

KAREN MCGRATH

Appellant

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v

ACCIDENT COMPENSATION CORPORATION

Respondent

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Hearing: 02 June 2011
Coram: Elias CJ
Blanchard J
Tipping J
McGrath J
William Young J

Appearances: A C Beck for the Appellant
P J Radich and L I Van Dam for the Respondent

CIVIL APPEAL

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MR BECK:

May it please Your Honours, I appear for the appellant..

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ELIAS CJ:

Thank you Mr Beck.

MR RADICH:

As Your Honours please, my name is Radich and I appear with Ms Van Dam for the respondent.

ELIAS CJ:

5 Thank you Mr Radich, Ms Van Dam. Yes Mr Beck?

MR BECK:

Your Honours, this appeal concerns fundamentally a matter of statutory interpretation, which may appear to be a somewhat archaic point in the Accident
10 Compensation Act, but it does have significant general consequences, in that it affects the way in which the Act is approached and the underlying approach taken by the Corporation to the legislation.

Now the section in question here is section 110 of the Accident Compensation Act
15 2001, and this is a strongly worded section. I say that for two reasons. First because it contains a mandatory prohibition on action by the Corporation. Secondly, it uses the word “likely,” so the outcome has to be a likely outcome before action can be taken, and I say that the Courts below have strayed somewhat from that wording and been distracted by side issues, rather than concentrating on what the Act actually
20 says.

The second point of some significance is that there is in the Parliamentary materials a reasonably good indication of the purpose of the section and the mischief it was designed to counter, and this is that the Corporation had been too quick to make
25 vocational independence assessments without the necessary foundation, and I say here that the, both of the Courts below have chosen to ignore that pointer in the statutory materials and neither Court refers to the Bill and the way in which the matter was introduced into the Bill.

30 Overall, my submission is that, on a realistic approach, the appellant was not likely to achieve vocational independence as suggested by the respondent, and that the respondent was only able to conclude that vocational independence would be likely by ignoring the most relevant evidence that it had at the time. So, in summary, that’s the case for the appellant, Your Honours.

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Now I’ve put in my written submissions, and there’s no real dispute as to, the factual background, the fact that the appellant suffered an injury and was subsequently

incapacitated and suffered ongoing pain from that time onwards. The issue really arises because of the material that was presented in support of the appellant's claim that she was unable to work on a full-time basis and that, that material, that supporting material for the appellant has been consistent, has consistently stated that she is unable to work for the required 35 hours per week.

Regardless of that, that medical evidence, the respondent has taken the position that she is nevertheless to be assessed as to whether she is able to work, regardless of the fact that her medical experts say that she is not, and that's where the difference between the parties arises. The appellant says that there simply should not have been any further assessment because the section required her independence to be likely, if she was to be assessed at all.

TIPPING J:

Are you coming back to the statute in a minute or two, Mr Beck, because there's a couple of things I'd like to raise with you at an appropriate time.

MR BECK:

Yes, yes Your Honour, I've set out the statutory, well, essentially the legal context in my submissions at paragraphs 15, 15 and onwards.

TIPPING J:

Well, what do you say is the proper meaning of the word "likely", in this context?

MR BECK:

I –

TIPPING J:

Leaving aside for the moment what I'll forecast as a second point, the timeframe.

MR BECK:

Yes, I say that the word likely is one that denotes a probable outcome. In other words it's not a mere possibility, it's something that has to be more probable than not. In other words, it's an expected positive outcome.

WILLIAM YOUNG J:

There's got to be 50% or more likelihood?

MR BECK:

I would say that's right, Your Honour.

5 **BLANCHARD J:**

Well why didn't the statute then say "unless the claimant will probably achieve..."?

WILLIAM YOUNG J:

Or "will achieve more probably than not".

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ELIAS CJ:

Or that "it is more likely than not that the applicant will achieve".

MR BECK:

15 All of these are possible formulations and it's just –

WILLIAM YOUNG J:

But likely doesn't – normally – in most, it's a common enough phrase in statutes that normally refers to something which is more than an outside possibility, a real
20 substantial possibility. Something that could very well happen.

MR BECK:

It can't just be possible, so it must be more than possible.

25 **WILLIAM YOUNG J:**

Yes.

MR BECK:

And I say that if it's likely, it must be something that is expected to happen, that's –
30 that you do expect a positive outcome.

TIPPING J:

Would you accept "could well happen"?

35 **MR BECK:**

I don't think that's, that's putting it high enough Your Honour. It's, that's more like a possibility, whereas here we're, in layperson's terms we're saying, you mustn't do this unless there's a –

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ELIAS CJ:

What about "reasonable –

MR BECK:

10 You'd expect this outcome to be –

ELIAS CJ:

– what about "a reasonable prospect"?

15 **MR BECK:**

That probably comes closer to the, to what it would have meant in the circumstances. I think that's –

WILLIAM YOUNG J:

20 Well it's got to be more than speculative, it's got to be more than a speculative possibility and despite what you say I can't see it being as much as "more likely than not" and so it's in the, in between there where it's, it's a reasonable likely – it's a reasonable possible, it's a reasonably probable outcome or anticipated outcome of the process.

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MR BECK:

Well I think that's right if you say reasonably probable, I mean reasonably likely. The point is you are, you are expecting that it's going to be a successful assessment. That's, that must be what the, well what the intention – you don't put a person
30 through the assessment unless you expect them to come out positively on the other side.

TIPPING J:

35 Wait a tick, unless – when you say, "unless you expect them to", I would have thought it has to be more objective than that?

MR BECK:

Well that's why I like, I like Justice William Young's assessment of adding in the reasonable and unless you –

TIPPING J:

5 Well Justice Young said "reasonably probable" –

MR BECK:

Yes.

TIPPING J:

10 – which no doubt attracted your attention, which I don't –

WILLIAM YOUNG J:

I don't, I didn't mean more – reasonably more probable or not.

15 **BLANCHARD J:**

Isn't it what the layperson would describe as someone having a "pretty good chance"?

TIPPING J:

20 Yes.

MR BECK:

Well I think that's right, Your Honour. That encompasses the idea of you do expect it to be positive and –

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BLANCHARD J:

But that doesn't make it probable, it's not as high as that.

TIPPING J:

30 There are a huge number of ways you can put it, in that intermediate position –

MR BECK:

Yes.

35 **TIPPING J:**

– the real issue is, is it intermediate or is it more probable than not?

MR BECK:

And I suppose it's, it may be difficult to decide exactly where it sits on the spectrum but I think, I think His Honour Justice Blanchard's idea of a pretty good chance is what a layperson would think and I accept it.

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TIPPING J:

Well that's not more probably than not. If it was a burden of proof issue which it's analogous to but you wouldn't say having a pretty good chance was more probable than not.

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MR BECK:

I would say if a layperson said it's got a pretty good chance, they certainly, at least, hovering around the 50 percent mark, it's –

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ELIAS CJ:

I wonder really whether it's useful to think about it in terms of percentages or exact measurement. I'm not sure that we can get better than a reasonable prospect that it would be found –

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MR BECK:

Yes.

ELIAS CJ:

– that she would be found to be vocationally independent.

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MR BECK:

And I think it's probably right Your Honour, that in the end it's not going to be quantifiable but –

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McGRATH J:

We've got to remember the context Mr Beck, is of a preliminary assessment to enter a process which has a lot of protections in itself –

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MR BECK:

Yes.

McGRATH J:

– before the conclusion of vocational independence is reached or not.

MR BECK:

That's – I think that's exactly right, Your Honour, and so this has to be like a broad-
5 brush assessment of that, at that preliminary stage. Do we go ahead or don't we?

McGRATH J:

But there is a threshold and it's quite clear as you say –

MR BECK:

10 Yes.

McGRATH J:

– from the language and from the legislative history, there's a threshold –

15 **MR BECK:**

Yes.

McGRATH J:

– but it's a threshold to a process that includes a lot of protections, so that I think tells
20 pretty strongly against the idea of probability. Where they're not wanting to have two
processes –

MR BECK:

No, I mean that's correct, Your Honour, but you have to have reached that stage of
25 saying, yes it's appropriate to go ahead here because there is that, that reasonable
prospect that it will be successful.

TIPPING J:

Well, it's designed to stop people being put through the process, isn't it?
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MR BECK:

Yes.

TIPPING J:

35 Unless the threshold is reached?

MR BECK:

That's correct, Your Honour. So it is preliminary, it has to be broad-brush, but the point here is the Corporation has to have come to that position of saying, yes it is appropriate to go ahead and we do reasonably expect that there will be a successful outcome.

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TIPPING J:

And you accept then that what it's looking to is the outcome of the assessment?

MR BECK:

10 Yes, yes Your Honour.

TIPPING J:

Right thank you, that was my second point.

15 **MR BECK:**

And I say that's where the Court of Appeal has muddied the waters to some degree by suggesting that it could be an outcome at any time in the future, and I say that's not the way that the Act is designed to work. That it's very much a situation where once you've suffered an accident you're entitled to rehabilitation under the Act and that rehabilitation is an ongoing process, may involve all sorts of different treatments and checkups and whatever, but only once that's been completed do we then go into this assessment.

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TIPPING J:

25 The time, the timeframe or the time dimension is fairly short, it's looking at what will happen or was likely, if I can borrow that word again –

MR BECK:

Yes.

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TIPPING J:

– to happen as a result of the process that's, to which this is the threshold.

MR BECK:

35 That's right. As a result of these two assessments, the occupational assessment and the medical assessment.

TIPPING J:

And you can't say, for example, well everyone tends to get better sooner or later?

MR BECK:

5 That's right, yes.

TIPPING J:

Which seems to have been a bit of the flavour of at least one way it was put.

10 **MR BECK:**

I think that's right, Your Honour. It's focussed on these immediate assessments and what outcome that they produced, in other words, the answers they produced for the Corporation which can then say, yes you are vocationally independent, or no you're not at this time.

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ELIAS CJ:

Mr Beck, you may be coming to this, but I wondered whether section 108, what an assessment requires, is relevant also, because in this particular case there is no question as to the occupational assessment –

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MR BECK:

Yes.

ELIAS CJ:

25 – so effectively, and yet that has to be undertaken, it must consist of both the occupational assessment and the medical assessment. Effectively, what the Corporation is seeking is, one would have thought, is in requiring this procedure, is another medical assessment.

30 **MR BECK:**

So, I mean, Your Honour's right. There have to be those two assessments –

ELIAS CJ:

Yes.

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MR BECK:

– occupational and medical.

ELIAS CJ:

Yes.

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MR BECK:

And the occupational assessment was in fact carried out here.

ELIAS CJ:

10 Yes –

MR BECK:

So the –

15 **ELIAS CJ:**

– and isn't in dispute?

MR BECK:

20 No, no, it was when it came to the medical assessment, which of course is the critical thing as far as the Corporation is concerned, because it needs that medical stamp if you like saying, yes this person is medically capable of working –

ELIAS CJ:

Yes.

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MR BECK:

– 35 hours a week, and it was at that point that the appellant said, well this is simply inappropriate, I'm not in a situation where I'm likely to achieve vocational independence, you shouldn't be carrying out this assessment at all.

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ELIAS CJ:

35 What bothers me a little bit is the submission that's made by the respondent that, that a second opinion could be obtained by invoking the Corporation's powers under section 72. So is there, is that so very different from going through the section 108 door?

MR BECK:

Well, it is different, that was my suggestion, Your Honour –

ELIAS CJ:

Yes.

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MR BECK:

– as to, and the Court says –

ELIAS CJ:

10 Yes.

MR BECK:

– well, what are we supposed to do then.

15 **ELIAS CJ:**

Yes.

MR BECK:

20 And it is different from the independence medical assessment because it doesn't
have the, it doesn't have the statutory consequence of removing your entitlements.
Once the medical assessor has said you're able to work, that's basically the –

ELIAS CJ:

I see.

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MR BECK:

– shutting the door. That's what puts a stop to your –

ELIAS CJ:

30 I see.

MR BECK:

– entitlements.

35 **ELIAS CJ:**

Whereas there would have to be some further process undertaken if they, is this
right?

MR BECK:

Yes.

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ELIAS CJ:

If they got a second opinion which said, we don't think the pain management assessment or the expert opinion is correct, then they would have grounds for seeking an assessment of vocational independence?

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MR BECK:

Yes, yes Your Honour.

ELIAS CJ:

15 I see, yes.

MR BECK:

And the point I've made here is that because we've got a threshold to cross –

20 **ELIAS CJ:**

Yes.

MR BECK:

– the Corporation must be in a position to say, well we've got some basis for our
25 belief that he will succeed in this test, and so I've said well, basically that's for the Corporation to say what's, that we do have a basis, but if you've got strong medical evidence that suggests that vocational independence is unlikely, then there's really something missing from your, from your decision to go ahead.

30 **ELIAS CJ:**

What's the provision, I should have looked at it, that says that once you've gone through this assessment, there's a consequence that –

MR BECK:

35 Now section 112 is, I think that's the one Your Honour that –

ELIAS CJ:

I see.

MR BECK:

Yes, that says you lose your entitlement to weekly compensation once, once a
5 vocational independence decision has been made by the –

ELIAS CJ:

Yes.

MR BECK:

10 – Corporation and that's the real significance of these independence medical
assessments is that they –

ELIAS CJ:

So is there no further determination that the Corporation has to make on receiving
15 the assessment under section 108?

MR BECK:

Well, I mean, effectively the decision is the Corporation's and –

20 **ELIAS CJ:**

Yes, but is there any additional –

MR BECK:

No, no further input.

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ELIAS CJ:

So you're automatically on the path once this is invoked, which is why you say they
shouldn't embark on it unless they, unless they're able to satisfy the statutory test?

30 **MR BECK:**

Yes.

ELIAS CJ:

And it may be that if they're not satisfied with the medical assessment, they could get
35 a further medical assessment and it might or it might not give them grounds to invoke
the section 107 procedure?

MR BECK:

Yes Your Honour, that's right.

ELIAS CJ:

5 Yes, thank you.

TIPPING J:

They're not remediless, if you like, on receipt of, from their point of view, an unfavourable medial assessment?

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MR BECK:

I mean, that's right Your Honour. Now the Corporation makes heavy weather of this and says, oh well, this is an extra step and something else has to be done, but my point is that this happens all the time. I mean, the Corporation is always requiring people to go and get assessments and checkups and medical reviews and whatever, so it's not an unusual type of thing. But the real point is, again it comes back to section 110, can you genuinely say this person has a pretty good chance of success when the most recent evidence you have is against it and that's, that's my contention, or that's why I say there has to be some, something else in a case like this to justify going ahead.

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BLANCHARD J:

It's a bit circular isn't it? It's an odd arrangement because I think what you're saying is that the Corporation could have resorted to section 72 and if that then revealed that there was, or appeared to be, a capacity to work, then the Commission, the Corporation could invoke section 110, because there would be the necessary likelihood, which would involve another medical assessment. It's quite, quite odd.

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MR BECK:

Well, in a way it is, but I think the point is here that there's nothing that compels the Corporation to make a, to undertake the vocational independence process. Nothing was forcing them to decide at this time that, we have to do this, they've got a discretion as to whether or not they go down that path.

