IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2018 00475

LEESA CONROY	Plaintiff
v	
ASSOCIATE PROFESSOR EVANGE ROMAS	First Defendant
JOHN SKELLEY	Second Defendant
DR JOHN KING	Third Defendant
DR DIANE NEILL	Fourth Defendant
WOOLWORTHS LIMITED	Fifth Defendant

JUDGE:	Ginnane J
WHERE HELD:	Melbourne
DATE OF HEARING:	31 May 2019
DATE OF JUDGMENT:	18 October 2019
CASE MAY BE CITED AS:	Conroy v Romas
MEDIUM NEUTRAL CITATION:	[2019] VSC 695

JUDICIAL REVIEW – Medical Panel – Opinion as to worker's work capacity – Extent of impairment – Suitable employment – Whether consideration of relevant matters – Whether consideration of irrelevant matters - Adequacy of reasons – Jurisdictional error – *Accident Compensation Act 1985* s 5; *Workplace Injury Rehabilitation and Compensation Act 2013* s 313.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr N Horner and Ms J Zhu	John McCristal Injury Lawyers
For the Fifth Defendant	Mr M Fleming QC and Ms S Gold	Hall & Wilcox

HIS HONOUR:

1 The plaintiff, Ms Leesa Conroy, seeks judicial review of a Medical Panel Opinion of 21 May 2018 ('Opinion'). The Panel's Opinion determined that she had suffered a soft tissue injury to her left elbow in the course of her employment with Woolworths Limited, the fifth defendant, to which I will refer as the defendant, but had current work capacity from 26 December 2016. The plaintiff argues that the Panel's conclusion about her work capacity involved jurisdictional error, as it failed to consider properly her lack of education and occupational skills and her residual pain from her soft tissue injury. She also contends that the Panel provided inadequate reasons and thereby made errors of law on the face of the record.

Background

2 The plaintiff was born in 1971, left school in Year 9 and then worked in a range of jobs for at least the next 25 years.

3 In February 2013, she commenced work with Beer, Wine and Spirits ('BWS'), which is owned by Woolworths, as a liquor assistant for 20 hours a week. Her job involved handling and sometimes lifting large cases of beer, and wine and liquor.[1] On 25 June 2014, while handling and lifting heavy slabs of alcohol, her left elbow became painful. Despite receiving medical treatment, the pain persisted. She worked on for two weeks but then stopped, and commenced receiving weekly payments under the *Accident Compensation Act 1985* ('AC Act'). She attempted to return to work but was unsuccessful, and was dismissed one year later.

4 The plaintiff's weekly payments ceased from 26 December 2016 after she received a 130 week notice which was based on her current work capacity, or on the alternative basis that that she had no current work capacity but this was not likely to continue indefinitely. These conclusions were based principally on a Transferable Skills Analysis conducted by Konekt, which identified 'suitable vocational options' which it considered that the plaintiff was capable of performing, as well as the opinion of Mr Peter Scott, a Senior Consultant Surgeon, that the plaintiff was capable of part-time

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1 Medical Panel Reference Number M118/0486, 21 May 2018, Reasons for Opinion, 4 ('Reasons').

work of a physically light nature, and the opinion of Dr Dush Shan, a Consultant Psychiatrist.

5 The plaintiff commenced proceedings challenging the 130-week notice in the Magistrates' Court at Ballarat. Upon the defendant's request, a Magistrate referred questions to the Convenor of Medical Panels for opinion.

The Panel's Opinion

6 A Medical Panel was convened and provided with copies of all documents in the possession of the parties concerning the medical questions, including the medical history of the plaintiff and medical and vocational reports from both parties. The Panel examined her on 24 April 2018 and published a Certificate of Opinion recording its answers to the referred questions and its reasons for so answering. The referred medical questions and the Panel's answers were as follows:

Question 1 **What is the nature of the plaintiff's medical condition relevant to the alleged injuries:**

(a) to the left elbow;

(b) to the left shoulder;

(c) to the left arm;

(d) to the neck; and

(e) consequential anxiety and depression.

Answer: The Panel is of the opinion that the plaintiff has:

(a) residual left elbow pain following a soft tissue injury (surgically treated);

(b) no intrinsic medical condition of the left shoulder;

(c) no intrinsic medical condition of the left arm;

(d) symptomatic cervical spondylosis with referred left upper extremity pain (but no clinical radiculopathy);

(e) no psychiatric or abnormal psychological conditions.

Question 2 **Was the plaintiff's employment with the defendant on 25 June 2014 in fact, or could possibly have been, a significant contributing factor to any medical condition identified by the Medical Panel in answer to question 1b – 1e?**

Answer: (b) Not applicable;

(c) Not applicable;

(d) No;

(e) Not applicable.

Question 3 **Does any medical condition found by the Medical Panel in answer to question one result from, or is it materially contributed to by, the plaintiff's employment with the defendant on 25 June 2014?**

Answer: The Panel is of the opinion that the current medical condition of the plaintiff's left elbow continues to result from and is still materially contributed to by the left elbow injury in the plaintiff's employment with the defendant on 25 June 2014.

Question 4 **Between 26 December 2016 and the date of the Medical Panel's examination, did the plaintiff have:**

(a) a current work capacity; or

(b) no current work capacity?

Answer: (a) Yes.

(b) No.

Question 5 **If the plaintiff had no current work capacity between 6 December 2016 and the date of the Medical Panel's examination:**

(a) was she likely to continue indefinitely to have no current work capacity;

(b) did her incapacity for work result from, or was it materially contributed to by any, and if so which, of the alleged injuries in question 1?

Answer: (a) & (b) Not applicable.

Question 6 **Does the plaintiff have:**

(a) a current work capacity; or

(b) no current work capacity?

Answer: (a) Yes.

(b) No.

Question 7 **If the plaintiff has no current work capacity is she likely to continue indefinitely to have no current work capacity?**

Answer: Not applicable.

Question 8 **If the plaintiff has no current work capacity, does her incapacity for work result from, or is it materially contributed to by any, and if so which, of the alleged injuries in question 1?**

Answer: Not applicable.

Question 9 **Is the claimed left C7 nerve root injection a reasonable and appropriate medical and like expense for the plaintiff's alleged injuries in question 1?**

Answer: Not applicable.

Grounds of review

7 The plaintiff seeks judicial review of the Panel's Opinion, specifically the opinion that the plaintiff had and has a current work capacity which was expressed in the answers to questions 4 and 6. As mentioned, her grounds allege jurisdictional error and error of law on the face of the record, and are as follows:

1. The Medical Panel fell into jurisdictional error by failing to take into account, when answering questions 4 and 6, considerations it was bound in law to consider when determining its Opinion, namely the plaintiff's education.

