which he was working at the time of his accident was to end in or about March 2010 and Mr Wang planned to move to another project in Australia. The intervention of his accident meant that he remained in McConnell Dowell's employ on light duties until a deterioration in his condition rendered him unable to work at all, although as at the date of the investigation meeting his employment had not ended. According to the statement of problem he says his redundancy should not be implemented until certain medical procedures have been completed, expected to be about September 2010.

[5] Accordingly Mr Wang seeks a declaration that he be made redundant as at September 2010.

### **The Accident Compensation Act 2001**

[6] Section 317 of the Accident Compensation Act 2001 (the ACC Act) provides as follows:

*"(1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of -*

*(a) personal injury covered by this Act ...*

*(b) ..*

*(2) Subsection (1) does not prevent any person bringing proceedings relating to, or arising from –*

...

*(b) any express term of any contract or agreement (other than an accident insurance contract under the Accident Insurance Act 1998) ...; or*

*(c) the unjustifiable dismissal of any person or any other personal grievance arising out of a contract for service.*

*(3) However, no court, tribunal, or other body may award compensation in any proceedings referred to in subsection (2) for personal injury of the kinds described in subsection (1)*

[7] The injury which Mr Wang suffered was a personal injury covered by the ACC Act. Matters including Mr Wang's treatment, rehabilitation and compensation are being managed through a private provider, Work Aon.

#### 1. The grounds on which Mr Wang seeks compensation

[8] The effect of s 317 of the ACC Act is to limit significantly the availability of any claim for compensation or damages outside of the scheme contained in the Act. Paragraph [3] in this determination lists the three grounds on which Mr Wang says he is entitled to compensation. Only first is capable of founding any claim for damages or compensation, with the other two being matters of disagreement best addressed either informally or under the dispute resolution provisions available under the ACC Act or through Work Aon.

[9] As to the first, Mr Wang says McConnèll Dowell failed to take adequate safety steps in a number of respects which he set out, the most significant of which (as I understand his concerns) concerned the adequacy of the system of warning lights and signalling in the construction tunnel where the accident occurred. Section 317(1) prevents him from bringing any proceeding in respect of this or any of his concerns about the adequacy of safety procedures on the work-site unless s 317(2) applies, and further subject to the proviso to subsection (2) contained in s 317(3).

[10] Subsection (2) does not prevent proceedings relating to or arising from any express term of any contract or agreement, or a personal grievance. Nothing in the documentation before the Authority indicates whether Mr Wang seeks to pursue his concerns as breaches of an express term of an agreement, or as a personal grievance, but I address both.

[11] To that end I turn first to the proviso in s 317(3). The meaning of the proviso as it appeared in a corresponding (but not identical) provision in preceding legislation was discussed in **Brittain v Telecom Corporation of New Zealand Limited**<sup>1</sup>. The case concerned claims for breaches of express and implied terms in employment agreements concerning the employer's obligation to provide a safe place of work, where the employees concerned had suffered injury as a result of occupational overuse syndrome.

[12] Regarding the relationship between provisions corresponding with s 317(2)(b) and the proviso in ss (3), the Court of Appeal found that a claim for a payment due under a contract as a result of the payee suffering a personal injury was not barred, but there was a bar on a claim for compensation as a result of an alleged breach of the contract causing personal injury. To the extent that Mr Wang's claim may concern a breach of a term of a contract or an agreement, there is no claim for a payment due under the contract or agreement and the remedy Mr Wang seeks amounts to a claim for compensation as a result of the alleged breach.

[13] Further to whether a personal grievance has been raised, Mr Wang aired a number of concerns arising since his accident, many of which involve Work Aon and are not capable of amounting to personal grievances since Work Aon is not his employer. To the extent that any concerns are about actions of his employer's, they are in general complaints which I do not consider justiciable.

[14] If for present purposes I assume a personal grievance has been raised in respect of Mr Wang's most significant concern in a legal sense - namely the adequacy of McConnell Dowell's health and safety procedures - while the door is not closed on such a proceeding the ability to recover any remedy is very limited. In particular neither damages nor compensation is available in respect of matters arising directly or indirectly from the personal injury Mr Wang has suffered.

[15] As I turn now to discuss in more detail, the remedies Mr Wang seeks arise directly or indirectly from the personal injury.

## 2. Matters for which compensation is sought

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<sup>1</sup> [2001] ERNZ 647 (CA)

[16] With reference to the particular matters for which Mr Wang seeks compensation, the first concerns his hoped-for course of study.

[17] Since it is not expected that Mr Wang will be able to return to his former occupation, he hopes to retrain for employment in an office-based role building on his skills and training as an electrician. However his claim for the reimbursement of study fees and for the payment of a proportion of his lost earnings while he undertakes that study cuts across the statutory scheme for rehabilitation. In other words the matter falls to be dealt with under the ACC Act, and in turn through Work Aon. To the extent that there is any dispute about arrangements for Mr Wang's vocational rehabilitation, that matter falls within the dispute resolution provisions available under the ACC Act or through Work Aon.

[18] On their face Mr Wang's claims for compensation based on the physical effects of his injuries which he listed, and the effects of his undergoing x-ray and CT scans, are directly barred by s 317(1).

[19] Mr Wang's claims for mental harm were based on the effect of the physical injury and dissatisfaction with aspects of his treatment by Work Aon. To the extent that the claim may incorporate any mental injury suffered by Mr Wang's family that is not a matter for the Employment Relations Authority and I do not address it. I address only the injury suffered by Mr Wang.

[20] Further to that, the term 'personal injury' is also defined in the ACC Act at s 26(1). The term includes mental injury suffered by a person because of physical injuries suffered by that person. Mr Wang spoke eloquently of the effect on himself and his family of his injuries, at the same time linking the matter clearly to his accident and the result of it and supporting a conclusion that his mental injury was linked with his physical injury. Since that form of mental injury is also a personal injury, any claim in respect of it is barred by s 317(1).

[21] The second aspect of Mr Wang's claim for compensation in respect of mental injury relates to aspects of the rehabilitation process as managed by Work Aon, and should be dealt with under the applicable dispute resolution procedures.

### 3. Conclusion

[22] For these reasons I find Mr Wang's claims for damages and compensation are statute-barred, and they are declined.

### Redundancy

[23] As mentioned, at the date of the investigation meeting Mr Wang's employment had not terminated.

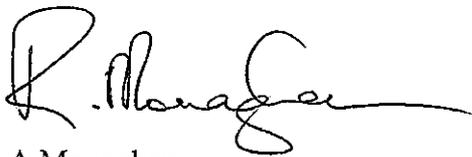
[24] There is no legal or factual basis on which the Authority can determine that Mr Wang's employment will end by reason of redundancy, or direct that the employment relationship end on that ground. Further there is no basis on which any date for the termination of employment can be identified, or for directing that a particular date be the date of termination of employment.

[25] Accordingly I make no order.

### Costs

[26] Costs are reserved.

[27] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.



R A Monaghan

Member of the Employment Relations Authority



EMPLOYMENT RELATIONS AUTHORITY OF NEW ZEALAND