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So, it's not as if they're in a situation where they have to act in a particular way and I say, when you get a strong pointer, like the medical evidence in this case, that's an indication to back off and say well no, it doesn't look as if this is the right way to be

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approaching this case. Of course, if you have serious doubts about that medical evidence, then well I say the obvious thing is to have a second opinion about that but by itself, it looks like a strong pointer to –

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TIPPING J:

Was the –

MR BECK:

10 – stop.

TIPPING J:

– Dr Acland's view a medical assessment, within the meaning of 108(1)(b)?

15 **MR BECK:**

No, no, he's not making that as the medical assessor, he's simply acting as an expert. In this case, a pain management expert.

TIPPING J:

20 So they're not, in effect, second guessing a 108(1)(b) assessment, by getting a second opinion.

MR BECK:

25 No, no, Your Honour, they would simply be saying well, we doubt that this is right, we'd like to have some further input into the matter but then there would still have to be this – the 108(1)(b) assessment is a comprehensive assessment, undertaken by the medical assessor –

TIPPING J:

30 But there is some – as my brother Blanchard said, if they get the second opinion and the Corporation thinks that that suggests likelihood, then you go back to the beginning if you like and that triggers the 108(1) process.

MR BECK:

35 That's right, but all they'd be doing here is seeking, presumably, an opinion from another pain management expert, to say well, I disagree with Dr Acland, or –

TIPPING J:

Then the medical assessment under 108(1)(b) would be yet a third –

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MR BECK:

But the medical assessment under 108(1)(b) is a statutory assessment that requires

–

10 **ELIAS CJ:**

Has consequences.

MR BECK:

It does have consequences, but it's also a comprehensive assessment and you'll see

15 from the materials –

TIPPING J:

I'm not necessarily against you Mr Beck, I'm just trying to fully understand this.

20 **MR BECK:**

Yes but that's why I say, it's not doing the same thing twice.

TIPPING J:

No.

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BLANCHARD J:

Well, it could be if the Commission invoked section 72 and asks for the kind of assessment that would be made under section 108(1)(b). It could do that, couldn't it, under 72?

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MR BECK:

That's possible, I mean, the Corporation has enormous powers to require any sort of assessment, so it can't be said that it doesn't have that power, but all I'm saying is that there are ways for it to overcome a medical report like this which it thinks is wrong.

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McGRATH J:

Don't they really, in the end, have to objectively weigh what such a report indicates and whatever information they have, it indicates to the contrary, before reaching –

MR BECK:

5 They do have to weigh it –

McGRATH J:

– the statutory test –

10 **MR BECK:**

– Your Honour, yes –

McGRATH J:

– there's no magic, I think you agree, in the fact that there is a medical report there
15 and medical –

MR BECK:

Well, that's right, Your Honour –

20 **McGRATH J:**

– reports in a particular context might have a lot of weight or very limited weight, and it's just a piece of information that, in this case, indicates against the need for a vocational assessment, against which they will have to look at the other contra-indicators.

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MR BECK:

I mean, that's quite right, Your Honour. It does have to be an assessment of everything that's in front of the Corporation at that time.

30 **TIPPING J:**

But they've got to direct themselves correctly, I would have thought, as to the timeframe. They can't simply say oh well, it could turn all right in the medium future. They've got to focus directly on the likely outcome of the assessment.

35 **MR BECK:**

Yes, yes, I think that's right, Your Honour. They've got to say that when you go to the medical assessor, it's likely that you'll get the tick, you will be told you can work 35 hours.

5 **TIPPING J:**

Well, there may be a contrary argument but that would be the way I would prima facie read it.

MR BECK:

I think that's right Your Honour, that ACC doesn't –

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TIPPING J:

Well, I was rather diverted by some of that discussion in the Court of Appeal which talked about timeframes and so on.

15 **McGRATH J:**

But the respondent doesn't appear to be adopting the Court of Appeal's –

MR BECK:

20 No, the respondent has distanced itself and that, to be fair, was the Court of Appeal's own idea, it was never put up by the respondent, but it's –

TIPPING J:

25 But why was the respondent, at least in part, talking about how – I'm saying this colloquially, oh well, people usually get better in the long run? There was a gentleman, wasn't there, Mr Hurring was it, who –

MR BECK:

Mr Hurring was the case officer.

30 **TIPPING J:**

– seemed to be – I maybe misleading myself –

MR BECK:

I'm not sure –

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TIPPING J:

– perhaps I'm –

MR BECK:

– but he said that he'd seen other people, other similar people, achieve success in vocational independence assessments.

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TIPPING J:

Right, was that what he was saying, yes, I may have not have got it quite right.

MR BECK:

I think that that's the highest he put it, Your Honour.

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McGRATH J:

Is this where we go to, on your submission, to decide what factors did weigh against Dr Acland's report, I mean, is this the reason, the essential reason, Mr Hurring's reasons?

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MR BECK:

Well, Mr Hurring says there are things that weight against the opinion of Dr Acland.

TIPPING J:

20 Would it be helpful for you to take us to those and then say why they shouldn't have been enough to outweigh the –

MR BECK:

The –

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ELIAS CJ:

Look, sorry, are you going to come back to the Scheme of the Act? Do so if that's helpful. I'm just trying to work out whether there is a determination that the Corporation makes because it seems to be a bit different than the section 103 procedure. This does seem to be –

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TIPPING J:

Section 107 seems to talk about a determination –

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MR BECK:

That's right, the powers under 107(1), Your Honour, and here it says, "The Corporation may determine the vocational independence of –"

ELIAS CJ:

But then it sets up a process for that determination which doesn't seem to contain an additional assessment by the Corporation. It seems to require the Corporation to act
5 on that report, the occupational assessment and the medical assessment.

MR BECK:

I think that's essentially right, Your Honour, although it is the Corporation's decision,
10 107 says that the determination is made by requiring the participation in those assessments and –

TIPPING J:

It really means, doesn't it, may determine in the manner here and after set out, so to
15 speak.

MR BECK:

Well, that's the way the sections seem to work. My only hesitation is "the Corporation may" is saying the Corporation is absolutely bound to follow those
20 recommendations, even if it has some serious concerns about them. So that –

TIPPING J:

Well, it doesn't have to act on them because it is only empowered to act on them.

25 **MR BECK:**

Yes, so –

ELIAS CJ:

Well, I wonder, though, whether that is the thrust of these provisions. They're quite
30 different from the original determination by the Corporation, of incapacity. It just seems more of a conveyor belt, but perhaps you might think about that a bit more and maybe Mr Radich can explain that to me.

MR BECK:

35 I mean, I suppose in a sense, the way it works in practice is largely a conveyor belt approach. If you get the occupational assessment and the medical assessment and

they're both positive, then the Corporation simply makes that decision. It's very unlikely to do anything else, but –

ELIAS CJ:

5 Well, it may be that it's an important part of the scheme of this legislation, that once the Corporation accepts that there is incapacity, it cannot then make a determination but it has to act on the assessments provided for in the later provisions. The reason I'm exploring that with you is that this circularity which I think is probably one of the more troubling aspects of the case, is answered, I think perhaps quite convincingly, if
10 the vocational independence assessment inevitably, inexorably, leads to a result, one particular result, then one can understand why there are safeguards like the likelihood –

MR BECK:

15 Yes –

ELIAS CJ:

– in the provision, but it may be that I'm misreading that because section 107 does purport to give the Corporation a discretion, it's just that I can't see after the process
20 that's provided for in the Act where – how it gets an opportunity to exercise a further discretion, and there may be legislative policy in that.

MR BECK:

The only thing that – I just – may be relevant there, Your Honour, is 108(3), which
25 talks about the purpose of the medical assessment being to provide an opinion for the corporation as to whether the, whether the claimant is able to work for 35 hours a week and that, that looks like something a little bit less than –

ELIAS CJ:

30 Yes.

MR BECK:

– a mandatory direction, but Your Honour's absolutely right in the sense that the process is mandated by the Act, you determine vocational independence by having
35 these assessments carried out and that's, that's all it says, you've got to do these two assessments. So the, in one sense it looks as there's a little bit of a gap as to what, how you make the decision, having got those assessments.

TIPPING J:

But if it is a deliberate legislative policy, it's pretty subtle because it – yes, I take the point but it isn't, it doesn't sort of shine out at you very strongly.

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ELIAS CJ:

No it maybe a total red herring, but –

TIPPING J:

10 No, no I don't mean –

ELIAS CJ:

– but just it's a little hard to understand.

15 **TIPPING J:**

Well it's quite right that there isn't a specific decision-making power, it seems that the decision follows once you've set the process in train.

MR BECK:

20 Yes, and I think Your Honour's right, there's a vagueness there in the Act because once there's a discretion to determine vocational independence, it then says you have to do it by carrying out these assessments, and then doesn't say anything beyond that. Although it looks as though the decision is the Corporation's – based on those assessments.

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BLANCHARD J:

I suspect that the "may" is only there because the Corporation doesn't have to embark on the process.

30 **ELIAS CJ:**

Yes, that's what I think.

MR BECK:

I think that's right, Your Honour.

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ELIAS CJ:

But if that is so, it has the effect that this is a very significant, the reassessment is very significant because it does lead inexorably to a particular result, which means that, which is loss of entitlement if it's adverse to the applicant.

5 **MR BECK:**

That's, I mean that's correct, Your Honour.

10 **TIPPING J:**

Well, that would really mean that 110(3) effectively means that the Corporation must not embark upon the process?

MR BECK:

15 Well that's right, because the assessments are the process –

ELIAS CJ:

Yes.

20 **MR BECK:**

– are the process, that's right.

ELIAS CJ:

I'm sorry, I deflected you from the –

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McGRATH J:

Then coming back to Mr Hurring's –

ELIAS CJ:

30 The – going to the facts.

MR BECK:

Your Honour. Perhaps it would be useful to look at what he actually said. And this is at pages 29 and 30 of volume 1. So he refers to the, in paragraph 21, he refers to
35 the initial medical assessment, this is the initial medical assessment in 2003 then a medical assessment, which would have been a 108(1)(b) medical assessment, in 2004, which was carried out and determined that the appellant was able to work, that

as he mentions was followed by a review which said that the decision was premature.

ELIAS CJ:

5 Sorry where are you, what para?

MR BECK:

This is paragraph 21C, Your Honour.

10 **McGRATH J:**

Judicial review.

ELIAS CJ:

Yes.

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MR BECK:

No, no an ACC review.

McGRATH J:

20 An internal review?

MR BECK:

Yes, yes Your Honour.

25 **ELIAS CJ:**

Oh, I had thought it was a judicial review.

MR BECK:

30 So that – that effectively meant the process had to be carried out again and then he refers finally to a physiotherapist report which indicated significant and certainly improvement to perform physical activities. So those are the documents, essentially the medical matters that he relies on. He then talks about his own view. He considered that, this is in paragraph 22, that vocational independence assessment was appropriate because of his experience with other clients with similar or greater
35 physical impairment. They've been able to return to work, so –

TIPPING J:

That was the passage I was thinking of –

MR BECK:

That's what I thought, Your Honour, was –

5

TIPPING J:

That's somewhat more general than –

10 **MR BECK:**

Yes, and I mean, he simply says well, I know people like this and they're able to return to work, without providing any more specificity.

ELIAS CJ:

15 And that also is again going off the physical impairment, whereas the review, or is it the later, is it a later review that says that the question of pain had been –

MR BECK:

20 In that review the reviewer has said the question of pain hasn't been sufficiently addressed.

ELIAS CJ:

In the one that's referred to in para C?

25 **MR BECK:**

Yes, that's right Your Honour.

ELIAS CJ:

30 So his "furthermore" in para 22 is harking back to the physical impairment?

MR BECK:

That is what he refers to there, yes.

TIPPING J:

35 He does actually use that expression –

ELIAS CJ:

Yes.

TIPPING J:

– in the –

5

ELIAS CJ:

Yes.

10 **MR BECK:**

But I mean, I think it's important that the case officer is not a medical person –

TIPPING J:

No.

15

MR BECK:

– he's simply a person with experience in working with ACC claims, so it's view, essentially, as a lay person. He mentions that, in paragraph 23, that ACC have provided all the vocational rehabilitation measures under the individual rehabilitation plan, well, that doesn't actually say one way or another why they should be, why it should be a successful thing, but he then, he then goes on to criticise Dr Acland in paragraph 24 and he says that he felt Dr Acland's opinion was at odds with that fact that Ms McGrath had in fact been working around 15 hours a week, which is odd because that's exactly what Dr Acland says and –

25

TIPPING J:

But do you have to be fit for 35 hours a week then?

MR BECK:

30 That's correct, Your Honour, so –

ELIAS CJ:

It's a pretty big gap between that, even between 18.45 hours on one occasion, it's hard to know why he –

35

MR BECK:

That's right, he does point out that she did work more than, more than 15 hours a week on that occasion.

ELIAS CJ:

5 But it's a long way short of 35 hours a week.

MR BECK:

It is a long way short, and I think that it's also relevant there that her GP noted that when she did work than more than 15 hours, she had additional pain, pain symptoms
10 that followed from that additional work.

TIPPING J:

I think as the Chief Justice mentioned, is it correct that Dr Acland actually had referred to the fact that she'd been working around 15 hours a week –

15 **MR BECK:**

That is correct, Your Honour.

TIPPING J:

His assessment was made in the light of that fact –
20

MR BECK:

That's –

TIPPING J:

25 – not in ignorance of that fact.

MR BECK:

Yes, I mean, that's absolutely right, Your Honour. He says on a number of occasions that he noted she'd been working for 15 hours a week and, but he doesn't think
30 there's any possibility of her, her working more than that.

TIPPING J:

Well, there's an element arguably of illogic then in this observation in 24?

35 **MR BECK:**

That's –

WILLIAM YOUNG J:

Isn't there one letter where Dr Acland said that she wasn't able to work and Mr Sara wrote back and said well, you've got to bear in mind she has been working for 15 hours a week, isn't there one, an exchange –

5

MR BECK:

There is an exchange to that effect, Your Honour.

WILLIAM YOUNG J:

10 That's probably what I was referring to, isn't it.

MR BECK:

The, but I think it's also relevant that her GP had –

TIPPING J:

15 But it's not at odds if Dr Acland is saying, okay I accept she can work 15 hours a week, but the test is 35 hours a week, there's nothing at odds with that at all.

MR BECK:

No there isn't, Your Honours, and Dr Acland has accepted that she is able to work for
20 15 hours a week and –

WILLIAM YOUNG J:

The real difference between Dr Acland and the earlier, the doctors who saw her earlier, was that he thought that she has complex regional pain syndrome and they
25 didn't. Isn't it as simple as that?

MR BECK:

Well, certainly he, I mean, he's addressing pain issues rather than anything else.

30 **WILLIAM YOUNG J:**

But, isn't that, isn't that the particular difference on the matters that, as it were, where there's commonality, that the first two doctors don't think she's got complex regional pain syndrome, whereas he does.

35 **MR BECK:**

No –

ELIAS CJ:

Did they address it?

WILLIAM YOUNG J:

5 Yes they did address it.

ELIAS CJ:

I haven't read that.

10

WILLIAM YOUNG J:

One said "complex regional pain disorder" but not "complex regional pain syndrome" and the other just said, "Didn't have complex regional pain syndrome".