2. The Medical Panel fell into jurisdictional error by failing to take into account, when answering questions 4 and 6, considerations it was bound in law to consider when determining its Opinion, namely the plaintiff's skills.

3. The Medical Panel fell into jurisdictional error by failing to take into account, when answering questions 4 and 6, considerations it was bound in law to consider when determining its Opinion, namely the impact of the plaintiff's residual impairment resulting from the accepted injury to the left elbow.

4. The Medical Panel fell into jurisdictional error by taking into account, in answering questions 4 and 6, irrelevant considerations, which it was bound by law to disregard when determining its Opinion, namely the plaintiff's excellent literacy skills.

5. The Medical Panel committed error of law on the face of the record by providing Reasons for Opinion, which are inadequate. The Medical Panel failed to provide reasons sufficient to show its actual path of reasoning either at all, or in sufficient detail to show how it arrived at its certified Opinion and whether its Opinion does or does not involve any error of law.

8 In summary, the plaintiff contended that the Panel's conclusion that she had current work capacity was affected by jurisdictional error due to: the failure to take into

account relevant considerations, being her education, skills and the residual impairment from her left elbow injury (grounds 1-3); the taking into account of an irrelevant consideration, being the plaintiff's 'excellent' literacy skills (ground 4); and the inadequacy of the Panel's reasons (ground 5).

The plaintiff's work history

9 The plaintiff's work experience and skills were relevant to the Panel's determination of her capacity for employment, as was its consideration of her physical limitations relevant to employment. I will next describe her experience and skills.

10 The plaintiff has mostly worked in a hospitality or customer service capacity. After leaving school in 1986 when she was aged 15, she worked until 1993 in customer service jobs at coffee shops, restaurants and retail stores.[2] For example, from 1986 to 1987 she worked as a produce shop assistant at a fruit and vegetable store serving customers and handling money.[3] In 1996 she worked selling tickets by telephone for a local not for profit club,[4] and also worked as a car detailer.[5] From 1998 to 2003 she managed the bar at a golf club,[6] and then worked for 9 years as a gaming and hospitality attendant at a hotel.[7] Between 2005 and 2007 she also worked as a self-employed gardener.[8] Her last job was with BWS.

11 She has a Certificate III qualification in Hospitality, and Certifications for Responsible Service of Alcohol and Responsible Service of Gambling and Gambling,[9] as well as a Beer Master Certification and a Keno Certification.

12 From her own reports the plaintiff is willing to return to the workforce. The Konekt report states that:

> Ms Conroy is interested in attaining suitable employment that adheres to her

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2 Court Book, *Conroy v Romas* (Supreme Court of Victoria, S ECI 2018 00475), 258 ('CB').
3 CB 274.
4 CB 273.
5 CB 273.
6 CB 257.
7 CB 256.
8 CB 273.
9 CB 258.

> current physical restrictions; preferably a position that requires alternation of sitting and standing and restricted change of direction. Ms Conroy advised she is interested in a position working in some capacity with children or utilizing her experience in a customer service position.[10]

13 However, the plaintiff consistently stated that her computer skills were poor. The Konekt report noted that 'Ms Conroy advised she has below average literacy and numeracy sills and very basic computer skills - 3/10. Ms Conroy advised she does not have the ability to access and send emails and utilise Microsoft Word or Microsoft Excel.' Dr Slesenger's supplementary report states that 'she advised that she had no computer skills'.[11] Mr Hartley reported that Ms Conroy 'advised that she has no computer skills and that 'she has no knowledge of any of the software used commercially or industrially as she has not been required to use a computer in a work situation'.[12]

The evidence before the Panel

14 The Panel examined the plaintiff and it had reports about her work capacity including:

- The Transferrable Skills Analysis dated 3 May 2016 ('Konekt report');[13]
- The Nabenet Labour Market Assessment dated 25 August 2017 ('Nabenet report').[14]
- The two reports of Dr Joseph Slesenger, occupational physician, dated 28 July and 29 August 2017;[15]
- The two reports of Mr Paul Hartley, occupational rehabilitation consultant, dated 3 and 30 August 2017.[16]

The Konekt report

15 The Konekt 'transferrable skills analysis' or report was arranged at the request of the

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10 CB 258.
11 CB 254.
12 CB 275.
13 CB 256-262.
14 CB 302-305.
15 CB 236-255.
16 CB 263-301.

defendant's agent who relied on it in issuing the 130-week notice. The report chronicled the plaintiff's working history and identified her working skills that could be used in other jobs, and recommended future employment options. The report described the plaintiff as having active listening skills, service orientation, speaking, critical thinking, problem solving and reading comprehension.[17]

16 The report identified five employment options or jobs that the plaintiff could do and which were suitable for her: integration aide, hospitality worker, bar attendant, customer service representative and sales assistant. The report noted the plaintiff's lack of computer skills and recommended that she undertake a beginners' computer course to enhance her employability in the recommended fields.

The Nabenet report

17 The Nabenet 'labour market assessment' was also conducted at the request of the defendant's agent. It was written by an organisational psychologist with experience in vocational assessments, job seeking support and job placements, and a registered occupational therapist with extensive experience in occupational rehabilitation.

18 It aimed at identifying actual job vacancies that were suitable for the plaintiff as proposed in the Konekt report. It identified three: customer service officer/receptionist at Stockland Wendouree Shopping Centre, sales assistant at Michael Hill Jewellers and customer service/bingo caller at Ballarat Bingo Centre. Those roles were said to be appropriately sedentary and therefore would not aggravate the plaintiff's left elbow injury, as well as being appropriate in view of her education level and occupational skills.

Dr Slesenger's reports

19 Dr Joseph Slesenger is a specialist occupational physician who examined the plaintiff at the request of the agent and provided an initial report on 28 July 2017. He was given the Konekt report and was asked whether the plaintiff was capable of undertaking suitable employment in light of her injury. He said that she had capacity for sedentary

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17 CB 256-258.

work, and in view of the Konekt Report, said that she could work as an integration aide, hospitality worker or customer service representative. However, he said that she should not return to work as a bar attendant and advised caution with respect to the sales assistant position due to its physical requirements.

20 Dr Slesenger wrote a supplementary report after considering the Nabenet report. He said that 'physically speaking', the plaintiff could work in the Stockland Wendouree Shopping Centre customer service officer role, though he had 'reservations' about this role as 'she advised that she had no computer skills'.[18] He considered that the sales assistant role at Michael Hill Jewellers and the bingo caller role were appropriate.

Mr Hartley's Reports

21 At the request of her solicitors, the plaintiff was interviewed in her home by Mr Paul Hartley, an occupational rehabilitation consultant, on 8 June 2017 for the purposes of a vocational assessment report. In Mr Hartley's first report he outlined the suitability of a range of employment options and any retraining that the plaintiff would require. Mr Hartley's opinion was the main basis for the plaintiff's challenge to the Panel's opinion.

