

Discrimination and the ACC Act

Mike Buis is a Spinal Support member who has a lot of experience dealing with the ACC Act.

Below is an opinion piece written by him in regards to aging while on ACC.

AGE, DISABILITY AND EMPLOYMENT DISCRIMINATION AND THE ACC ACT

On 9th December 2019 I wrote to the Hon Iain Lee-Galloway, Minister for ACC in respect of the discrimination inherent in clause 52 of Schedule 1 which ceased weekly compensation payments once reaching the NZ Super qualifying age of 65 years despite the claimant still being fully incapacitated within the meaning of the Act.

The official position is based on the argument that weekly compensation should cease at some point and NZ Superannuation Qualification Age (NZSQA) provides a convenient proxy. Knowing this I was then unsurprised with the Ministers 29th January 2020 response to my letter in which he stated that he was comfortable with the current settings in the ACC Acts.

The official position may have had some validity in 1974 when the first ACC Act came into effect from 1st April but it should be remembered that in those days a great many did in fact cease paid employment at 65yrs and average life expectancy in 1975 was only 72.22yrs.

(Life expectancy today is 82.04yrs on average)

NZSQA was lowered to 60yrs in 1975 and for the next 28 years was not in accord with the ACC Acts in setting a cut off date for weekly compensation payments so it cannot be argued that there has been continuity in the legislation.

National Super and Accident Compensation are completely different schemes paid and funded for completely different reasons as had been made clear in the Human Rights Tribunal decisions in *Heads v AG (NZHRRT 012/2015)* & *Hennessy v ACC (NZHRRT 004/2019)*

In my view ceasing weekly compensation at NZSQA today is simply a matter of official convenience and not a reasoned approach based on circumstances today.

Accident Compensation is directly funded out of levy and a claimant is entitled to weekly compensation for as long as you remain incapacitated by way of your covered injury. Entitlement remains even if you incur a secondary condition during that period of incapacity, even if that condition itself might be terminal.

ACC can test your continued right to entitlement by either the Vocational Independence process to see if there is any job type that you could carry out for 30hrs per week or more, or test if the cause of your ongoing incapacity is wholly or substantially related to non covered injury factors. This test was different under the 1972 and 1982 ACC Acts in that your incapacity

had to be exclusively not related to your cover before ACC could suspend.

In my view the correct approach to test ACC over 65yrs continued right to weekly compensation is to, as above, base entitlement on a specific assessment. The legislation should reflect circumstances today in setting a fair and reasonable age, (perhaps based on a certain number of years below average life expectancy), that assessment may be carried out as required. The legislative test for continued weekly compensation might be for example, that despite ongoing incapacity, if a secondary condition would itself have prevented the claimant from working, then ACC could suspend, normal Review and Appeal rights would follow.

I have received on 16th December 2019 a confirmation of receipt of my application from the Office of Human Rights Proceedings to represent my discrimination arguments before the Human Rights Tribunal under Part 1A of the Human Rights Act on the grounds of Employment, Disability and Age.

The current legislation discriminates against those claimants with a serious incapacitating injury of more than 24 months duration and are 65 years or older. On the grounds of employment as Super is paid as of right to those working past 65 years and this should be no different for those who are being compensated because they are incapacitated from employment.

Many able bodied citizens today continue to work well past NZSQA, the majority of those who are in a position to work, and if they can find employment, do so for financial reasons, according to published Retirement Commission figures.

It must be remembered that serious injury claimants are not in a position to supplement the loss of ACC compensation with any sort of work and the concern is that many will have to contend with a massive drop in their standard of living along with the associated mental stress impacting on health which is already compromised.

Also if a seriously injured claimant is a home owner they are not in a position to carry out any sort of maintenance themselves but will have to pay someone and ACC do not cover for lawn mowing and gardening costs which the claimant will have to cover out of National Super Benefit once compensation is ceased. There is of course limited help available under the Social Security Act for unexpected costs by way of emergency payments and regular Disability Allowance payments.

I think it unfortunate that in cases of discrimination the most that can be gained is a declaration of inconsistency issued by the Human Rights Tribunal which simply puts the Government on notice that a particular piece of legislation is out of step with the Human Rights Act. If New Zealand had a proper constitution then the Courts could strike down discriminatory law.