15 **MR BECK:**

I think it is important that the first doctor, Dr Porteous, was simply doing an initial assessment, which is carried out for rehabilitation purposes, not independence purposes, so it's a report that's carried out for a different purpose.

20 **WILLIAM YOUNG J:**

Well I'm looking at page 95 of the case, of volume 2 of the case.

MR BECK:

25 That's right, Your Honour, he talks about indications of a chronic pain disorder in her right shoulder.

WILLIAM YOUNG J:

30 Yes, "she now has indicated the chronic pain, there is no marked indication of complex regional pain and therefore I believe this is more now a complex regional pain disorder".

MR BECK:

Yes, yes.

35 **WILLIAM YOUNG J:**

And then there's the other doctor from Karori Family Health –

ELIAS CJ:

Your point being that he is not addressing vocational independence in this?

MR BECK:

5 That's correct, Your Honour.

ELIAS CJ:

Yes, I see.

10

MR BECK:

He's simply doing an initial medical assessment. No, Dr Antoniadis is doing a independence assessment.

15 **ELIAS CJ:**

Yes.

WILLIAM YOUNG J:

20 At page 102 he says, "There's - currently there's no evidence of residual reflect sympathetic dystrophy", there is evidence of residual sympathetic dystrophy, but no evidence of a chronic regional pain syndrome?

MR BECK:

25 Yes, that's correct, Your Honour, so he really is differing from the way in which –

WILLIAM YOUNG J:

And that difference between them may just be a matter of time, because Dr Acland's reporting three or four years later.

30 **MR BECK:**

That is certainly a possibility, Your Honour. But I say that the time must be an important factor anyway, where, in the sense that Dr Acland's assessing her several years later.

35 **TIPPING J:**

Well, this is an aspect that I find troubling, that you bring to a client very historic medical assessments against a contemporary one and –

MR BECK:

Yes.

5 **TIPPING J:**

– I would've thought from one's own knowledge of these matters, that there's inherent difficulties in that.

10

MR BECK:

Well I say that that's an issue, Your Honour, in the sense that we are looking at the situation in 2008 and saying at this point, is vocational independence likely, and an historic report, while obviously may be referred to, has to be tested against the most recent evidence by a particular specialist. So I say that the age of these reports is something that counts against them when you're weighing up the evidence that you've got.

15

TIPPING J:

20 The essence of the reasoning is comprehended in paragraphs, section 21, 22 and – no 21 to 24, is that –

MR BECK:

That's Mr Hurring's reasoning, Your Honour.

25

TIPPING J:

Mr Hurring's approach.

MR BECK:

30 I have pointed out that that was not the basis on which the case was advanced in the High Court. There was no reference to these – to these previous reports at that stage, or there was simply a reference to the fact that rehabilitation had been carried out and an occupational assessment had been carried out.

35 **TIPPING J:**

You mean no reference in argument?

MR BECK:

No reference in the pleadings, so the way in which the case was pleaded did not rely on these matters at all, they only came up later.

5 **TIPPING J:**

Well that's pretty odd.

MR BECK:

Well it did – my theory is that I'm trawling through the files subsequently, these things
10 came to light, which is why they're right at the end of the agreed bundle of documents, they were in fact introduced subsequently. But, that – I mean that wasn't the basis on which the –

TIPPING J:

15 But does that matter, I mean it's the basis upon which the matter is before us, I take it. There's no argument that the matter should be similarly confined as it was in the High Court?

MR BECK:

20 Well, what I say is that you plead your case in a particular way. Now –

TIPPING J:

Are you saying it's just a persuasive issue, not a –

25 **MR BECK:**

It probably is, well, I think when it comes to the crunch, if you're arguing reasonableness or unreasonableness in judicial review then the fact that there are other bases that subsequently come to light may be permissive to look at, it's a little odd that you wouldn't bring them out straight away and say well, I had a reasonable
30 basis for my decision because of X, Y and Z. But in the end I'm not sure that that's a factor that totally precludes the Court from looking at these matters.

TIPPING J:

But the evidence was in, in front of the High Court, you're just saying it wasn't
35 pleaded and was it not argued either in the High Court that reliance on these –

MR BECK:

It was argued, the Court –

TIPPING J:

So it's really just a pleading point?

5

MR BECK:

It probably is just a pleading point, the –

TIPPING J:

10 It's a bit late –

McGRATH J:

And not one that was raised at the leave stage?

MR BECK:

15 Oh it was raised, it was raised in the High Court, the Court –

McGRATH J:

But in terms of this Court, it's come to this Court really on whether there was a correct interpretation of the Act –

20

MR BECK:

That's –

McGRATH J:

25 – in the ways that you've been discussing for most of your submissions?

MR BECK:

That's the point in which the Court, the Court gave leave, I mean, that's certainly right, Your Honour.

30

ELIAS CJ:

But if, yes, but it may be necessary to go into the consequences, so it is necessary to have a look at what the underlying, well, what reason the Corporation had for its, for its view I would have thought –

35

MR BECK:

Well, I mean –

ELIAS CJ:

– in terms of results, yes, yes.

5 **TIPPING J:**

If this is a legal threshold, it's the Court's assessment as to whether it exists, isn't it, not whether the Corporation could reasonably have thought it existed?

MR BECK:

10 Well it's, because it's judicial review, Your Honour, we come at it in a, in a side angle.

ELIAS CJ:

It's not honest, it's not honest belief, it's reasonable belief.

MR BECK:

15 That's right, Your Honour, well, that's what's been accepted.

ELIAS CJ:

Yes.

20 **TIPPING J:**

Well, I'm a step back. Let us assume that one was of the view that the threshold was not established. It's the Court's assessment of that, isn't it, not whether the Corporation had reasonable grounds to think it was established.

25 **ELIAS CJ:**

That's what I mean, it's reasonable belief, not honest belief.

MR BECK:

So the reasonable belief –

30

ELIAS CJ:

It's not their subjective –

TIPPING J:

35 No, it is whether we think –

ELIAS CJ:

Yes.

TIPPING J:

– the grounds were established.

5

ELIAS CJ:

Yes, objectively assessed, yes.

10

MR BECK:

I mean, I suppose, Your Honour, Your Honour's right in the sense that it's a reasonable ground for that conclusion. So it does require an objective assessment of the material.

15

TIPPING J:

Well, we can hardly –

McGRATH J:

20 It's the actual situation that in the end the Act focuses on, isn't it, it's not the belief as to the actual situation?

ELIAS CJ:

Yes.

25

TIPPING J:

Yes.

MR BECK:

30 No, the Corporation must not make an assessment unless the, it is likely that there will be vocational independence.

McGRATH J:

Which is a question of fact, not –

35

MR BECK:

It is a question of fact. The –

McGRATH J:

And the facts are here and in the passages you've been pointing to and there is no contradiction of what's said by Mr Hurring in his affidavit as to the facts.

5

MR BECK:

No, that's correct, Your Honour.

McGRATH J:

10 I think that's really enough for us to proceed.

TIPPING J:

The question is whether paras 21 to 24 amount to, give rise to the necessarily likelihood.

15 **MR BECK:**

That's correct, Your Honour, and that's why I say well, the countervailing factors have not really been addressed. Well, he mentions, Dr Acland certainly as the Chief Justice has pointed out that there's an issue as to whether there's any conflict there with Dr Acland or not, and he doesn't refer to the GP's ongoing certification of fitness to work for 15 hours a week.

20

TIPPING J:

But you're entitled, I would have thought, to point to any other facts that were before the Corporation that can bear on the objective likelihood, one way or the other.

25

MR BECK:

That's –

TIPPING J:

30 In your case, the other.

MR BECK:

– correct, Your Honour, that's why –

35 **TIPPING J:**

But is there anything beyond this that he hasn't referred to but was available, that you say yourself assists your client?

MR BECK:

I suppose there's the ongoing reference to Dr Acland. In fact, Dr Acland went, saw the appellant again, subsequent to what Mr Hurring has said, and confirmed again
5 that she was only able to work for 15 hours, and in paragraph 62, Your Honour, I've referred to the –

TIPPING J:

But wait a moment. That is after the decision to refer her to the assessment was
10 made, I would have thought you had to look at what was before the Corporation –

MR BECK:

No, no, what I'm saying –

TIPPING J:

15 – at the time –

MR BECK:

– several times before the decision to –

20 **TIPPING J:**

– oh, I see –

MR BECK:

– refer her was made, Dr Acland confirmed that 15-hour limit.

25

TIPPING J:

So it wasn't just a single –

MR BECK:

30 No, no, no –

TIPPING J:

– it was several by Dr Acland?

35 **MR BECK:**

That's right, Your Honour.

BLANCHARD J:

Have we got that confirmation in the materials?

ELIAS CJ:

5 Sorry, what's that, I missed it?

MR BECK:

The letters from Dr Acland are all here, Your Honour.

10

BLANCHARD J:

What's the latest of the letters?

MR BECK:

15 The latest one is –

BLANCHARD J:

The latest prior to the ACC decision?

20 **MR BECK:**

It's at page 79, Your Honour, in volume 1.

BLANCHARD J:

Was that letter before the ACC when they made their decision?

25

MR BECK:

Yes, yes, Your Honour.

ELIAS CJ:

30 Sorry, page 89, was it?

MR BECK:

Page 79, Your Honour. Now, the GP, Dr Muir, also certified the appellant fit for work for 15 hours a week and –

35

ELIAS CJ:

Sorry, who was this?

MR BECK:

Dr Muir is the appellant's GP, and he noted that where she worked for more hours that there were pain consequences for her, and this is on page 70. He points out that
5 "She barely copes with the 15 hours a week, recently trialled a few more hours and had increased pain after work and had to withdraw."

ELIAS CJ:

So the medical reports they had are only Porteous, Antoniadis and Acland, oh,
10 Acland and Muir, is that right, was there anything more?

MR BECK:

I mean, there were in fact other medical reports before the previous review.

ELIAS CJ:

15 Yes.

MR BECK:

So going back into the, in time –

20 **ELIAS CJ:**

Yes.

MR BECK:

– but this is what –

25

ELIAS CJ:

They were relying on.

MR BECK:

30 – they were relying on –

ELIAS CJ:

It's just that, looking at Dr Antoniadis' report, it's quite contingently expressed because he refers to further, not assessment, but a treatment with the Dunedin Pain
35 Clinic.

TIPPING J:

What page is that?

ELIAS CJ:

Page 103.

5

MR BECK:

I mean, that is correct, Your Honour, he seems to acknowledge that there's an ongoing pain issue there which –

10

ELIAS CJ:

Yes, and he's a family general practitioner?

MR BECK:

15 Well, he's a qualified as one of these people who can do –

ELIAS CJ:

Yes, yes, do –

20

MR BECK:

– medical assessments, yes –

ELIAS CJ:

– the assessments, but he is indicating that it may, well, he seems to be indicating
25 that it's at the limits of his knowledge, if he's referring to further discussion with
specialists.

MR BECK:

I mean, that's correct, Your Honour, but he does allow for the – well, he seems to
30 allow for that possibility of further pain issues. On page 107, he did a supplementary
report but at the bottom of that page, he talks about, "Some breakthrough pain, may
require a dressing should it persist." So the issue was certainly there.

McGRATH J:

35 So, where's that in page 107?

MR BECK:

Right at the bottom of the page, Your Honour.

TIPPING J:

This is nearly four years before the important time?

5

MR BECK:

That's correct, Your Honour. Now, I mean, I have also referred Your Honour to the additional evidence of Mr Matheson. I don't whether Your Honours are interested in that at all and it's –

10

BLANCHARD J:

What's its relevance?

MR BECK:

15 I say it's relevant in the sense that it shows that this is – that Dr Acland's report is not just a flash in the pan but there's –

WILLIAM YOUNG J:

But doesn't it have to be addressed as at the time the decision was made?

20

MR BECK:

It does, Your Honour, but I say that this is – Mr Matheson is not suggesting there's deterioration but that, in fact, confirming what Dr Acland has said.

25

ELIAS CJ:

It's not relevant Mr Beck, to the –

MR BECK:

I'm not going to push that, Your Honour.

30

ELIAS CJ:

No.

MR BECK:

35 Simply that, had it been available at the time, before the review, I would have put it in –

ELIAS CJ:

I mean, it might come in, in rebuttal to a submission that Dr Acland's view is a flash in the pan, but I don't understand that to be being suggested.

5 **MR BECK:**

Well, I mean, Justice Miller was somewhat sceptical of Dr Acland's evidence, for no reason that I could ascertain but I – Mr Matheson was the surgeon who saw the appellant before the initial review, so going back a long way and he comes out with the same view. I say that's, well, this is what the Corporation should have been doing, is if they didn't like Dr Acland, get a second opinion –

10

ELIAS CJ:

You've given us a bit of impermissible comfort Mr Beck.

MR BECK:

15 I won't take that –

ELIAS CJ:

That's as far as you can –

20 **MR BECK:**

– any further, Your Honour. Those really are my submissions, Your Honour.

ELIAS CJ:

Yes, thank you. Yes,, Mr Radich.

25

MR RADICH:

If Your Honours please, I do have a very brief outline of some presentation notes which I'd like to hand up just for the purpose of taking Your Honours through the statutory scheme, rather –

30

ELIAS CJ:

Yes, thank you.

MR RADICH:

35 – than adding anything. If they could just be handed up. Your Honours, the purpose for doing this is to look at the suite of provisions, if I can put them that way, that relate to vocational rehabilitation. Your Honours have heard and questioned my learned

friend on a number of the provisions, there are others that I would suggest are relevant. So these notes, in the first place, make some very general comments and then we'll unpick them, if you will, by going through the scheme just to –

5 **BLANCHARD J:**

Is this not in your submissions?

MR RADICH:

Yes, they are the same points that are in my submissions, Your Honour, in the sense

10 –

BLANCHARD J:

Well, we don't normally receive additional material which exceeds more than one or two pages.

15 **MR RADICH:**

Well, I'm very happy just to do it orally, Your Honour, if that's more assistance to you.

ELIAS CJ:

20 Well, I'd find it of assistance because although the first page seems to be pretty repetitive, you then get into going through the sections in a way that I think we may find helpful, but it might have been set out in a more compressed way, which would have made it even more helpful.

MR RADICH:

25 I understand your point, Your Honour. A number of the points that have been raised in discussion –

ELIAS CJ:

Yes.

30

MR RADICH:

– this morning I will cover off as I go through –

ELIAS CJ:

35 Yes, I understand that.

MR RADICH:

– this, so hopefully that will create a completeness that we can work from.

ELIAS CJ:

Yes.

5

MR RADICH:

But effectively the position is, and I don't go to the first page given Your Honour's comments, but just that middle paragraph is a summary of the submissions in the first page of the written submissions and it is that a vocational independence assessment, it does of course have an entry point, in terms of subsection (3) of 110, but a threshold is not high, in the words of the Courts below, at this referral point, does require judgement to be exercised by a case manager, supervised by the courts of course, based on their understanding of the point that a claimant has reached, but it is not, in my submission, an evidence-based assessment where the case manager is required in the face of an opinion from one specialist to then get a rebutting or countervailing view from another in order to proceed. If there is sufficient information generally on the file based with the case manager's experience, then the entry point in ACC's submission can be passed and I, with that comment in mind, look at the scheme as a whole over on page 2 of the notes, and I've set out, I won't go through it all, but the statutory scheme there, in terms of each of its parts, is set out and this is part 4 that we are concerned with, entitlements, so it deals with cover and claimants' rights. There's a code of rights there, entitlements, which is including rehabilitation, and then the other aspects, management and the financial aspects and then schedule 1, which is very relevant to the discussion in this case, which deals in more detail with the notion of vocational rehabilitation and the independence assessment.