22 Mr Hartley report was a 'skills audit' of the plaintiff which revealed that her literacy and digital literacy were below average, the latter particularly so. He considered the employment options proposed in the Konekt report and concluded that the 'transferrable skills' identified were relevant only in applying for unskilled employment positions, most of which were inappropriate because of the physical restrictions caused by the plaintiff's left elbow injury. Her skills identified in the Konekt report – as outlined above – were general skills connected to her employment, but she would be unable to work in higher skilled jobs without the requisite educational and literacy levels. The beginners' computer courses proposed in the Konekt report would be unable to 'address the deficits of a lifetime, or allow her to fulfil the digital requirements of industry in alternative employment'.[19] He considered

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18 CB 254.
19 CB 280.

the proposed customer service representative role to be inappropriate as it required completion of Year 12, a certificate IV in Business Sales and intermediate computer skills,[20] none of which she possessed. Mr Hartley concluded that none of the positions identified in the Konekt report would be suitable for the plaintiff and said that he could not propose any suitable employment for her and that she faced 'substantial barriers' to gaining employment.[21]

23 In his supplementary report, Mr Hartley commented on the Nabenet report. He said that it did not cause him to alter his opinion that there was no suitable work for the plaintiff because of her physical restrictions and lack of education and skills. He considered that the Stockland Wendouree Shopping Centre customer service officer role was unsuitable because the plaintiff did not have any clerical work history and had no functional computer skills to perform the inherent administrative requirements of the job.[22] He said the same about the Michael Hill Jeweller's role, because the plaintiff lacked computer skills and because of the barriers posed by her chronic pain. He considered that the Bingo Caller role was also inappropriate, as it would involve repetitive cash handling that could re-aggravate her injury, and because the plaintiff lacked the computer and strong numeracy skills it would require. Further, the limited hours and shifts available meant that this was not a financially viable replacement for worker's compensation and Centrelink payments.

Other medical evidence

24 I will refer two other medical opinions to which the defendant referred.

25 Mr Peter Scott, an orthopaedic surgeon, examined the plaintiff in June 2016. He considered that the jobs recommended by Konekt would be suitable provided that she worked part-time 2-3 days per week with identified restrictions.[23]

26 Mr Rodney Simm, an orthopaedic surgeon, examined the plaintiff in July 2017 and

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20 CB 281.
21 CB 295.
22 CB 296.
23 CB 213.

considered that she could work fulltime, with restrictions, in suitable light work such as receptionist, call centre operator or customer service operator.[24] He considered that the jobs of integration aide, customer service representative and sales assistant were suitable for her.[25]

The Panel's reasons

27 The Panel's members were by profession a rheumatologist, an orthopaedic surgeon, a neurologist and a psychiatrist.

28 The Panel's reasons addressed the nature, extent and cause of the plaintiff's alleged physical and psychological injuries. It concluded that the plaintiff's left elbow pain was a consequence of her workplace injury, but did not so conclude in the case of her other accepted injury – symptomatic cervical spondylosis with referred left upper extremity pain, which caused neck pain.

29 The Panel considered the plaintiff's work capacity, in the last two pages of its thirteen pages of reasons and concluded that she could not return to her pre-injury employment as a part-time liquor assistant, as its physical demands would be likely to re-injure her left elbow. In considering her capacity for other positions, the Panel stated that it had had regard to the relevant definitions in the legislation, and specifically took note of:

- the plaintiff's current age of 45 years (which does not restrict her potential employment options);
- the plaintiff's excellent literacy (which does not limit employment options);
- her work experience in hospitality and certificates relating to responsible serving of alcohol and gambling;
- her residence in Sebastopol (which places her within the reach of potential suitable employment opportunities);
- the nature of the plaintiff's residual left elbow pain following a soft tissue injury for which she has had a surgical procedure, with minimal objective signs of residual left upper extremity dysfunction, which does

24 CB 231.
25 CB 232.

not restrict suitable employment options;

- the reports of the practitioners who have treated or examined the plaintiff.

30 The Panel considered the employment options proposed in the Konekt report: integration aide; hospitality worker; bar attendant; customer service representative; and sales assistant.[26]

31 The Panel considered that the proposed positions of hospitality worker and bar attendant were unsuitable, as they would be likely to require manual handling exceeding the plaintiff's capabilities, and that the role of integration aide would require the plaintiff to undergo additional training and certification. It did consider, however, that the role of customer service representative would be suitable employment for the plaintiff as it would typically be a sedentary role. The reasons stated:

> The Panel considered that the role of customer service representative is typically sedentary to light physical demand work involving use of light hand-held objects such as writing implements, telephone, faxes, personal computers, photocopiers, scanners, calculators and electronic payment terminals. This position requires appropriate interpersonal and communication skills and literacy levels which are considered within the plaintiff's capabilities as she has residual elbow pain (but no objective upper limb dysfunction) and she has no psychiatric conditions.
>
> The Panel concluded that the residual functional restrictions due to the plaintiff's residual left elbow pain following a soft tissue injury (surgically treated) was and is minimal and such that, from 26 December 2016 and as at the date of the Medical Panel's examination there was (and is) work for which the plaintiff was (and is) suited and which she could have performed then (and now) on a reliable and consistent basis.

32 Applying this reasoning, the Panel concluded that the customer service position was suitable for the plaintiff and that she therefore had a current work capacity. They mentioned Mr Hartley's reports in the following passage:

> In reaching its decision about the issue of whether or not the plaintiff had (or has) no current work capacity since 26 December 2016, the Panel took into account the views expressed by Mr Paul Hartley, independent vocational assessor dated 3 August 2017. Mr Hartley's analysis presumed that the plaintiff had compensable left shoulder and neck dysfunction in addition to her left elbow injury. The Panel considers that Mr Hartley had significantly

26 CB 259-262.

> overestimated the extent of left elbow dysfunction which the Panel considered is minimal (i.e. although the plaintiff has residual elbow pain there are no objective signs of left upper limb dysfunction attributable to the left elbow injury) following successful elbow surgery. The Panel therefore reached a different conclusion.

33 The Panel concluded by stating that it had noted the relevant issues highlighted in the parties' submissions. The Panel did not refer to the sales assistant position mentioned in the Konekt report; presumably the authors did not consider it to be suitable employment, or decided that they did not need to consider it in view of their conclusions as to the suitability of the customer service job.

The legislative scheme

34 A worker who has suffered a compensable injury is entitled to weekly payments if their incapacity for work results from, or is materially contributed to by, that injury.[27] After the expiry of the 'second entitlement period' – in this case 130 weeks – a worker is entitled to ongoing weekly payments only if they have 'no current work capacity' that is likely to continue indefinitely.[28] In this case, the employer's agent deemed that the plaintiff either had a current work capacity or, alternatively, concluded that any incapacity for work was unlikely to continue indefinitely. The Panel agreed with the agent's first contention – which disentitled the plaintiff to prospective weekly compensation payments.

35 Most relevant to the issues in this proceeding are the following definitions in s 5 of the AC Act:

> **5 Definitions**
>
> *current work capacity*, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment;
>
> *no current work capacity*, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment;

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27 *Accident Compensation Act 1985* s 93.

28 Ibid s 93C(1).

suitable employment, in relation to a worker, means employment in work for which the worker is currently suited—

(a) having regard to—

(i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, the certificate of capacity supplied by the worker; and

(ii) the nature of the worker's preinjury employment; and

(iii) the worker's age, education, skills and work experience; and

(iv) the worker's place of residence; and

(v) any plan or document prepared as part of the return to work planning process; and

(vi) any occupational rehabilitation services that are being, or have been, provided to or for the worker; and

(b) regardless of whether—

(i) the work or the employment is available; and

(ii) the work or the employment is of a type or nature that is generally available in the employment market;

Submissions

The plaintiff's submissions

36 The plaintiff's submissions focused on the Panel's conclusions: first, that she had a current work capacity; secondly, that the customer service representative position was suitable employment for her; and thirdly, that she had 'excellent literacy skills'. The second and third conclusions formed the basis for the first conclusion that she had and has a current work capacity.

37 The plaintiff submitted that the Panel failed to properly consider the inherent requirements of the customer service representative position, both its physical requirements and the qualifications, experience and skills it required.

38 The plaintiff argued that the Panel's second conclusion – that a customer service representative position would be suitable – was affected by jurisdictional error as, in so concluding, the Panel failed to take into account factors it was bound to consider. They were the plaintiff's education, her occupational skills, and her residual impairment from the left elbow injury. She then argued that the third conclusion – that she had excellent literacy skills – was a factor that the Panel was bound to disregard. That argument evolved into a submission that the Panel's finding of her excellent literacy was incorrect on the evidence and affected the ultimate finding that she had a current work capacity.

39 Finally, the plaintiff submitted that there was an error of law on the face of the record, as the Panel's reasons were inadequate and did not show the path or reasoning that enabled it to reach the conclusions that she challenged.

Ground one: failure to take into account the plaintiff's education

40 To repeat, s 5(1) of the AC Act lists matters that a Panel must take into account when determining whether a proposed employment position constitutes 'suitable employment' for a worker. One group of matters is the worker's 'age, *education*, skills and work experience'. In this regard, the plaintiff submitted that the Panel had not taken into account her level of education in reaching its conclusion that a customer service representative position was suitable. The Panel failed to address the educational requirements of that position, which she argued required a minimum educational standard which she did not have. She relied upon Mr Hartley's report to support this contention and his statement that he was 'unable to put forward any employment options' of which she was capable of fulfilling the inherent requirements.[29] This was because her left elbow injury prevented her from working in 'laborious unskilled roles' and her lack of education and skills prevented her from working in other, higher skilled roles. He considered that the roles that the Konekt report considered suitable, but was of the opinion that the plaintiff was not fit to fulfil the inherent requirements of any of them. In relation to the proposed customer service

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29 CB 265.

representative role, he wrote:

> This is an office based sales representative role, for which Ms Conroy has no education, skills or experience. Completion of Year 12 is required, as is good to upper level literacy, intermediate computer skills and the usual qualification is completion of Cert IV in Business Sales. Ms Conroy meets none of these criteria. She has no useful office based, clerical or marketing skills related to this role.
>
> From a physical perspective, it is designated as sedentary to light demands but I note it is often sedentary. However, repetitive bimanual hand activity is required to use computers, answer the phone and write notes.
>
> I do not believe Ms Conroy could fulfil the inherent requirements of this role.[30]

41 The Panel acknowledged that the plaintiff left school at age 15 without completing Year 9, and had no basis for assuming that she had completed a Cert IV in Business Sales. The plaintiff therefore submitted that the Panel failed to properly grapple with the disparity between her education and the required education standards for the position.

42 The plaintiff also argued that the fact that the Panel did not expressly refer to her education supported an inference that it did not take it, or the lack of it, into account.[31]

Ground two: failure to take into account the plaintiff's computer skills

43 Section 5(1) of the AC Act requires that a Panel consider a worker's 'skills and work experience' when determining the suitability of proposed employment. The plaintiff argued that the Panel did not do so as it did not consider the documents that revealed she did not have the computer skills, or 'digital literacy', necessary for the customer service representative position.

44 She relied on Mr Hartley's report to substantiate this ground, including his statement that a customer service representative role would require 'intermediate computer skills', when she did not even possess basic computer skills. Mr Hartley wrote that:

> Ms Conroy advised that she has no computer skills, she has never undertaken a computer course but has observed her daughters. She does not own a computer and there is no internet access at home. She does not know how to touch type and on the few occasions that she accessed the Internet and used

30 CB 281.

31 She relied on *Combined Enterprises Pty Ltd v Brister* [2016] VSC 807.

> keyboard she has had to look at every letter she has typed, requiring sustained neck flexion. She has no knowledge of any of the software used commercially or industrially as she has not been required to use a computer in a work situation.
>
> She does however own a smart phone on which she can access Facebook, Google and e-books. Otherwise she is unfamiliar with the majority of the apps on her phone.
>
> From an industrial perspective, she can be considered digitally illiterate in my opinion.[32]

45 The plaintiff also relied on the Konekt's report suggestion that she undertake a beginners' computer course as suggesting that she lacked fundamental computer skills. The report stated:

> Ms Conroy advised she has below average literacy and numeracy skills and very basic computer skills - 3/10. Ms Conroy advised she does not have the ability to access and send emails and utilise Microsoft Word or Microsoft Excel. Ms Conroy advised she would benefit from enrolment in a basic computer course to increase her computer skills.[33]

46 The plaintiff finally relied upon the report of the occupational physician Dr Slesenger, obtained on behalf of the defendant. He identified the nature of her injuries and expressed the opinion that she had capacity for work with certain restrictions which precluded any employment requiring repetitive physical motions.[34] He wrote a supplementary report specifically addressing the customer service officer role at Stockland Wendouree Shopping Centre:

> I have reservations with regard to her returning to work in this role as she advised that she had no computer skills; nevertheless, she would be able to fulfil the manual handing and postural requirements associated with this role.[35]

The plaintiff relied upon this passage as fortifying her contention that she did not have the requisite occupational skills for the customer service role. She contended that the Panel did not consider that matter in reaching its conclusion that a customer service position was suitable.