25

So, if I can start. Do Your Honours have a copy of the Act, as I will just tend to be moving to and fro between the schedule and the provisions? I do have spares if that is helpful.

30

ELIAS CJ:

I've got that bit, I don't know whether...

BLANCHARD J:

I've only got what's been provided for us.

35

MR RADICH:

In that case, Your Honour, there are some spares which may be helpful if I were to hand them out.

ELIAS CJ:

5 I might take one of yours and then I can mark it up, thank you.

MR RADICH:

10 If I could ask Your Honours at this point please to look at the beginning of part 4 of the Act, which is at section 69. I'm afraid my Act won't have the same page numbers as yours, so section 69 is at the beginning of part 4, which deals with entitlements and related matters and it provides in section 69 that the entitlements in the Act are, "(a) rehabilitation", which comprises treatment, three things, "treatment, social rehabilitation and vocational rehabilitation". So rehabilitation is an entitlement. It's very much a cornerstone of this Act. The entitlement is provided, if one looks at 15 section 70, through rehabilitation, to assist in restoring the claimant's health, independence and participation. This really is a key provision in the Act in terms of framing that which follows, to the maximum extent practicable. The important point follows –

20 **TIPPING J:**

What does "participation" mean, in the workforce or –

MR RADICH:

Yes.

25

ELIAS CJ:

Well, it must be in the community as well –

MR RADICH:

30 Yes.

ELIAS CJ:

– because it's social rehabilitation in part.

35 **MR RADICH:**

It is, and if Your Honours look back, just on that point, to the definitions section, rather should I say just proceeding that, section 3 of the Act, which talks about the

purpose as a whole, section 3, the point is picked up here in section 3, the purpose of the Act, and there is that initial paragraph here through, and then the subparagraphs that follow paragraph (c), is relevant here, “Ensuring that, where injuries occur, the Corporation’s primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum extent practicable, health, independence” and then that word again, “participation”, and so I agree, Ma’am, that is participation generally in the community, up and about.

10

BLANCHARD J:

It’s not a defined term.

MR RADICH:

15 It’s not, Sir. And while we’re in this part of the Act, it’s relevant as well to look at the definition of rehabilitation, that is in section 6 of the Act, under a long definition section, but this –

TIPPING J:

20 What are the areas of difference between you and Mr Beck on the interpretation of the – I’m to trying to listen to this, understanding what’s in dispute.

MR RADICH:

Yes.

25

TIPPING J:

Because I didn’t understand very much to be in dispute.

MR RADICH:

30 No. Well I come right to it, Sir, but the position at its heart is that the section 110(3) entry point, if I can call it that, does not in the fact of there being one piece of medical evidence required in order for ACC to believe that entry should be made, using the words of 110(3), doesn’t require there to be effectively, evidential assessment by that ACC officer dealing with it at that point, the officer should not have to say “I have for example an opinion in this case of Dr Acland, I have a lot of other information on the file as well, and my own experience”, but because of that, he should not have to, in
35 ACC’s submission, then use the likes of section 72 and say, “I must therefore”, or

“I should therefore obtain another opinion before going through”, so long as reasonably, that case manager as it tends to be, has sufficient information to satisfy himself of that threshold, and one of the points I go on to make, Your Honour, in the context of the analysis is that the medical assessment that follows the entry point is a very comprehensive assessment carried out by someone with particular qualifications and, importantly, and this is where I’d like to take you to the schedule shortly, the input that that medical assessor has, must require under the Act, any submissions from the claimant, from the claimant’s medical practitioners, any reports, any information that they wish to give, and so that is –

5

10

ELIAS CJ:

For the medical practitioner, did you say?

MR RADICH:

15 Yes, this is the medical assessor who conducts the –

ELIAS CJ:

Yes.

20 **MR RADICH:**

– medical assessment once –

ELIAS CJ:

That’s interesting in itself, because it indicates, and I’m sure you’ll come on to tell us this, that the – that my question about whether the Corporation makes a determination or whether it’s precluded – don’t do it now, but that –

25

MR RADICH:

I’m happy to go to it now, Your Honour, if that helps.

30

ELIAS CJ:

No, it’s fine, it’s just that the schedule –

MR RADICH:

35 Or maybe I’ll come in –

ELIAS CJ:

– if the schedule envisages that the submissions go to the medical assessor, that may have some bearing on it.

MR RADICH:

5 In ACC's submission, Ma'am, it does have quite a material bearing, and again it's only when one looks at the scheme as a whole that it really does make sense properly. So –

10

ELIAS CJ:

Now you keep talking about the entry point, and I just wonder whether it is accurate to, and perhaps in this review you can show me why it is, but whether it is accurate to look at this stage as an entry point, because it's actually an exit point, and there may
15 be a different approach that's appropriate in the scheme of the Act once the Corporation has assessed someone as entitled to benefits under the Act, in unloading them.

MR RADICH:

20 Mmm.

BLANCHARD J:

I've got a problem with your statement, and you read from page 1 of your notes, "Requires judgment to be exercised by a case manager, based on their
25 understanding of the point a claimant has reached." Surely there's an objective standard in section 110(3)(a)?

MR RADICH:

Yes.
30

BLANCHARD J:

It's tested objectively, it's not just what the case manager thinks, it's what the case manager ought to think.

35 **MR RADICH:**

I accept that point entirely, Sir, the language used there is a reflection of the fact that it is the case manager who will have the file on his or her desk will be – will have

been dealing with the claimant for some years typically, or at least some time, knows the person, and it is an individual within ACC, practically speaking, who must look at that provision and say "Is the claimant likely to achieve vocational independence". Now we all, testing that person's view, approach it objectively, that person must also
5 adopt an objective approach to it, but it is at the end of the day that person who will make a decision. So the language is designed to reflect that, Your Honour.

BLANCHARD J:

I think you put it better just now, than you did in the middle of the first page.
10

ELIAS CJ:

Yes.

MR RADICH:

15 Yes, thank you Sir. Well all right, well look if I can turn back now, having left the definition section to section 70 of the Act, which was the point we were at. Now section 70 I've mentioned briefly, I wanted to underline section 70, paragraph (b) of which provides that a claimant who has suffered person injury for which he or she has cover is responsible for his or her own rehabilitation, and this is part of the notion
20 that it's a reciprocal scheme, there are reciprocal rights and obligations in it. Moving to section 72, the responsibilities of claimants, and this is the section that has been covered, but this is where it falls in the scheme, the claimant must, when reasonably required to do so by the Corporation, and various things, the one we've been looking at is (d) "undergo assessment by a registered health practitioner or professional".
25 This is not, of course, the vocational independence assessment, this is generally when looking at people's entitlements of any kind.

BLANCHARD J:

But the Corporation could presumably select the health professional who has the
30 expertise to make a vocational independence assessment, and ask for advice in relation to that possibility.

MR RADICH:

Sir, yes, the medical assessor who has the prescribed qualifications and training, has
35 a task of going through quite a formulaic approach that the schedule sets out. In my submission it would not be necessarily appropriate in terms of the way the scheme

operates to have that assessor carry out effectively a pre-assessment check on the person, in a sense of assisting the 110(3) decision.

ELIAS CJ:

5 But the assessor, the medical practitioner, wouldn't be doing the check, the Corporation would be, and it would be obtaining information which it could feed into the medical assessor.

MR RADICH:

10 Yes.

BLANCHARD J:

The Corporation could, under section 72(1)(d), refer the claimant for a medical examination, the purpose of which was to get an opinion of whether the claimant was
15 likely to achieve vocational independence.

MR RADICH:

And I think, Your Honour, that is almost the nub of the case, if you will, in the sense that my learned friend would say, that is, that in the face of an opinion such as that,
20 given by Dr Acland, that ACC should have done that. ACC's case is that that would make this scheme unduly cumbersome and difficult, and this is a point that the Court of Appeal took up in the sense that it would require effectively two assessments, and in the face of my learned friend's submissions that he made in support of the appeal, that these assessments really are invading bodily integrity to
25 have two reports, to have an assessment at the section 110(3) stage, just to be followed by another one, it would not –

WILLIAM YOUNG J:

The problem is that where there's a diagnosis by a specialist of a particular condition
30 and an opinion of its consequences, it's not very likely that the GP with an occupational health background is going to say, well, Dr Acland is talking through a hole in his head, she's as right as rain. So unless there's something to rebut Dr Acland's opinion, it is probably going to be a bit of a waste of time, isn't it?

35 **MR RADICH:**

Well, Sir, the position is that the detailed process, or may I put it this way, the best person and the best time at which that kind of evidential clinical assessment is

undertaken is not at the section 110(3) stage, but at the medical assessment stage where –

WILLIAM YOUNG J:

5 I understand that, but just looking at it in a practical sense, what's Dr Wright, who was, I think, the initial person who was proposed, going to say when confronted with the report from Dr Acland that she has complex regional pain syndrome. Is he going to say, I don't think so, I think that's complex regional pain disorder actually, just jolly well better get on with it, or is he going say, well, you know, this is at the edge of my
10 expertise, I've got to go with what the specialist says, unless there's something to rebut it.

MR RADICH:

And that, in my submission, is the beauty of the medical assessment in the sense that that medical assessor can do any number of those, any number of those things –
15

WILLIAM YOUNG J:

Well, what, can he call for a report, another report?

MR RADICH:

20 He can take on board. In fact, if I go to the schedule, just to underline the point, this is schedule 1 to the Act, it's very, very, very near the end, the schedules aren't too long. Have Your Honours had the schedule 1, entitlements, part 1, rehabilitation and –

25 **WILLIAM YOUNG J:**

Sorry, if you just hold a second, I struggle to get, so I've got to the beginning of the schedule, now where am I going to next?

MR RADICH:

30 Yes, thank you, Sir, I'm taking you at this point, if I may, to clause 24 of the schedule, and this is the beginning of the vocational rehabilitation section, and just to deal with it, with Your Honour Justice Young's question in mind, now at 25 the occupational assessor must look at information provided by the Corporation, looks at the individual rehabilitation plan and I haven't come to what that plan is yet, but I will do so briefly –

35

ELIAS CJ:

But we're not concerned with the occupational assessor, are we?

MR RADICH:

No, Sir, no Ma'am, we're not, and then there's a report and then the medical assessor is the key provision, 27, there are the qualifications or the credentials, interest in work experience and disability management, at least five years in practice, a fellow of the Royal College and relevant advanced training, and then 28 is the point I was wanting to come to in answer to the question, conduct of medical assessment. So the medical assessor is to take into account information provided by the Corporation, the individual rehabilitation plan and that is something that the claimant and the claimant's specialists or advisors all have input into as well, and any of the following medical reports provided by, requested by the Corporation before the plan was prepared.

WILLIAM YOUNG J:

But all of this, I mean, you are really beating around the bush on this. There's nothing here to suggest the medical assessor will commission another report from another pain specialist.

MR RADICH:

Not directly, Sir, but at (f) it really is, if a claimant has information that they wish to put, for example Dr Acland –

WILLIAM YOUNG J:

But that's not helpful because the claimant's got what she wants, she's got an unequivocal opinion from a specialist saying that she's not, hasn't got vocational independence, so she's not going to put up the report from another doctor that says she's okay. So how do you expect the medical assessor to get past what Dr Acland says?

MR RADICH:

Well, the point, Sir, is that certainly Dr Acland is a specialist when it comes to managing pain. A medical assessor is someone with expertise and appointed for that reason in work assessment, in taking opinions received in relation to pain, in taking, importantly, that which has gone before it, which is the vocational assessment, which says, these are the types of jobs that this person could do and then using the different skills that the medical assessor has, the question is, bearing in mind anything that a pain specialist might say, having regard to their own expertise

and examination, and having regard in particular to the occupational assessment report, all of those things in mind, are there any of the jobs that the occupational assessor has commended the appellant could do, that, I believe, she in fact could do.

5 **TIPPING J:**

How can he believe that honestly when an expert says she can't?

MR RADICH:

It would be an important factor, there is no doubt, Your Honour.

10

BLANCHARD J:

It does sound heroically optimistic.

ELIAS CJ:

15 In fact it seems – it seems very sensible for the case manager in such a situation to obtain a report under section 72, if there is doubt as to whether Dr Acland's opinion should be accepted. Because otherwise what you end up with is a result imposed by the medical assessor which leads automatically to a drop off in the person losing entitlements and then you'll have to go through judicial review before they can get
20 back on to them, if that's – if that opinion is unreasonable in some way, if it doesn't deal with the pain issue.

MR RADICH:

Mmm. To pick up that point, Your Honour, and it comes back to the point you were
25 asking my learned friend, what does the Corporation do –

ELIAS CJ:

Yes.

30 **MR RADICH:**

– after it has received the assessment, and I think if I just come straight to that –

ELIAS CJ:

Yes.

35

MR RADICH:

– it's in section 111. And again there's not a direct decision provision here as you might see in other statutes, but what this provision provides is the word "If". "If the Corporation determines that a claimant has a vocational independence", so it comes after the referral point in 110(3), and then it gives the Corporation a discretion, and it is the same discretion that Your Honours were looking at under section 107, which says "The Corporation may determine the vocational independence by requiring...", and it's important as well to look at the purpose of, if we're looking at section 107, the purpose of it –

10

ELIAS CJ:

Can you just pause there? It's very different from section 103, which is cross-referred and it's to be regarded as a determination under section 103. Section 103 makes it quite clear that it is the Corporation which must determine.

MR RADICH:

And the language is a little different in the sense that 103 says the Corporation must determine incapacity, 107 the Corporation may determine vocational independence, and the difference –

ELIAS CJ:

Yes but 107 is the result, if you like, but then there is a means by which that result is to be achieved, which doesn't seem to leave open any basis for the Commission taking, the Corporation taking a different view of the outcome of the assessment.

MR RADICH:

Well yes Ma'am, 103 is dealing, in my submission, which a different matter to 107, in the sense that they're separate things, so –

30

ELIAS CJ:

Well this is the incapacity –

MR RADICH:

Yes.

35

ELIAS CJ:

And now we're talking about, notwithstanding the fact that we have determined that you had incapacity, we are now determining that you – that status has changed.

MR RADICH:

5 Yes.

ELIAS CJ:

It may not be entirely equivalent at all. One can understand there being less discretion permitted to the Corporation in the drop off and therefore the procedure
10 that's been adopted under section 107 and the following sections.

MR RADICH:

Yes. Yes, but the different is the mandatory language of 103 and then the discretionary language of 107, um –
15

ELIAS CJ:

Well, it quite clearly is a decision that the Corporation has to make under 103.

MR RADICH:

20 Yes Ma'am.

ELIAS CJ:

Perhaps we'll take the adjournment, thank you.