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32 CB 275.
33 CB 258.
34 CB 253.
35 CB 254.

47 The plaintiff submitted that the Panel conflated the broader inquiry it was required to undertake to determine the suitability of the customer service position with a narrow focus upon the potential physical restrictions arising from her left-elbow pain. The Panel looked only at the physical requirements of the customer service position and did not take a holistic view of what it would require. Thus the Panel stated:

> ...[t]his position requires appropriate interpersonal and communication skills and literacy levels which are considered within the plaintiff's capabilities as she has residual elbow pain (but no objective upper limb dysfunction) and she has no psychiatric conditions.[36]

Ground three: failure to take into account the plaintiff's residual impairment

48 The third mandatory factor which the plaintiff argued that the Panel had not considered was her residual impairment arising from her left elbow injury. The Panel accepted that the plaintiff suffered that injury in the course of her employment with the defendant and suffered residual pain as a consequence. Section 5(1) of the AC Act requires that in considering whether proposed employment is suitable, that the 'nature of the worker's incapacity' be considered. The plaintiff argued that the Panel did not consider the effect of her residual pain on her capacity to perform the customer service position.

49 The plaintiff relied upon Mr Hartley's report and the Konekt report to support this submission. Mr Hartley wrote that the customer service representative role would require 'repetitive bimanual hand activity' in using computers, answering phones and writing notes, rendering it unsuitable.[37] The Konekt report listed the relevant characteristics of the customer service representative position as including:

> **Stretching, twisting, climbing and lifting** may be necessary on an occasional to frequent basis if the job involves direct customer service that includes such tasks (e.g. Airline customer service representatives will load luggage onto a conveyor belt).
>
> **Repetitive movements** will be required when driving and using a computer.[38]

50 The Panel concluded that the nature of the plaintiff's left elbow pain did not restrict

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36 Reasons, 13.
37 CB 281.
38 CB 260.

her suitability for the customer service position and that its requirements were within her capabilities. But she submitted that it did not consider the issues identified in the above reports. In contrast, in determining that the position of hospitality worker and bar attendant were unsuitable for the plaintiff, the Panel expressly mentioned how those positions would be likely to require manual handling beyond her capacity.[39]

Ground four: taking into account the plaintiff's excellent literacy skills

51 The plaintiff's fourth ground was that the Panel took into account a factor which it was bound to disregard, being her purported 'excellent literacy skills'. In considering her current work capacity, the Panel took note of 'the plaintiff's excellent literacy (which does not limit employment options)'.[40] The Panel did not explain how it came to reach that conclusion, as the plaintiff did not report a high literacy level and it was contradicted by what was recorded by the vocational assessors. The papers contained no reference to the plaintiff having 'excellent literacy skills'.

52 Mr Hartley described the plaintiff's literacy as follows:

> Due to her poor school performance and attendance, Ms Conroy has compromised literacy. Although she has no difficulties with verbal communication or comprehension, her reading and writing skills are less than average. She does however enjoy recreational reading such as e-books on her phone via the Internet. She has written letters previously but has never written reports. She can however read and interpret a street directory.[41]

53 Further, as already outlined, the Konekt report recorded that the plaintiff described herself as having 'below average literacy and numeracy skills and very basic computer skills – 3/10'.[42]

54 The plaintiff submitted that the Panel wrongly used its 'excellent literacy' conclusion as a basis for its determination that she had current work capacity. She argued that the conclusion was irrelevant and was not supported by, but rather contradicted by, the vocational assessment reports.

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39 Reasons, 12.
40 Ibid.
41 CB 274.
42 CB 258.

Ground five: inadequacy of reasons

55 The plaintiff submitted that the Panel did not provide a discernible path of reasoning and thus committed an error of law on the face of the record.[43]

56 The Panel's reasons did not state why it considered the position of customer service representative to be suitable employment for the plaintiff when her education and occupational skills fell short of that job's requirements, and why her residual left elbow problems would not impair her ability to perform the inherent functions of the job.

The defendant's submissions

57 The defendant submitted that the Panel fulfilled its statutory functions, and did not err in any manner alleged by the plaintiff. It described her case as complaints about the merits of the Panel's intermediary findings regarding her skills and abilities and the requirements of the customer service position. Her grounds were a protest that the Panel's findings differed in some respects to other opinions contained in the referred documents, but that did not provide a basis for a finding of jurisdictional error. The Panel had made evaluative findings about facts, findings that were open to it as an expert tribunal regardless of the opinions expressed by other experts.

Grounds one, two and three: failure to take into account relevant considerations

58 The defendant submitted that the Panel expressly addressed the plaintiff's education, skills, and residual elbow pain. For instance, it decided that the proposed hospitality and bar attendant jobs were unsuitable because they called for physicality in excess of the plaintiff's post-injury capabilities, and rejected the suitability of the integration aide job because she did not satisfy the requisite educational standard. The Panel did not have to minutely address every aspect of the reports provided to it, for instance it did not have to express agreement or disagreement with Mr Hartley's conclusions about the educational requirements of particular jobs. In this regard, the defendant

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43 *Masters v McCubbery* [1996] 1 VR 635.

relied upon the judgment of John Dixon J in *Haq v Dodgshun*.[44]

59 In the defendant's submissions, the Panel simply did not accept Mr Hartley's statement about the requirements of the customer service position. Rather, it relied upon the plaintiff's work history in similar customer service and hospitality positions, as well as on other opinions, for instance Dr Slesenger's endorsement of the proposed sales assistant position at Michael Hills Jewellers.[45]

60 The defendant submitted that contrary to the plaintiff's contention, the Panel had considered what the customer service position 'actually involved' and the duties and skills it required, including literacy and interpersonal communication skills and that it considered the plaintiff possessed them.

61 The defendant submitted that the Panel statement that it had formed its opinion 'with regard to the documents and information referred to in Enclosure A' was particularly important.[46] Those documents included the Konekt report, Nabenet report, Mr Hartley's two reports and Dr Slesenger's two reports. The Panel also wrote that it 'considered all aspects of the definitions of "no current work capacity", "current work capacity" and "suitable employment" contained in the Legislation' and that it took note of 'the reports of the practitioners who have treated or examined the plaintiff'.[47] The Court should accept these statements and therefore conclude that the Panel did have regard to those factors which the plaintiff alleges it failed to consider.

Ground four: taking into account an irrelevant consideration

62 The defendant argued that the Panel was entitled both to consider the plaintiff's literacy skills in determining whether she had a current work capacity and to reach its own view as to her literacy level. It submitted that the Panel's finding that her literacy skills were 'excellent' was open on the material before it, and referred the Court to its written submissions to the Panel about her skills:

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44 [2015] VSC 450.
45 CB 254.
46 Reasons, 4.
47 Reasons, 12.