25 **COURT ADJOURNS: 11.34 AM**

COURT RESUMES: 11.53 AM

MR RADICH:

Thank you Ma'am. I wonder if I might take up one or two of the points that were
30 being made just before the break and then if I might return to the scheme, that in doing so I've covered so much but the latter part will be quite brief. The first point, Your Honour, is in relation to the discretion that the Corporation has under section 107, and the point I was speaking, talking with Your Honour the Chief Justice about soon before the break, and that is the nature of the decision. So if I can do it in this
35 way. There are two important parts to the provisions here. The first of them, if I may, is to look at section 108, subsection (3), which speaks about the purpose of a medical assessment being to provide an opinion for the Corporation. So there is

certainly nothing automatic, and if one goes back to the words of section 107(1), “The Corporation may determine the vocational independence.” Now that is not to say the Corporation may send someone to a vocational independence assessment, rather those words are directed to the end of the process where there has been the occupational assessment and the medical assessment. Having achieved those things, the Act then says the Corporation may determine it, and this is picked up in the same way in section 111, where it says –

TIPPING J:

10 Doesn’t subsection (2) of 107 –

MR RADICH:

Yes.

15 **TIPPING J:**

– suggest that the Corporation makes the determination by reason of the steps that are there set out and therefore whatever the result of those steps becomes the Corporation’s determination?

20 **MR RADICH:**

Yes, in my submission, Sir, that is a procedural provision in the sense that the provision is saying as a whole to the Corporation, you have a discretion to determine someone’s vocational independence and in subsection (2) it is saying, here’s how you go about doing that, here’s how you go about conducting it. Subsection (3) tells us that the purpose of the assessment is to ensure, and this is where the discretion comes in and this is what ACC must do at the end of the assessment process, has there been comprehensive rehabilitation, have the things covered in the individual rehabilitation plan been completed?

30 **TIPPING J:**

Let us assume that the result of the process which the Corporation sets in train under 107(1) and (2) is that the person is vocationally independent.

MR RADICH:

35 Mhm.

TIPPING J:

Where is the discretion for the Corporation to say well, never mind that, we're not going to take that view?

MR RADICH:

5 It's inherent, in my submission, Sir, in the words of section 107 and 111, because these provisions say that in order to determine rehab- vocational independence, you must go through this process, then when it comes out, when the result is there, there is the word "may" determine, and in doing that the Corporation must look at the purpose of the assessment again. If the, to use the words –

10

TIPPING J:

Wait a moment, sorry, which word "may" are you referring to there?

15 **MR RADICH:**

In 107(1), Sir. So those words, in my submission, are not simply saying there's a discretion in sending someone into the process. Those words link up with the words in section 111.

20 **ELIAS CJ:**

But leaving aside this "may" maze, the purpose of this assessment is indicated in the, in section 108. It is first, there's an occupational assessment, are these sort of occupations suitable, and then there's the fit, is the person capable of doing the work that has been identified and the schedule indicates that it is to, that in making that assessment, that is the assessment really that the medical practitioner is required to make and report on, and in making that it's the medical practitioner who receives all information which is relevant to that fit. But in the end it is only the fit that determines whether you are now fit for vocat- that you are of vocational independence. So I can't see what is left for the Corporation to do.

25
30

MR RADICH:

Well, what is left Ma'am, if I may put it this way, is the residual discretion. So that if, for example –

35 **ELIAS CJ:**

If there was a residual discretion, you would expect the submissions to be made to the Corporation and you would expect some criteria.

MR RADICH:

And I can't give evidence obviously, but there often are. At that point if there is an adverse, from the claimant's point of view, finding then all manner of submission
5 information can come storming down –

ELIAS CJ:

Well, that might be so, but how does the scheme of the legislation promote that?

10

MR RADICH:

Well, the other important thing about it is two things, I think, Ma'am. First of all, my point again about there being a residual discretion such that ACC can receive
15 anything. Secondly, the point, and to pick up Your Honour's point about there being possibly review after this, in fact there is statutory review –

ELIAS CJ:

Yes.

20

MR RADICH:

– of this decision, which is a hearing de novo where everything's considered from scratch, and then there is a statutory appeal right which again looks at everything. So the completeness of the –

25

ELIAS CJ:

Well, what decision is being looked at though? Effectively it must be the assessment by the medical practitioner isn't it?

30

MR RADICH:

It's ACC's decision to say that, based upon the occupational and medical assessments –

ELIAS CJ:

35

Yes.

MR RADICH:

– that vocational independence has been reached. So there is certainly, and it's certainly not an inexorable process by any means. If one looks, for example, at section 109(1) for a moment. The provision says, "The Corporation may determine the claimant's independence at such reasonable intervals as considers appropriate," and that is because many times over these assessments come out saying the person isn't ready –

ELIAS CJ:

Isn't yet.

10

MR RADICH:

Isn't yet ready.

15 **ELIAS CJ:**

Yes but that's neutral, or, I mean, that's irrelevant really to the point that we're discussing, it seems to me.

MR RADICH:

20 Yes.

ELIAS CJ:

Because that's initiating the process.

25 **MR RADICH:**

Yes.

TIPPING J:

30 If the Corporation gets a positive on both the occupational and on the medical, what possible lawful basis would there be for it to not make the decision that the person was vocationally independent? I would have thought there would be a duty, if one likes to analyse it in those terms, to act upon it, otherwise the whole thing is a nonsense.

35 **MR RADICH:**

Yes, Your Honour that – I agree with you but I would simply say that there does remain the – and it's an important objective on the part of ACC, under section 107(3),

to always go back and do a safety check to ensure that in fact the vocational rehabilitation has been completed, in fact everything is focused on the complainant's needs –

5 **TIPPING J:**

Well, assuming all that, assuming that there's a proper process and the outcome is that it's vocationally independent, how could the Corporation lawfully say well, we know that but this person is a good chap, so we won't impose it on him?

10 **MR RADICH:**

I agree entirely, Sir, it would be a rare occurrence but I can think of –

TIPPING J:

Well, rare?

15 **MR RADICH:**

Mmm.

McGRATH J:

I suppose, there is – it's a dynamic situation at times and that there might be some
20 new information coming in at the last moment and the ACC may well say, well look, rather than making a decision now and sending this off, seeing it go off to review, we will actually just defer the whole thing for a couple of months, or something. That type of flexibility, you're saying, would be helpful to the system?

25 **MR RADICH:**

That is the case, Your Honour, because certainly at that stage, at the stage between medical assessment outcome and ACC making a decision, there was a rush of activity –

30 **TIPPING J:**

With great respect, that doesn't answer my point. New information, fine, but given that the assessments are in favour of vocational independence, both of them, what legal basis could the Corporation have, under this statutory scheme, for saying, despite that, we'll decide otherwise?

35

MR RADICH:

And I'm certainly not taking issue with Your Honour's point, the only thing I can do is to say that that is likely to be right in the vast majority of cases –

TIPPING J:

5 Well, that's not good enough. You have to point to a legal basis, under this scheme, for them to go against what is their outcome of the process.

MR RADICH:

10 Yes, it could be – I can do no more Your Honour, I'm acknowledging entirely Your Honour's point, than to look at section 103, for example (a) and (b), that is it such that this person can now maintain or obtain employment, or regain, or require –

TIPPING J:

15 Well that's what the whole process is designed to elucidate.

MR RADICH:

Yes, so if there's been a terrible mistake, if there had been a terrible mistake that there was clear evidence of, then at that point I would say that ACC could intervene.

20 **TIPPING J:**

Of course. If someone suddenly pops up and says there's been a terrible mistake and genuinely there has been, it's –

MR RADICH:

25 That is right.

TIPPING J:

Yes, but that is just avoiding the point.

30 **MR RADICH:**

Mmm, and I don't, I don't, I take no, no – make no other point, apart from that, Sir, in relation to your –

TIPPING J:

35 All right, thank you. I don't want to press you –

MR RADICH:

No, no.

TIPPING J:

– because you’re stuck with the statutory scheme.

5

MR RADICH:

Yes I am Sir, that is the way it is, but coming back to the assessment process, and this is why the assessment, the medical assessment process, is so important, because it gathers together so much information in the hands of a person who is very skilled at assessing that information and dealing then, for example, with information the likes of Dr Acland’s opinion. Now, Dr Acland saw a limited picture. If I can put it this way, he addressed, as a pain specialist, Ms McGrath’s pain in her current job. Now that is a job at a high school, standing by a photocopier, photocopying documents, and he was saying that “based upon my assessment and the GP’s assessment, that 15 hours a week is too much for this woman.”

Now, the fact that she had certain pain in that job is, for example, the reason why a medical assessor may say well, with that level of pain, yes, I agree she can’t do that sort of job, she can’t do anything that requires her to stand up, but she can do, for example, some things that require people to sit down, and this is where the skills of the medical assessor come in. The medical assessor is required to look at the quite comprehensive assessment that’s gone before him or her in the form of the vocational assessment and to say, are any of these things, yes she has pain now in doing what she’s doing but is there something better for this person to get them back on their feet – well, not in this case – to get them sitting down, perhaps, for a longer period and submissions from all involved come in on that point. This is the pain level, these are the diagnoses, there maybe differences in points of view about what the diagnoses are, or what her condition is, but it’s the medical assessor and not the ACC case manager, in my submission, who is best placed to consider that and if that view is not favourable to a claimant and if they can’t then persuade ACC at that residual discretion stage, acknowledging Your Honour Justice Tipping’s point there, then they have a complete right of review de novo.

ELIAS CJ:

Well, that point I think is fairly made, that matters may have reached the position where ACC was justified in saying “we want a medical assessment under the Act which will take into account Dr Acland’s view and come up with the conclusion”. It’s

an aspect only. I think there are two things that you need to address further in development of that. First, whether Dr Acland's opinion is correctly characterised as being so limited, and secondly – oh, there was a second point which seems to have totally escaped me, I'll have to come back to it but if you could just take us to that.

5

MR RADICH:

I'll certainly come to that very soon. So, I wonder with that and as I say, I've covered so much of it now, I'll just check to see if there's things that I've missed that might be useful, just to referring to briefly, in my hand-up of the Scheme, I just wanted to make
10 the point, going back a little bit, to show how it all starts, simply for context. So, in section 75, there is a thing called an individual –

ELIAS CJ:

Oh, I'm sorry. The second point was, then it turns really on this likely aspect, yes.
15

McGRATH J:

What information is the basis of the likelier figure –

ELIAS CJ:

20 Yes, what is the information as to the basis?

MR RADICH:

Yes, yes and I'll come to that too, Your Honours, quite soon. So, just taking it through briefly, section 75, the individual rehabilitation plan. Now that's something
25 that – this starts matters off in terms of achieving rehabilitation, getting people back to participation. So, that's in consultation with the claimant, so there's input from the beginning. Now, in preparing the plan, in section 77, there needs to be an assessment of the claimant's needs for rehabilitation, looking at sections 79 and 80 and just looking at those two things, the purpose of social rehabilitation is to restore
30 independence and vocational is to, as appropriate, maintain or obtain employment, or regain or acquire vocational independence.

Now, social rehabilitation, we needn't deal with it all, but it's just set out there in section 81, aids and appliances in a childcare education support, those sorts of
35 things. So that's one of the two types of independence. I just mention that the next one over the page now which is more relevant, at 85, is vocational rehabilitation and the Corporation is liable to provide vocational rehabilitation. Moving over the page to

schedule 1, I just want to identify these without dealing with it in much detail, but schedule 1 of the Act again then has a scheme for the preparation of these rehabilitation plans and I'm looking at clause 7 in schedule 1.

5 I just make one or two points going through here. The first is that, under clause 7(1), paragraph (d), "The Corporation must tell the person from the outset that there is a right to ultimately move to vocational independence." So that is known from the outset. Now, there is then a suitably qualified person engaged to assist. Then, at 3, this is 7, subclause (3), the people, the claimant has an opportunity to participate, as
10 does their medical practitioner and employer. They must agree to the plan, or should try and agree to the plan under clause 8, clause 9 disputes about the plan, that goes to statutory review as well, and appeal if need be, if there can't be agreement at –

BLANCHARD J:

But I'm not sure how this helps us with determining the requirement of
15 section 110(3). It's all very interesting, but it's very much in the background.

MR RADICH:

Yes, Sir, the point I seek to make is that 110(3) is a part of quite a detailed iterative process that spans a period of time that involves the claimant at all stages, the
20 claimant at each stage has full right of participation and input, even when they're designing what's going to happen, so I really was just –

ELIAS CJ:

But I think we can readily accept that. What are you drawing from it that's relevant to your argument here, in relation to this assessment?
25

MR RADICH:

What I'm drawing upon is the fact that when it comes to the section 110 stage, there is – a great deal has happened. The case manager and people within ACC have had a history of dealing with the person and understand. They're not just dealing with a
30 name and some documents in a file in front of them; they have an understanding. The person is aware where the process might lead. The vocational rehabilitation process does not lead automatically to an independence review. There are many people who, during the course of it, go back to their jobs. Some, on the other hand, will never go back, it just proves that they're too incapacitated. Others, and this is
35 where section 110(3) comes in, it's that third category of others, where a case manager is of the view that I have worked with this person for some time now, I can

see what's happened, I can see various reports and information. I believe objectively that this person should move through to the vocational independence assessment stage. At that stage the medical assessor will look at everything that can be offered and that medical assessor will come out with a view, and if it is unfavourable, if it's 35
 5 hours a week are okay for this person in, for example, telemarketing, for example, then that person has a right of – and the Corporation does make the decision, which it's likely to, then that person has a right of appeal at which the whole thing can be revisited, or right of review first.

10 And so the point I make in looking at the scheme as broadly as I do, is that it really is part of quite a, sometimes quite a long continuum, and sometimes a person can go into the vocational independence assessment phase, the conclusion is that they're not actually ready, they go back out, another individual rehabilitation plan is prepared, saying "Okay what else can we do to help you?". The object is to get back
 15 on people's feet: "What else can we do?" And then it goes forward again. Things can happen along the way. People can get better, people can get worse, and so the scheme will react to them differently. But that is the point, Your Honour, that I make.

So I can probably, having said those things, pass over much of what I want to say,
 20 apart from just going, if I may, to the bottom of page 4, and this is a point in the last paragraph there that I made in the submissions, that a claimant does have choices at the 110(3) stage. He or she may in fact decline to be assessed, as Ms McGrath has. They can simply say, "I refuse, I am not going to an appointment". What, in fact, that does is have the ability to trigger section 117.

25 So just looking at that section for a moment, section 117, subsection (3), "The Corporation may decline to provide any entitlement if the claimant unreasonably refuses or fails to -" and then (b) "undergo medical or surgical treatment", or comply with any requirement. Now the way in which that will work, just for completeness, if
 30 you were to go to section 134, Your Honours, that then enabled that person, if that is the consequence, to apply for review of a decision.

ELIAS CJ:

What section?

35

MR RADICH:

It's 134, Ma'am. So 134(1)(a) "Claimant may apply to –

TIPPING J:

What bearing does this have on the correct construction of 110(3)? As succinctly as you can because I'm getting a bit lost.

5

MR RADICH:

Yes. The bearing, Sir, is that at that review, if the person doesn't go, they can then test the section 110(3) decision, they tell the reviewer.

10 **WILLIAM YOUNG J:**

But that's only – that would be quite a good argument perhaps if you were saying that the section 110(3) decision wasn't reviewable, but you've conceded it is reviewable.

MR RADICH:

It's statutory review, Sir, yes.

15

WILLIAM YOUNG J:

No, in the High Court the argument for the ACC was that judicial review was not available. Now if there was an in substance administrative review process, well that would be quite a good basis for that argument, but you're not taking that argument?

20

MR RADICH:

No, no I'm not, Sir.

WILLIAM YOUNG J:25

So why are we going here?

MR RADICH:

I make the point to say that ACC does not say that it's not reviewable, but it does say there's a very low threshold for getting through the 110(3) door, so, and the reason that it's low, is that there are so many checks and balances in the scheme, that the checks and balances include the things I've been speaking of, and this is one other of them, it's not an absolute answer by any stretch, Sir, no.

30

ELIAS CJ:35

Well there has to be a reasonable basis for the statutory threshold for requiring the assessment.

MR RADICH:

Yes.

ELIAS CJ:

5 Really there's nothing much more to be said than that is there?

MR RADICH:

Nothing more to be said, but apart from the fact that if a claimant believed there is no reasonable basis and then doesn't turn up for the assessment, there is a right of
10 review, at which they can say "I didn't go and ACC's now stopped my entitlement, I didn't go because I didn't think it was reasonable", and that's when the reviewer does the same job.

ELIAS CJ:

It's really not very realistic, it seems, this submission.
15

TIPPING J:

The fact that you can challenge says nothing as to what it is that's got to be established.

20 **MR RADICH:**

Yes, I make the point for completeness, that these are the things that happen at that stage, that a claimant has choices, they cannot go –

TIPPING J:

25 But effectively the Court's saying to you "so what". Our job is to determine what section 110(3) means.

McGRATH J:

I can accept that section 110(3) has to be interpreted in the context of the whole Act,
30 including the scheme of what's involved. But I also have this sort of niggling concern that section 110(3) wasn't really a provision that emanates as part of a whole scheme, it was a provision that came in during the select committee process, as I understand it, as a result of particular submissions and it seems to have been premised on the view that the scheme, elaborate as it is, and with all of the
35 safeguards, is rather a burden on people who have to go through it, and that there should be some threshold in that regard, and it's probably a case where we can't place too much emphasis on the Act read as a whole, because it was a particular

provision to deal with the political argument put to the select committee, which it bought.

MR RADICH:

5 I agree, Sir, that's a very fair point, and the notion is that there must be reasonableness exercised at the section 110(3) stage, that it is, that there is a door through which one must pass.

McGRATH J:

10 Well there has to be compliance with what the statute says.

MR RADICH:

15 Yes, that is so, Sir. But I would seek to make the point that that being the case, and accepting that ACC does of course, it does nonetheless form part of a scheme where there are checks and balances, significant checks and balances.

McGRATH J:

I think we certainly understand that.

20

MR RADICH:

25 Yes thank you, thank you, Sir. All right. Well on that basis, if I can just make the points on page 5 or the notes that these are the essential parts of that scheme, the obligation of – these are the bullet points towards the top – the obligation to restore independence, the pathway created, incremental information, the specialist skills of the assessors, it is that person's specialist opinion in terms of analysing countervailing opinion information that is the focus of analysis, and of course under section 64, 54 as well, picking up Your Honour Justice McGrath's point, "ACC must make every decision on reasonable grounds", that's always been there, having regard to the nature of the decision and all the circumstances, and so that has always been the case with everything ACC does.

30

35 In the written submissions filed in advance, the point was made that to introduce, and this is at paragraphs 55 and following, just to encapsulate in a sentence or two, the gist of the submissions there, the position has been that to introduce as my learned friend has put it in his submissions "the need for countervailing expert evidence", or cogent supporting material contrary to the likes of Dr Acland's opinion at the section

110 stage, is unwarranted, because of the scheme and it is cumbersome. To actually require more than an assessment, bearing in mind the 110(3) threshold, requiring more than the information that is before the person, does, to use the Court of Appeal's phrase, "introduce a doubling up", and it's a point I make in
5 paragraph 58.

Now with that in mind, I wonder if I might turn to address one or two of the other questions, certainly that raised by Your Honour the Chief Justice a moment or two ago, by looking at the documents in the case on appeal, volume 2. I think the best
10 way to do it is to actually look at the paper at –

ELIAS CJ:

Is there, I can't remember, is there any statement that the Corporation makes as to
15 the reasons why it's referring the appellant?

MR RADICH:

Some of it comes out through the documents and it is brought together, if I can –

20 **ELIAS CJ:**

Was there a letter that was sent?

MR RADICH:

A letter, yes, yes there is Ma'am and –
25

ELIAS CJ:

Can you just take us –

MR RADICH:

30 – I'll come right to it.

ELIAS CJ:

Okay.

35 **MR RADICH:**

Yes. It's probably the last in the chain of just a few things. I'm not going to take you by any stretch to every page, but just to show the picture in its entirety because that is important –

5 **ELIAS CJ:**

Can we go to that letter first?

MR RADICH:

Oh, yes.

10

ELIAS CJ:

Because I might have a question arising out of it.

15 **MR RADICH:**

Well, there are in fact several of them, Ma'am, which is, the last one, the last letter, working backwards, and this doesn't help Your Honour because this is page 83 of volume 2, this is the last in a chain of correspondence. It's a letter from Mr Hurring to Mr Sara, who's the appellant's solicitor, and as I say that doesn't help you too much because that's just says, based on all the information on the file.

20

ELIAS CJ:

Well, maybe it's the initial letter I need to see.

25 **MR RADICH:**

Yes, well okay, so can I take you then, Ma'am, to page 6 of this volume because there are in fact three or four, the referral letters in three or four decision letters if you like, so this is the first one and it says to Mr Sara "ACC has tried without –

30 **ELIAS CJ:**

At page 6?

MR RADICH:

Page 6, Ma'am. It's a letter from Mr Hurring to Mr Sara. "... Tried without success to reach agreement on the plan", there's a new plan. Then fourth paragraph, "After considering all the interventions provided to date, I consider it an appropriate time to assess Ms McGrath's vocational independence", and the file's been forwarded to,

35

and this is of interest, the technical claims manager and branch medical advisor for their comments about starting the process.

5 Then the next thing that I should take you to, because it builds on Your Honour's question, is page 12. This is another letter from Mr Hurring to, in this – this time to the appellant directly and this is following the input having been received from those medical advisors, 28 November 2007. "ACC considers your programme is complete and plans to assess your independence, your vocational independence." And there follows –

10

ELIAS CJ:

Well, is there anything that's not generic on this?

15

MR RADICH:

Yes, it develops, Ma'am, because of the interactions with Mr Sara. And so you'll see, for example, on page 14, Mr Sara is writing to the branch medical advisor, challenging her, the view, in the last paragraph you'll see, "My client's only working 15 hours per week", so he's intervening at that, at that section 110(3) stage. Then there is a letter from Dr Muir that follows on page 15 to Mr Sara and –

20

ELIAS CJ:

Sorry, what, I'm sorry, this certification on 6 September, isn't that fairly, isn't that what they're acting on?

25

MR RADICH:

I'm sorry, Ma'am?

ELIAS CJ:

30

Sorry, in that letter, at page 14 –

MR RADICH:

14.

35

ELIAS CJ:

– it quotes a certificate of the ACC branch medical advisor. Isn't that the foundation?

MR RADICH:

5 Certify. I wonder if that word is used, rather than referring to a certificate, but yes, yes Ma'am, there is in fact, the only reference we have to that on the file is this quotation here, in terms of ACC's file or any file that's been used in these proceedings.

ELIAS CJ:

I see.

10 **TIPPING J:**

Quite a good point in your favour but it's, can you not find it?

15 **MR RADICH:**

That is what we have, Your Honour, I'm afraid. There's no reason why it cannot proceed through the process. Now, issue is taken with that and this is very much a developing conversation between ACC and Mr Sara at this stage, because page 15, there's a contrary view –

20

ELIAS CJ:

I'm not sure that it's necessary really, to go through all of this –

TIPPING J:

25 No.

ELIAS CJ:

– because, in a way, it's subsequent. I just wondered whether there was some statement –

30

WILLIAM YOUNG J:

35 Was there ever – there's never anything akin to a decision letter saying “under section 110(3), it has to be likely that she will achieve vocational independence before we go on with the process, likely to be established in this case by the following five factors”?

MR RADICH:

No Sir, there is no letter of that sort. The documents I'm referring you to now, Ma'am, precede an application for judicial review which set the process aside and then –

ELIAS CJ:

5 Oh yes, I see.

MR RADICH:

– it started again so –

10 **ELIAS CJ:**

And that was because pain hadn't been factored into the determination?

15 **MR RADICH:**

That is right, Ma'am. So you had Dr Porteous and Dr Antoniadis, so Dr Porteous did an initial assessment, for the purpose of getting the plan drawn up, Dr Antoniadis did a full medical assessment. On review, the review officer said, and it's just important I think, to look at what he said very finely, on page 119 of the bundle –

20

ELIAS CJ:

Is this pre the judicial review that sent it back?

MR RADICH:

25 Yes.

ELIAS CJ:

Well, I don't think we need to go back there.

30 **MR RADICH:**

No, no –

TIPPING J:

35 Would it not be helpful for you to tell us whether there's anything beyond what Mr Hurring said in his affidavit, in those paragraphs that we were referred to which you say supports likelihood?

MR RADICH:

There are one or two matters, if I might just address Your Honour on it.

TIPPING J:

5 Well, it seems to me that that is as close as we get to someone saying why they thought it was likely –

MR RADICH:

Yes, yes, that is –

10

TIPPING J:

– and if there's other material to which proper reference can be made, that would be helpful, but that's the end of it, isn't it?

15 **MR RADICH:**

No, the only other reference I wanted to take Your Honour to was to put in context Dr Acland's comments, but in terms of likelihood there is nothing further than the affidavit.

20 **TIPPING J:**

So you rely on Mr Hurring's affidavit, those various points, plus what you're about to say now?

MR RADICH:

25 Yes Sir, plus what I'm about to say, Sir, yes. So, if I can just note these documents without referring to them in detail. So, page 34 of the bundle, this is another letter now from Mr Hurring to Mr Sara, and says although this reference is about to be made, there is still a debate around it and so this is saying that there –

30 **TIPPING J:**

Look, with great respect, this is all very woolly. Can you not just, I mean, referring to his letters generically –

MR RADICH:

35 All right.

TIPPING J:

– what is it, as a matter of fact, that you say supports the decision, beyond Mr Hurring’s compilation?

MR RADICH:

5 Well, it’s merely the context for Dr Acland’s view, so if I can come to that then, Sir, directly, page 66 of this volume. This is a letter from Mr Sara to the GP, asking him to have Dr Acland make some comments. So this is context and the end of the second paragraph there, the sentence reads “In order for any sensible decision to be made about Ms McGrath’s vocational independence, a realistic assessment of her
10 work capacity, having regard to her known condition, needs to be undertaken. In my view, this is best provided by the Mercy pain specialist”. This has been the view, I think this almost comes to the heart of the case throughout, that that is the appellant’s view that Dr Acland is best, ACC’s view is that the medical assessment process provides far better credentials to make that form of assessment and that
15 Dr Acland’s view is very important but it’s not determinative.

Moving forward, then, I go to the first letter from Dr Acland that is of note, and that is at page 71. Here he is referring back to page 70, just back one leaf and this is – my learned friend has taken you to this, this is Dr Muir but we only have half of this letter
20 for reasons, as does the file, that are unclear. This is the letter in which Dr Acland says “I’ve no more to offer.” Now, it was at this time that the initial decision to refer to the medical assessment was set aside, well, was the subject of a judicial review case. The judicial review case was settled on the basis that there would be the referral back to Dr Acland and this is it, this is what Dr Acland had to say as a result.
25 He says “I’m sorry, I have no more to offer,” and then –

ELIAS CJ:

So, where is his earlier view?

30 **MR RADICH:**

This is the first view, Ma'am, this one here. This is the first view that –

McGRATH J:

Has he just seen her clinically, for clinical purposes before?

35

MR RADICH:

Yes, previously, Sir, he had, yes, yes indeed.

ELIAS CJ:

And is there no report arising out of that?

5 **MR RADICH:**

No, Ma'am, this is the point –

ELIAS CJ:

I see.

10

MR RADICH:

15 – is that these are three or four line letters in each case and then, just noting in passing, 75 just notes the resolution of the judicial review on the basis that Dr Acland is involved –

WILLIAM YOUNG J:

20 Well, that's not strictly speaking true, because there's a letter of Dr Acland of 3 June 2008, page 57.

ELIAS CJ:

Page 27?

25

WILLIAM YOUNG J:

Page 57.

MR RADICH:

30 I am sorry, Your Honour. You are quite right, there is one previous one, yes, yes and this is written to the GP, "Thankfully, didn't think amputation was a consideration –

McGRATH J:

Sorry, page, you're at page?

35

MR RADICH:

Page 57, Your Honour.

WILLIAM YOUNG J:

But this does seem to be a clinical consultation, rather than an ACC reporting matter?

5

MR RADICH:

That is right, it was not in the context that we're looking at right now. So then, going back to the point we were at on page 71, that was the first letter that was directed to our issues. The next one is on page 76, again to Mr Sara, and Mr Sara's letter, just to make sense of it, is on page 73. On 76, Mr Acland is saying that "We were quietly optimistic that she could increase. This doesn't appear to be an obtainable goal." Then the last sentence, "Sadly, it does not look as though Karen will be able to return to any vocational pursuit." Then, page 78, Mr Sara writes and says "I should just point out to you that she is in fact working. She's working 15 hours a week", and in response to that on page 79, this is the final letter from Dr Acland. He says "Thank you for clarifying the employment situation. I totally agree, not more than 35 hours, I don't think she can sustain this."

So, in each case, the only point I seek to make is Mr Acland's views are brief, they are based upon a specific request from Ms McGrath's solicitor, and they are not an assessment of the things that she might be able to do. They're an assessment of her current job and the scheme is really looking to go much deeper than that in making an assessment.

So really, to conclude, Mr Hurring's reasons are set out again, just summarised, on ACC's submissions to this Court on page 14. I won't go through them again, but his view, based upon all of that information, including Dr Porteous and Dr Antoniadis, that there was enough reasonably for him to be able to conclude, under section 110(3), that the claimant was likely to achieve vocational independence, in the sense that there was a good reasonable prospect, a good chance, that she could get there, bearing in mind Dr Acland's view, but that view would be tested in due course if that was put up to the medical assessor, as of course it would be and so –

BLANCHARD J:

Do we not have anything from Mr Hurring, beyond what's in his affidavit on page 30, explaining how he came to his view?

MR RADICH:

Just completing then, Sir, on that point, there were letters from Mr Hurring in between those from Dr Acland. They are brief though, I should say, so –

5 **BLANCHARD J:**

Yes, because you see, I think you said a little while ago that this was an assessment against a job which did require her to stand and there might be jobs which required less standing, et cetera. Is any of that in the materials?

10 **ELIAS CJ:**

Mmm, I was going to ask that too.

MR RADICH:

15 It is, it comes out through, if one looks at Mr Hurring's affidavit, I can do no more, Your Honour, than obviously refer to what Mr Hurring has said, and that is the point that was being made by His Honour Justice Tipping in paragraph 22 –

McGRATH J:

20 Page, what page?

MR RADICH:

I'm sorry, Sir, page 30 of volume 1 of the case on appeal, which is simply his reference to experience with other claimants with similar or greater physical
25 impairment.