> The worker is aged 45 and has a Year 10 education. She has completed a certificate III in hospitality and also has certificates relating to responsible serving of alcohol, responsible services of gambling, beer serving and keno.
>
> She has considerable work experience in customer service in a range of different roles including working in a coffee shop for eight to ten years, as a bar manager at Buninyong Golf Club, catering and cleaning for the Uniting Church for two years, bar work and in a customer service role at BWS.
>
> The worker's duties at BWS included customer service at the cash register, using the cash register, providing change, using EFTPOS equipment and stock control. Her work at Zagames also involved money handling, use of EFTPOS and customer service, as did her work at the golf club. The worker also has experience in telephone based ticket sales.
>
> The worker considers that her numeracy skill are good. She owns a smart phone on which she can access Facebook, google and e-books.[48]

The references in this extract refer, *inter alia*, to the information contained in Mr Hartley's report. The defendant also referred to his reference to the plaintiff enjoying recreational reading of e-books, some experience in writing letters, and her ability to read and interpret a Street Directory.[49]

63 The defendant further argued that the Panel's evaluation of the plaintiff's literacy standard was immaterial in any event, as it was not said that the customer service position required excellent literacy skills. Mr Hartley described the position as requiring 'good to upper level literacy',[50] whereas the Nabenet report did not refer to minimum literacy requirements.[51] The Panel found that the plaintiff had sufficient literacy skills for the customer service position.

Ground five: inadequacy of reasons

64 The defendant argued that the Panel's path of reasoning as to the plaintiff's current work capacity contained in the final two pages of its reasons was adequate. It made an evaluative finding of fact regarding the suitability of the customer service position. The plaintiff was seeking to rely on isolated parts of opinions in the referred documents that were arguably capable of supporting different conclusions. But, the

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48 Defendant's Submissions to the Medical Panel, 13 February 2018, 8.
49 CB 274.
50 CB 281.
51 CB 303-304.

Panel's role was not to explain why it reached different conclusions to those of particular experts or to 'address all possible paths of reasoning and dismiss them one by one'.[52]

Analysis

Grounds one to three: failure to take into account mandatory considerations

65 The Court's task is to consider whether the Panel performed its statutory duty in answering the questions before it by taking into account the relevant mandatory factors contained in the AC Act. The plaintiff's first three grounds are interrelated, in that they all allege that the Panel failed to take into account a factor it was bound to consider under s 5(1) – the first education, the second occupational skills and the third residual left elbow pain. Therefore, the Court's task is to consider whether the Panel's conclusion about the plaintiff's current work capacity, specifically the suitability of the proposed customer service position, was reached with proper regard to those factors.

66 A worker's education, occupational skills and the residual impairment from compensable injuries are all relevant considerations in determining the suitability of proposed employment. The Panel referred to all these factors in a general sense. However, the plaintiff argued that the incompatibility of her lack of education and computer skills and residual left-elbow pain with the requirements of the customer service position was a fundamental issue for determination, yet was not properly identified, considered or addressed by the Panel.

67 A Medical Panel need not expressly refer to every opinion or issue raised in the referred documents. As the High Court said in *Wingfoot Australia Partners Pty Ltd v Kocak* ('*Wingfoot*'):

> It goes too far, however, to conceive of the function of the Panel as being either to decide a dispute or to make up its mind by reference to competing contentions or competing medical opinions. The function of a Medical Panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical

52 *McIntyre v Fish & Ors* [2015] VSC 82 [124] (Zammit J); *Haq v Dodgshun* [2015] VSC 450 (John Dixon J).

> question. The function is in every case to form and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.[53]

68 The Panel in answering the referred questions needs to address only the fundamental issues arising from the referral material. The Court of Appeal, in *Ryan v The Grange at Wodonga* ('*Ryan*'), discussed this requirement in considering whether a worker's return to work would aggravate a pre-existing injury. Neave JA stated:

> Under s 65(5), a Medical Panel may ask a worker to meet with the Panel to answer questions, to supply relevant documents and to submit to a medical examination. Under s 65(6B), a person referring a medical question to a Medical Panel must submit copies of all documents relating to the medical question in his or her possession to the Medical Panel. It necessarily follows that the Panel is bound to consider the worker's answers to questions and the documents submitted by the worker and the referring body, when the Panel forms its Opinion and delivers its Reasons. If the worker's answers or the documents provided raise an issue which the Reasons do not address, the Panel has failed to take account of a relevant consideration.[54]

69 In *Omerasevic v Kotzman*, Riordan J summarised the principles stated in *Ryan* in the following terms:

> (a) A medical panel is bound to have regard to the referral material for the purpose of determining the fundamental issues that will enable it to answer the referred questions.
>
> (b) The fundamental issue arising from the referral material, in the circumstances of that case [*Ryan*], was whether the worker, by returning to her work duties, would aggravate her pre-existing shoulder injury.
>
> (c) The reasons of the medical panel did not deal with the fundamental issue of 'whether the appellant's return to her pre-injury duties would further aggravate her pre-existing shoulder condition'.
>
> (d) Her Honour inferred that the medical panel 'did not take account of' the fundamental issue – presumably on the basis that:
>
> (i) it was not expressly referred to in the reasons; and
>
> (ii) if such a fundamental issue had been considered, one would expect that it would have been referred to.
>
> (e) The medical panel, by failing to deal with the fundamental issue, for the purpose of answering Question 2, had failed to fulfil its statutory function of forming its opinion on the medical question referred to it.

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53 (2013) 252 CLR 480, 498-499 (French CJ, Crennan, Bell, Gageler and Keane JJ) (citations omitted).

54 *Ryan v The Grange at Wodonga Pty Ltd* [2015] VSCA 17, [60].

> Speaking colloquially, I infer her Honour as concluding that, given its significance to the referred question, the medical panel had failed to have regard to the elephant in the room. This constituted jurisdictional error.[55]

70 An argument that a Panel erred by not expressly addressing an issue raised in the referral materials will only succeed if consideration of that issue was fundamental to answering the referred question, and thus to the performance of the Panel's statutory task. Therefore, the plaintiff's first three grounds can only succeed if the considerations identified were fundamental issues and were not properly considered. I will next separately consider the three considerations identified by those grounds.

Ground one: the plaintiff's education

71 The plaintiff argued that the Panel had not taken into account Mr Hartley's statement that a customer service representative required a Year 12 pass and a Certificate IV in Business Sales in circumstances where she had left school in Year 9 and did not have the Certificate.

72 The plaintiff also argued that the suitability of an occupation means more than a person's physical capability of performing the role. I accept that argument. In *Richter v Driscoll*, Ashley and Kaye JJA state that s 5(1) requires a holistic view of the suitability of employment, and not just a focus on a worker's physical capacity alone:

> Third, we agree with the applicant's submission that return to work in employment, so understood, requires more than that a physical capacity to engage in a task or tasks. That is because there is more to an ability to work in employment—'ability' being converse of 'inability', which appears in the definitions of 'no current work capacity' and 'current work capacity'—than the ability to perform a task that happens to be required in that employment. The definition of 'suitable employment', which falls for consideration in the context of 'no current work capacity', plainly shows that physical capacity to perform a particular task does not mean that an employment requiring that task thereby becomes suitable employment. If it were otherwise, paragraphs (a)(ii), (iii) and (iv) would have no work to do.[56]
>
> ...
>
> First, the Panel alluded to matters set out in paragraph (a)(i) to (iv) of the definition of 'suitable employment' when concluding that three of the four 'possible job options' did not constitute suitable employment. It may be said

55 [2016] VSC 383, [97] (Riordan J) (citations omitted).

56 *Richter v Driscol* (2016) 51 VR 95, 114 [76] (Ashley and Kaye JJA).

> that this entailed consideration of the applicant's relevant personal circumstances, of which the work-caused incapacity was a necessary part, but only a part, of what the Panel had to consider. Whether consideration of those circumstances—all aspects of which, it needs to be understood, must be comprehensively brought to account—was any more than formal recitation (except in the case of the applicant's problems with literacy and numeracy) need not be conjectured. But what can be said is that, in terms, the Panel's consideration of the 'light process worker' option incorrectly focused entirely upon the applicant's physical capacity to undertake the duties described in the Assessment. It concluded that she would be able to perform those duties 'in line with her current physical and mental condition'. The Panel's reasons show that it approached the matter in a way which was not consistent with the submission for the respondents that it must be taken to have brought to account the applicant's age, previous experience, education, skills and place of residence, as it stated it had done in the case of the other job options.[57]

73 Adopting a holistic assessment of the suitability of employment, the plaintiff's education was a fundamental aspect of determining her suitability for the proposed positions, particularly as she had left school in Year 9. However, the specific educational attainments such as possession of certificates, claimed by Mr Hartley, were not *per se* fundamental issues requiring express reference. There was no evidence that possession of such certificates was required in the job market.

74 The Panel did consider relevant aspects of the plaintiff's education. For instance, immediately before considering the suitability of the customer service position, it stated that the integration aide position was unsuitable as it 'requires additional training and certification'. On the evidence, the Panel was entitled to proceed on the basis that the plaintiff had been in work for 27 years and that her work history was particularly relevant and not just the year in which she left school. The Panel was aware of Mr Hartley's opinions and, when it consider it necessary to do so, explained why it differed from him, e.g. in respect of residual impairment.[58]

75 A reading of the reasons with 'an eye keenly attuned to the perception of error'[59] could lead to the conclusion that the Panel considered the educational requirements for the integration aide position only, and not for the customer service position, and only considered Mr Hartley's views on the physical impediments to employment rather

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57 Ibid 123 [103] (Ashley and Kaye JJA).

58 Reasons, 13.

59 *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287 quoted in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

than any educational or other requirements. But read fairly, the Panel's recognition that the plaintiff had insufficient education for the integration aide position suggests that it considered education requirements where applicable, when considering suitable employment options. There was no express evidence that the customer service position required the possession of a Certificate IV in Business Sales. The Panel considered the holistic requirements of the position, not only its physical requirements, and thus referred to the 'appropriate interpersonal and communication skills and literacy levels…'[60].

76 The Panel was not required to consider minutely every matter raised by the reports, or explain the basis upon which it disagreed with opinions or conclusions expressed in them.[61] This was particularly the case when expert opinions differed on particular issues.

77 The plaintiff had spent much of her working life in jobs with customer contact. As counsel for the defendant said in oral submissions, the plaintiff has 'direct vocation experience in the either identical or closely analogous roles that are captured by the concept of customer service assistant'.[62]

78 I therefore conclude that the Panel did not fall into error as contended in ground one as it had regard to the plaintiff's education and was not required to expressly address the purported minimum educational standard proposed by Mr Hartley.

79 Ground one is not established.

Ground two: the plaintiff's skills

80 The plaintiff's second ground is that the Panel failed to take into account her skills and work experience, as required by s 5(1). She claimed that it did not consider her lack of computer skills and the computer requirements of customer service positions.

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60 Reasons, 13.

61 *Haq v Dodgshun* [2015] VSC 450.

62 Transcript of Proceedings, *Conroy v Romas* (Supreme Court of Victoria, S ECI 2018 00475, Ginnane J, 31 May 2019), 44 ('T').

81 The Panel's conclusion that the plaintiff had current work capacity was based on its conclusion that the customer service position proposed by Konekt was suitable employment for her. It required the use of 'light hand-held objects such as writing implements, telephone, faxes, personal computers, photocopiers, scanners, calculators and electronic payment terminals'.[63] Konekt did not consider the extent of computer or digital literacy required for that category, but did suggest that the plaintiff undertake a beginners' computer course to 'gain confidence in [her] computing skills and enhance [her] job seeking preparation skills'.[64]

82 The Nabenet report identified two roles in the customer service category proposed by Konekt; first a customer service officer/reception role at Stockland Wendouree Shopping Centre, and second a bingo caller role. The former required no formal training or qualifications, and included basic reception duties, online communication management, and some basic computer duties, although 'training is provided'.[65] The bingo caller role required no formal qualifications, but according to the Nabenet report did require computer duties.[66]

83 The Nabenet report also described a position at Michael Hill Jewellers. That position fell under the fifth Konekt proposed category of suitable employment, being sales assistant. The Panel did not consider the fifth proposed category, but even this position had a requirement for 'very basic computer skills'.

84 Mr Hartley considered that a customer service role would generally require intermediate computer skills, and that the Stockland role proposed by Nabenet would be beyond the plaintiff's computer abilities, even with training, as she had no computer work experience upon which that training could build. He considered that the bingo caller role was inappropriate for other reasons, including its limited hours and remuneration. Dr Slesenger deemed the Stockland role physically appropriate for the plaintiff, but had reservations about whether she could perform the computer

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63 Reasons, 13.
64 CB 261.
65 CB 303.
66 CB 304.

based elements of the job.

85 In taking a holistic view of a proposed job to be determine whether it would be suitable employment, it is insufficient to consider only whether the worker is physically capable of performing that job.

86 In my opinion, the plaintiff's lack of computer skills was a fundamental issue in determining whether she had work capacity. Her employment history was mainly in hospitality and manual labour jobs which she can no longer perform. She must transfer to sedentary employment in order to have a work capacity, and most such jobs are likely to require some computer skills. The material before the Panel suggested that her computer skills are very limited.