Then, in terms of the bundle in Mr Hurring's correspondence, page 80 of volume 2, this is also Mr Hurring, and what he's saying here was that the previous judicial review proceeding was discontinued on the basis that there would be a referral back
30 to Dr Acland for assessment, and he's referring to Dr Acland's letter that I have referred you to saying he has nothing more to offer. Therefore, to use his words, it is now appropriate to complete the vocational independence assessment. ACC's legal section has indicated that proceeds should start again. Then, there's a further letter from Mr Sara taking issue with that, and on page 83 Mr Hurring's final word on the
35 topic, albeit brief, "Based on all the information on file, ACC considers it is appropriate to continue with the vocational independence assessment."

BLANCHARD J:

Well, the difficulty for ACC, it seems to me at the moment, is that it hasn't really ever explained itself. You've come up with an explanation, but of course, we're constrained by what's in the papers.

5

MR RADICH:

Yes.

BLANCHARD J:

10 I'm not suggesting that your explanation may not be the right one, but one would have thought when this got to the stage of getting into the Courts in judicial review, ACC would have had Mr Hurring explain in some detail how he reached his conclusion.

MR RADICH:

15 That explanation Sir, and I can say no more than this, is given in his affidavit in which he does refer to the initial medical assessment of Dr Porteous and Dr Antoniadis and again, without adding to that, that he has, he's relied on them to a reasonable degree in there.

20 **BLANCHARD J:**

Where are you referring to now, we –

MR RADICH:

Page 29, Your Honour, of volume 1 on the case on appeal, Mr Hurring's affidavit –

25

BLANCHARD J:

Yes.

MR RADICH:

30 – paragraph 21, "My assessment, the VI assessment, was appropriate, was based on the following information contained in the file", so first of all Dr Porteous, and Dr Porteous is at volume 2 at page 93, and so he hasn't unpicked that report if you like, but he's relying on it. This is an initial medical assessment, it is historic, it's 2003 –

35 **ELIAS CJ:**

It's not directed at the pain issue and it's, and you subsequently were directed, or you agreed after judicial review proceedings were instituted, that pain had to be

assessed. You went back, you got this opinion, why, I mean, the opinion given, it could mean, on the basis of it, that pain only impacts on the occupation that she's actually doing and there are other occupations which could be undertaken. That would be –

5

MR RADICH:

Mmm.

ELIAS CJ:

10 – legitimate. Why wouldn't you get a further opinion from, from Dr Acland, directed at that? Are you talking simply about, because there's just a gap in the information. We don't know whether that is directed at, we don't even know what there is in her 15 hours' occupation that she does. You've said to us, well, it's because it entailed standing.

15

WILLIAM YOUNG J:

There's quite a lot, there's actually quite a lot about that in the material.

ELIAS CJ:

20 Is it?

WILLIAM YOUNG J:

There is.

25 **MR RADICH:**

In the vocational assessment report, page 39 of the, of volume 2, Ma'am, there is a detailed discussion about what she's, what she's doing now –

ELIAS CJ:

30 Yes.

MR RADICH:

– and what's she capable of doing and that information also –

35 **ELIAS CJ:**

And when was that taken?

MR RADICH:

That was in May 2008.

ELIAS CJ:

5 Well, that was before the, the reconsideration in the light of the pain described. It was about the physical impairment, was it?

WILLIAM YOUNG J:

10 No it's about what she was doing. It's about the – it deals with the work she was doing.

MR RADICH:

15 So the way – the order in which it went, Your Honour, was that there was a view by Mr Hurring that Ms McGrath could go through the VI process. She then – at that stage she went through a – well, what I – she went through a vocational independence assessment in May 2008, and there it is on page 39. She was then referred, to be referred to a medical assessment. At about this time, if you look, Your Honour, at page 58 of the bundle, this is an amended rehabilitation plan that
20 has been amended, if you looked at page, the numbers are difficult to read, at page 60 of the documents, it's accepted through subsequent correspondence that these changes are Mr Sara's and Mr Sara has signed at the bottom, so it's saying here "ACC will fund a referral to Mercy Pain Clinic for medical treatment, including pain management and recommendations in relation to Ms McGrath's work hours and
25 duties."

30 So in the face of that, when ACC looked to proceed with the vocational assessment, judicial review proceedings were commenced. Because that hadn't been done, and that is when the judicial review proceedings were, the parties agreed immediately, "All right, well let's not go to Court about this, let's go back and do that", and it was at that point that Dr Acland gave his view, and that is the view on page 71. As a result of that Mr Hurring's view was, "All right, we've done that, we have completed everything in the vocational plan, which is the second plank of section 110, the first of them is the "likely" quest, and the second is that you've completed your plan, off we
35 go again", and that is when this judicial review proceedings started.

ELIAS CJ:

Well it would be so much better if there was an indication that we're proceeding because we think that there may be some occupations, that notwithstanding the pain syndrome identified by Dr Acland, you might be fitted for.

5 **MR RADICH:**

And that, Ma'am, if you were to answer that question directly, is on page 39. This is the vocational independence report, which identifies 15 jobs that Ms McGrath can do. So if Your Honour was to look, for example, there are, just to deal with Your Honour's earlier point about an assessment of what she's doing now, page 41 of the bundle
10 looks about her work –

ELIAS CJ:

Sorry, you've just taken us to 39, what are we meant to be looking at there?

15

MR RADICH:

Yes, this the vocational independence report, and there, beginning on page, as Your Honour says, page 46, are the 15 jobs identified as suitable. And the way in which these –

20

ELIAS CJ:

Sorry, which page?

MR RADICH:

25 Page 46, Ma'am.

ELIAS CJ:

General Clerks, clerical and administrative workers. Is that right?

30 **MR RADICH:**

So these are each a category which are based on international standards, which do categorise, and the job of this person is to identify which ones are possible, and then over the page, page 47, Clerical, and you'll see in each case there are the claimant's comments, she largely disagrees with each of them. Page 48, Hotel Service
35 Manager, also number 6, so, and on it goes through to page 52. The report then continues on page 54, and which this person says at the very second paragraph on this page "I could find no vocational barriers to Karen working 35 hours a week".

BLANCHARD J:

Sorry, where are we looking now?

5 **MR RADICH:**

Page 54, Sir.

ELIAS CJ:

Oh, vocational barriers.

10

MR RADICH:

Which is this person's job, that is their ultimate obligation.

WILLIAM YOUNG J:

15 The point you are making, or trying to make, is that there are a whole range of jobs for which she has been assessed as capable of doing vocationally.

MR RADICH:

Yes.

20 **WILLIAM YOUNG J:**

Dr Acland's assessment is focused on the particular job she was doing.

MR RADICH:

That is the point, Sir.

25

WILLIAM YOUNG J:

And is thus not inconsistent with a likelihood of vocational independence in other, not necessarily inconsistent, in other fields.

30 **MR RADICH:**

Yes Sir, thank you.

ELIAS CJ:

35 So why is he not asked in respect of the other vocations? Why is there not clarification sought from him?

MR RADICH:

From Dr Acland Ma'am?

ELIAS CJ:

Yes.

5

MR RADICH:

Well, because the only –

ELIAS CJ:

10 You say his report is inadequate because it's only directed at what she's doing.

TIPPING J:

15 I'm not sure that that's a fair inference, but let us assume that that is the case, that it's only directed specifically. I read it rather more generically, but that's an issue we'll have to look at.

MR RADICH:

Yes, sorry, and Your Honour you're referring in saying that to –

20

TIPPING J:

I'm not fully persuaded at the moment that Dr Acland's report was directed only –

MR RADICH:

25 Oh I see.

TIPPING J:

– to whatever it was she was supposed to be doing at the time. I read it as a continuum, as a flavour as being much more generic, but I may be wrong.

30

MR RADICH:

Well, I had read it differently, Sir, but you may be right also. I looked for examples –

TIPPING J:

35 But you see my essential problem is in this case that I think what you have to confront is that there's not enough medical evidence on the file of a contemporary kind to give rise to likelihood in the light of Acland's opinion. That to me is the bottom

line on the facts. You've drawn attention to everything you can on the medical side, but just in case there's anything more you can say on that, I thought fairly I ought to put that to you.

5 **MR RADICH:**

Thank you, Sir. You refer to historic information, all I can say of course is there is detailed information from people who are assessors rather than, rather than the narrower focus of Dr Acland.

10 **TIPPING J:**

Yes, but it is the pain that's supposed to be the problem, not the physical impairment per se. It's not as if she's got a missing hand, it's the pain.

MR RADICH:

Yes, that's right, Sir.

15

TIPPING J:

That's where I think there's been a slight failure to engage.

MR RADICH:

20 And the pain, it might be said, is causing a –

TIPPING J:

It might be right, it might be wrong, but I'm worried you got there too lightly, in the light of the purpose of subsection (3).

25

MR RADICH:

Well Your Honour, the purpose of – yes –

TIPPING J:

30 Is to surely to make – not to put people through this process, with the consequences that may lie at the end of it, unless there's a reasonably firm foundation for doing so.

MR RADICH:

35 And the foundations, Sir, do no more than to refer to Mr Hurring's affidavit, which we have looked at.

TIPPING J:

Well, that's right. It's the Hurring affidavit, plus these pages that you referred to, supplementary.

MR RADICH:

5 And the nature of the instructions to Dr Acland, which I think must be –

TIPPING J:

What do you mean by that?

10 **MR RADICH:**

I mean, for example, at page 66 –

WILLIAM YOUNG J:

You mean the questions asked by Mr Sara?

15

TIPPING J:

You mean that they were slanted, or –?

MR RADICH:

20 Not that they were slanted, but they were asking for a specific view, and they are based – if one looks at 66, for example – on Ms McGrath working 15 hours –

TIPPING J:

But Mr Hurring doesn't say that's because of the way Dr Acland was instructed?

25

MR RADICH:

No, no he doesn't.

TIPPING J:

30 No, we can't go down there. That's getting a bit below the belt.

ELIAS CJ:

And if that was so, surely you'd get another opinion, either from him or from someone else. And while it may be entirely right that if you did have an opinion that answered
35 these questions, you might then say "well there are – there are occupations that have been identified that would not be excluded by that, therefore off she goes to

reassessment". If you look at page 53, I think that's where it's summarised what she's – are those the 16 occupations that she's been identified –

MR RADICH:

5 Yes, Ma'am.

ELIAS CJ:

– as being vocationally qualified for. Well I mean there are maybe three, I don't know, that it might be arguable that they're not really comparable to the job she's
10 doing at the moment, and on which Dr Acland's opinion is based. And they are switchboard operator, call or contact centre operator, and telemarketer, but everything else, one would have thought there was an inference that if she's not fit for the light clerical duties she's doing at the school, she's not fit for those occupations either.

15

MR RADICH:

That's quite so, Ma'am. It's entirely plausible, and that is where the medical assessment which would follow, would have followed, but that it is preceding will then take that list and say look, let's now look realistically at what you can do, if anything.
20 Can you do any of these things? Dr Acland is telling us that you, that your pain, in terms of the work you were doing now as such, that you doing what you're doing now, certainly you won't be able to work 35 hours a week and that person may well say, I agree entirely with that and let's look and see if there are any other things here and the submission is that it is that assessment by that person, with those skills,
25 following the receipt of this information, that is the proper focus, rather than someone like Mr Hurring acknowledging of course that there is a threshold that he must satisfy, but rather than someone like Mr Hurring having to try and do that in advance, without criteria, without a framework when the framework is then provided. So the submission for ACC is to, for Mr Hurring or someone like Mr Hurring in a case like
30 this, to have to say in the light of Dr Acland's views, what I need to do in fact is get another opinion, get another assessment before I can refer you on to get another medical assessment. It's doubling up.

ELIAS CJ:

35 Well, you might just have gone back to Dr Acland and said, do you think she could be a switchboard operator, call or contact centre operator or telemarketer.

MR RADICH:

And that is the point, Ma'am, at which my learned friend and I would differ significantly, because in ACC's submission it's really, while Dr Acland could of course make a comment on that, he's not trained to do so, he's not used to the system. The
5 person who is best placed to do that, in that the statutory scheme mandates to do that, is the person who then gets this report, because of course, the section 110 –

ELIAS CJ:

That person needs information about the impact of the pain that Dr Acland is the
10 specialist in and that's where the whole thing went awry before. Just doesn't seem to me that the bases have been covered for this next stage being undertaken.

MR RADICH:

Ma'am, I understand your point. All I can say is that the progression needs to be,
15 first of all, 110 threshold. There is, there wasn't the vocational independence assessment there, so at that stage Mr Hurring, no I'm sorry, that was there from a previous occasion, no you're quite right, that was there. Typically at a 110(3) threshold stage there might be an initial assessment under the plan provisions, but there wouldn't be something like this. In the typical case the case manager will be
20 saying, what have I got on file, what is my understanding, do I meet the 110(3) criteria, and so advice from people as to whether people can do certain tasks or not can only really follow the actual undertaking of the vocational assessment. In this case all of the parties in this particular case, the facts of which are a little peculiar, given that it started, stopped, and then started again, this document did exist. Mr
25 Hurring's reasons, and in my submission, they are satisfactory well and truly for there to be some reasonable basis for Mr Hurring to believe that section 110(3) applied. He looked at, and the –

ELIAS CJ:

30 Well, as you've said, what he did is what's set out in his –

MR RADICH:

Yes that is right, Ma'am.

35 **ELIAS CJ:**

– affidavit.

MR RADICH:

And I should just add that the initial medical assessment that he looked at, even though it was several years old, the initial medical assessor is required to assess the same types of things as the medical assessor is ultimately. If one looks at the statutory scheme in terms of what that initial medical assessor is required to do, one
5 sees that in section 89 and section 93 and section 95. They are very similar things to the ultimate assessment. So Dr Porteous's report was properly focussed.

TIPPING J:

10 It was properly focussed by it was very old.

MR RADICH:

It was very old, correct. Dr Antoniadis gave two a year or so later, gave two different
15 reports, both of which, in both of them he found there to be no reason why, with sitting jobs, his words on page 107 of volume 2, "occupation which allows her to sit predominantly but stand intermittently, no reason why that would not be suitable." So, these are people who are focusing on the statutory criteria. When someone like Mr Hurring is faced with very brief comments from Dr Acland and I don't seek to
20 diminish what he says –

ELIAS CJ:

But the whole process got derailed because no one had addressed the pain issue. So it went off for pain assessment and Mr Hurring proceeded on the basis of the
25 earlier reports?

MR RADICH:

And that was because when the assessment that came back, to use Dr Acland's words, was literally three lines and says that "I don't think there's anything else I can
30 do for her", and so that caused Mr Hurring to think –

ELIAS CJ:

That has to be read in the light of his earlier –

MR RADICH:

35 Yes, Ma'am, yes, but I mention that because Mr Hurring's thinking was really, in terms of that aspect, was focused on section 110(1)(b), (3)(b) should I say, which

means that you can't – and this was the reason for the judicial review last time round that was settled. Mr Sara, quite rightly, for Ms McGrath said you can't send this person to vocational rehabilitation unless the individual rehabilitation plan is completed, and there's something in the plan that says you need to go and see Dr Acland and you haven't done that yet. So ACC said yes, okay, we, without accepting your point –

ELIAS CJ:

We've gone through the process?

10

MR RADICH:

At that point, Ma'am, there had been the vocational independence report we looked at, from the vocational point of view. She'd been referred to the medical report but then the judicial review proceeding came. ACC said "we don't necessarily agree with you but we will go back now to Dr Acland", and so they did. Having done that, Mr Hurring, having the advice from Dr Acland that there aren't actually further steps you should take because at that point what Dr Acland might have come back with, hypothetically, was a report saying well, we think we can help her some more by doing A, B and C, in which case there would have been no vocational independence, it would have gone back, a new rehabilitation plan would have been prepared. They would have worked through steps A and B and C and then thought okay, are we ready for 110(3) now or not, but in this particular case what came back from Dr Acland was a three-line letter and I make no –

25

ELIAS CJ:

Well, it's not right to say that. His opinion is maintained that she isn't able to undertake further work.

30

MR RADICH:

Yes, and I make this point just to underline the fact, Your Honour, that Mr Hurring's focus here was in terms of section 110(3)(b) –

35

WILLIAM YOUNG J:

So he's not looking at whether she – a medical assessment is likely to go a particular way, rather he's saying okay, we've ticked off this box because medical treatment has gone as far as it can, there's nothing more to be done?

5 **MR RADICH:**

We've ticked every box on the plan. Everything that we said that we would do for you, we've done.

WILLIAM YOUNG J:

10 Right, so he's not thinking about whether pain is in fact a barrier to vocational independence?

MR RADICH:

And that was because the reason for the challenge –

15 **WILLIAM YOUNG J:**

Yes, yes, I know.

MR RADICH:

That's right, Sir.

20

BLANCHARD J:

The problem that I've got is this comment that Mr Hurring makes, that Mr Beck refers to very early on, where on page 30 he says that he felt Dr Acland's opinion was at odds with the fact that Ms McGrath had in fact been working around 15 hours a week, when we know that Acland actually referred to that and the problem was that if she worked more than 15 hours a week the problem with the pain got too much?

25

MR RADICH:

Yes, the letter that he's referring to, I believe, is the first of the, rather, the second of the three letters. So this is on page 76 of volume 2 and there, Dr Acland said, in the last sentence "it does not look as though Karen will be able to return to any vocational pursuit", and I believe and I'm drawing an inference, Your Honour, but Mr Hurring was referring to that and not the next one –

30

35 **BLANCHARD J:**

But earlier in that letter, it talks about "we were quietly optimistic that she would be able to gradually increase her hours of work."

TIPPING J:

Well, he's got it wrong, in all good faith I'm sure, but he's got it wrong because there was that second letter which made it clear that Acland was aware that she was
5 working 15 hours a week.

MR RADICH:

That's right, because it was pointed out by Mr Sara.

10 **TIPPING J:**

Yes, so he's erred, as a matter of fact. I'd have to say I agree with my brother Blanchard that this is a troubling factor because it's a fact, he discounts Mr Acland's views on a false premise.

15 **MR RADICH:**

He –

TIPPING J:

By false, I don't mean anything pejorative.

20

MR RADICH:

No, no. In my submissions, Sir, understanding Your Honour's point, there was more than sufficient, in ACC's submission, for Mr Hurring to make the decision that he did. That point onboard as well –

25

TIPPING J:

That's your overall submission?

MR RADICH:

30 Yes, it is.

TIPPING J:

I think I've just got that point Mr –

35 **MR RADICH:**

Yes, and the point –

TIPPING J:

But what can you say about him misdirecting himself, in effect, to use a slightly grand term: he got the facts wrong?

5 **MR RADICH:**

What he's referring to here was, yes, he was referring to a view expressed by Dr Acland that she couldn't work at all. I don't know that the subsequent opinion expressed by Dr Acland that –

10 **BLANCHARD J:**

Well, was Dr Acland saying that she couldn't work at all?

MR RADICH:

I'm sorry, Your Honour?

15 **BLANCHARD J:**

Was Dr Acland saying that she couldn't work at all?

MR RADICH:

20 The letter on page 76, "Karen will not be able to return to any vocational pursuit", I'm taking to be, because they in fact are the words used, I see, by Mr Hurring in paragraph 24 of his affidavit.

WILLIAM YOUNG J:

25 But that's whether he means, i.e. vocational independence, or will never work again. It's probably not very likely that he means will never work again.

TIPPING J:

30 And it's not consistent with, "will gradually increase her hours of work". These doctors' letters are often a bit sort of loose, in my respectful –

ELIAS CJ:

No, they don't like writing letters. Can I just ask you, how much longer do you expect to be?

35 **MR RADICH:**

Well, I'm subject to any further questions. I just wanted to make one or two final comments and then I'm done Ma'am.

ELIAS CJ:

Yes, well we'll take the adjournment now and resume at 2.15, thank you.

5 **COURT ADJOURNS:1.02 PM**

COURT RESUMES: 2.15 PM

MR RADICH:

10 Thank you Ma'am. There were just three points that I'd make quite briefly in conclusion. The first of them is this, that although Mr Hurring doesn't unpick the reports that he relies on, that is to say the reports of Drs Porteous and Antoniadis, those reports do indicate that the appellant is capable of undertaking sedentary roles for 35 hours a week, that's the first point.

15 The second point is that Dr Acland's opinion was varying with the facts as he understood them to be, and I just make one document reference in saying that, and that is to the case on appeal volume 2, at page 78, Mr Sara's letter to Dr Acland where he refers to the letter that Your Honours have been referring to, where Dr Acland has said, to use his words, that "Ms McGrath will not be able to return to any
20 vocational pursuit", and here Mr Sara notes that conclusion and he, it seems, is taking also –

ELIAS CJ:

Sorry, what page is it again?

25

MR RADICH:

Sorry Ma'am, page 78.

ELIAS CJ:

30 Yes, thank you.

MR RADICH:

Mr Sara seems to be understanding Dr Acland to be saying "that means she can't work at all" and asks, therefore, "perhaps I didn't make it clear in my correspondence
35 that she's working 15 hours a week", to which on the next page, Dr Acland responds that "in that case, I agree and she can't sustain any more than that". So the point I

make is that the opinion was varying with the facts as Dr Acland understood them.
The final point –

ELIAS CJ:

5 Sorry, I'm not sure that he can say that. He may well have written the letter of
1 September in the knowledge that the issue really is 35 hours a week. There's
nothing in that letter that – I mean –

WILLIAM YOUNG J:

10 Well, at page 76 he does talk, as my brother Tipping said, about increasing her hours
of work.

ELIAS CJ:

Yes.

15

MR RADICH:

Yes, well, that's right, so I don't think he was ever meaning that she couldn't work at
all. But I think that Mr Sara might've thought that that's what he was meaning.

20 **ELIAS CJ:**

So what –

MR RADICH:

Yes.

25

McGRATH J:

But the 2nd of September letter's the last one, that's –

MR RADICH:

30 Is the last one, Your Honour.

McGRATH J:

And it's perhaps not precise in addressing the position, but it does seem to indicate
broad general agreement with what Mr Sara's saying.

35

MR RADICH:

It does, Sir.

McGRATH J:

And it's certainly – he now certainly understands she's working 15 hours a week.

5 **MR RADICH:**

And with that information in mind, he draws the conclusion that he does, yes Sir, that's quite right, yes.

BLANCHARD J:

10 In fact the letter to Dr Acland of 1 August 2008 from Mr Sara, to which reference is made by Dr Acland in the letter of the 19th of August, sets out the history of the correspondence including the letter of the 22nd of July, which is in response to a letter of 8 July, to Dr Acland, which refers to his previous report about how she's managing to work 15 hours per week. It's quite clear, "and Karen with her pain, just barely
15 copes with these hours" et cetera.

MR RADICH:

Yes.

BLANCHARD J:

20 And then coming forward again to the letter of 22nd July, Acland is saying "obviously this appears to be her limit". So he's addressing 15 hours.

ELIAS CJ:

Mmm.

25

MR RADICH:

I think that's a very fair point, Sir, I think in his letter of 19 August, he was of one point of view that was corrected and in his letter of 1 –

30 **TIPPING J:**

Well he's just dropped the ball perhaps momentarily in his last sentence.

MR RADICH:

Certainly. That may well be the case. I don't seek to make a big point of it, but I
35 make the point that his –

ELIAS CJ:

Or Sara's just trying to make sure that he is on the same page.

MR RADICH:

Yes, I think so, Ma'am.

5

ELIAS CJ:

Yes.

MR RADICH:

10 Yes. I take that point no further. And really I just wanted to finish by referring back,
although it's a first instance, to His Honour Justice Miller, if you'd allow me, just very
briefly in volume 1 of the case on appeal, at page 41, and Justice Miller, who's had
occasion to deal with a number of these issues, was saying there in paragraph 29, to
use His Honour's words, "but in considering whether to grant an assessment, ACC
15 need not accept the opinion of a claimant's general practitioner, or a given expert to
whom she's been referred under her individual rehabilitation plan. The statute does
not limit the information that may be taken into account, or preclude the exercise of
judgment by the case manager, whose decision need not be preceded by any
independent medical or other assessment". And then just finally at 30(b), His Honour
20 said, "Dr 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, and that in turn
appeared to rest on Ms McGrath's self-report, which ACC need not accept at face
value." "As mentioned", His Honour said, "there is evidence that she has recently
worked longer hours", and just for the record, that's in the independence report, page
25 40 case on appeal 2. The vocational assessment, should I say, shows her that she
was working 22 and a half hours there. So I would just, from ACC's point of view, in
conclusion, that those sentiments from His Honour are those that ACC would adopt.
And unless Your Honours have any further questions, they are my submissions.

30 **BLANCHARD J:**

Where's the bit about working 22 hours?

MR RADICH:

35 That, Your Honour, if you look in volume 2 on page 40. This is page 2 of the
vocational assessment report.

McGRATH J:

Whereabouts are we looking?

MR RADICH:

5 If Your Honour looks about halfway down, there's a grey heading, "Job", then the next column, "Duration in years and months", just down under the heading "Part-time" there, that was her current role at King's High School, currently 22 and a half hours.

TIPPING J:

10 That's as of 2005?

MR RADICH:

That is –

15

TIPPING J:

I'm sorry, I was just looking at the top.

MR RADICH:

20 Commencing at 2005, I understand this to be a reference to what she was doing at the time the report –

TIPPING J:

No, my brother's right, it's May 2008.

25

MR RADICH:

Yes, Sir.

McGRATH J:

30 And are you saying that that information links to what Justice Miller is saying at paragraph 30(b) of his judgment?

MR RADICH:

That is the reference that I understand His Honour to be making, Sir, yes.

35

McGRATH J:

The reference to the self-assessment?

MR RADICH:

The, yes, the reference to there being some evidence of working, working hours of that sort, yes.

5

McGRATH J:

In fact I don't immediately see the connection between the passage at page 41 of the case in appeal, Miller J's judgment. Mr, on Dr Muir's assessment, Ms McGrath was unable to work for more than 15 hours a week, which appeared to rest on Ms McGrath's self-report which ACC need not accept at face value, I don't see the link between that and what the information on page 40 of the first of the second volume, perhaps –

10

15

MR RADICH:

Perhaps His Honour was referring to the information Dr Acland was using about 15 hours a week and perhaps His Honour was saying that needn't be accepted at face value, and I take his second sentence to be an aside by reference to there being some evidence to the contrary, but the point that I sought to make from that reference was His Honour's comment that in terms of the section 110(3) threshold there needn't be taken that opinion at face value and that comes right into ACC's –

20

McGRATH J:

25 Mr Hurring didn't seem to be questioning that, did he?

MR RADICH:

Mr Hurring had some concerns about Dr Acland, but what he was saying was that there are, he was basing his assessment or his decision under section 110(3) on a range of other matters.

30

BLANCHARD J:

It's unfortunate we don't have the second page of the letter of the 8th of July, page 70, because I think the 22 and a half hours needs to be put in the context of this letter.

35

It's, it's just a few months after the, that document that you referred us to –

MR RADICH:

Yes, Sir.

ELIAS CJ:

That's quoted in one of the judgments isn't it? I've just noticed the withdrawal, which
5 is –

BLANCHARD J:

“With her pain just barely copes with these hours”, that's the 15 hours, “and in fact
recently trialled a few more hours because of other staff shortages, she had
10 increased pain, both at and after work and had to withdraw”, and then it stops.

MR RADICH:

That is the mystery, Your Honour, and I can only say that the second page of that
letter hasn't appeared in any, any file that counsel have had access to.
15

ELIAS CJ:

Well, one could take it as had to withdraw really, surely?

BLANCHARD J:

20 Sorry –

ELIAS CJ:

The withdrawal couldn't make sense.

25 **BLANCHARD J:**

It is that to which Acland is responding in his letter of the 22nd July, when he says
“obviously this appears to be her limit”, and I can only interpret that on what we've
got as being the 15 hours.

30 **MR RADICH:**

That's right, Sir. Yes I agree with that entirely.

ELIAS CJ:

So 15 hours is the last, is the position at the end of this process. A reference to 22
35 hours would be quite misleading –

BLANCHARD J:

Well, no it's more significant than that. She tried 22 and half hours –

ELIAS CJ:

Yes, that's what I mean.

5

BLANCHARD J:

– it didn't work.

ELIAS CJ:

10 Mmm.

MR RADICH:

The reference on page 40 in the individual rehabilitation plan, the independence report I should say, simply makes the notation "currently 22 and a half hours".

15

BLANCHARD J:

Yes, but that is in May.

MR RADICH:

20 That's right.

BLANCHARD J:

The letter that I'm referring to is July.

25 **ELIAS CJ:**

Yes.

MR RADICH:

30 That is right, Sir, and that, of course, I would just say is in the context of that particular photocopying job that she was doing.

ELIAS CJ:

Well, it's photocopying and clerical wasn't it?

35 **MR RADICH:**

And clerical, yes.

TIPPING J:

Not very promising.

MR RADICH:

5 If Your Honours please, they are my submissions.

ELIAS CJ:

Thank you. Mr Beck did you have anything to say in reply?

10 MR BECK:

I don't really have any substantial matters in reply. Simply to point out that the consultation with Dr Acland was of course specifically a matter in the individual rehabilitation plan, so it was the foundation for whatever went thereafter. The plan is seen as an important document in terms of the whole assessment process, and Dr
15 Acland was someone who had seen her on a number of occasions. He had diagnosed a complex regional pain syndrome and his subsequent letters have to be understood in that context and he certainly doesn't, in his letters, limit himself to a particular job. He appears to be talking generally, I mean, I accept that there are different ways of looking at it, but he appears to be making general statements
20 regarding her ability to work for longer hours.

Those are really the only points I wanted to make, Your Honours, and I need to mention that the appellant has applied for legal aid, but ACC matters are dealt with in Christchurch which appears to have shut down, so that the agency has not, has not
25 actually made a final decision on that matters as at the moment, Your Honours.

ELIAS CJ:

Yes, thank you. All right, thank you counsel. We'll reserve our decision in this matter, thank you for your assistance in it.
30

COURT ADJOURNS:2.32 PM