87 The Panel's reasons do not refer to the plaintiff's computer or digital literacy or address the computer requirements of the proposed categories of employment or jobs. The closest the Panel came to that issue was in stating that the customer service position typically requires, *inter alia*, the use of 'personal computers, photocopiers, scanners, calculators and electronic payment terminals'.[67] That was a quotation from the Konekt report's description of the customer service occupation or category (ANZSCO code 611399). But, having set out those typical duties, it did not consider whether the plaintiff had the capacity to perform them. The Panel did state that the occupation or position required 'appropriate interpersonal and communication skills and literacy levels which are considered within the plaintiff's capabilities…'.[68] But, it did not consider whether the plaintiff's very limited computer skills were likely to match the job requirements of a customer service position. Read in context, its reference to 'literacy levels' was not to computer skills.

88 The fact that the Panel did not refer to the plaintiff's lack of computer skills meant that it did not deal with a fundamental issue. Her contention was that she had 'very basic computer skills' and an inability to 'access and send emails and utilise Microsoft Word

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67 Reasons, 13.
68 Ibid.

or Microsoft Excel'.[69] Konekt recommended basic computer training at the plaintiff's suggestion.[70] Dr Slesenger had reservations about her ability to perform the Stockland role because she lacked computer skills. Some of the positions to which the Nabenet report referred required some computer skills. Mr Hartley's clear opinion was that the plaintiff could not perform a customer service role in part because of her lack of computer skills.

89 In reaching its conclusion that the customer service position was suitable employment for the plaintiff, the Panel discussed its requirements only by reference to the Konekt report. In stating that the role 'is typically sedentary to light physical demand work involving use of light hand-held objects...' it was quoting the description of the customer service representative position contained in the Konekt report. It did not explain why it considered that the plaintiff had the necessary computer skills to use 'personal computers' as the category required. It may have been open to the Panel to base its finding that the customer service position was suitable employment for the plaintiff on a finding that she had the skills necessary for the Stockland customer service position outlined in the Nabenet report. That position required 'some basic computer duties' but its description stated that training would be provided. But there is no indication that the Panel adopted that approach. It did not address the computer use requirements of the customer service positions proposed by the Nabenet report nor whether the plaintiff's skills met those requirements. There is only the Panel's conclusion that the plaintiff could meet the requirements of the customer service category or position described in the Konekt report.

90 The customer service category or position described in the Konekt report is a collection of tasks that may be required in that occupational category. But a worker, in order to be suitable for a particular position in that occupational category, need not be able to perform every task listed. For example, a person unfamiliar with the operation of fax machines would be unlikely to be unsuitable for all positions that fall within that occupational category. But a basic competence in computer use is usually important

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69 CB 258
70 Ibid.

in the modern workforce, for instance the customer service position at Stockland proposed by Nabenet required 'online communication'. The Panel was not obliged to find that the plaintiff's limited computer skills meant that she was not suitable for a customer service position, but it was required to address that issue.

91 It may be that the Panel considered that, because the plaintiff used a smartphone and read e-books, she would be able to adapt to the computer requirements of a customer service position. But it did not say so. Alternatively, the Panel may have based its decision on the bingo caller customer service position identified by Nabenet. Again, it did not say so. Its reasons did not consider the plaintiff's computer skills or digital literacy or the requirements for those skills in the customer service position or occupation category.

92 The effect of the plaintiff's limited computer skills was a fundamental issue in determining whether there was suitable employment for her. Because of her compensable injury, she can no longer work in her previous jobs. If an issue in the referred materials is fundamental to the answering of the referred questions and is not properly addressed, a Panel has committed jurisdictional error.[71]

93 The Panel did not consider the effect of the plaintiff's lack of computer skills and its effect on her ability in the 'use of… personal computers'. It therefore failed to consider a significant issue relevant to the determination of her work capacity and suitable employment. Consequently, it did not perform its statutory function and made a jurisdictional error.

94 Ground two is established.

Ground 3: failure to consider the plaintiff's residual impairment

95 The plaintiff's third ground is that the Panel failed to take into account her residual impairment arising from her compensable left elbow injury. Section 5(1) states that relevant to the consideration of the suitability of employment is the 'nature of the

71 *Ryan v The Grange at Wodonga Pty Ltd* [2015] VSCA 17, [60].

worker's incapacity'. In that regard, the Panel deemed her pre-injury employment at BWS as unsuitable, as it would aggravate the injury.

96 The plaintiff argued that the Panel neglected to consider properly the physical requirements of the customer service role described in the Konekt report - including stretching, twisting and repetitive movements - and Mr Hartley's warnings that 'repetitive bimanual hand activity' was required in using computers, answering phones and writings notes, which movements might aggravate the residual impairment.

97 The Panel was required to consider any residual impact from a compensable injury when considering the existence of suitable employment for the plaintiff. However, I consider that the Panel did consider the issue of the residual pain when determining that the customer service role was suitable. The Panel expressly stated that the requirements of the role were within the plaintiff's physical capabilities. It wrote:

> The Panel concluded that the residual functional restrictions due to the plaintiff's residual left elbow pain following a soft tissue injury (surgically treated) was and is minimal and such that... there was (and is) work for which the plaintiff was (and is) suited and which she could have performed then (and now) on a reliable and consistent basis.

98 The Panel then referred to the contrasting opinion of Mr Hartley.[72] It did not accept his conclusion that the plaintiff had no physical capacity for work for two reasons: first, that he assumed that her left shoulder and neck dysfunction were also compensable injuries, whereas the Panel concluded otherwise which precluded those injuries from being considered when determining the suitability of employment. Secondly, the Panel considered that he had 'significantly overestimated' the extent of the plaintiff's left elbow dysfunction, which the Panel deemed to be minimal.

99 As mentioned, the Panel did conclude that the plaintiff's prior employment at BWS was unsuitable because its physical requirements would be too onerous for her because of her residual left elbow pain. The Panel also dismissed the suitability of the proposed hospitality worker and bar attendant roles because they required manual

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72 Reasons, 13.

handling in excess of the plaintiff's capability. The Panel thereby demonstrated that it considered the plaintiff's residual impairments when it determined that the customer service role was suitable. It explained why it disagreed with Mr Hartley's conclusions.

100 The third ground is not established.

Ground 4: taking into account an irrelevant consideration

101 The plaintiff's fourth ground was that the Panel erred in taking into account her 'excellent literacy skills' – a factor which it was bound to disregard. In *Love v State of Victoria*, Cavanough J summarised the 'irrelevant considerations' ground as follows:[73]

> To successfully impugn an administrative decision on the 'irrelevant considerations' ground, a challenger must satisfy the Court of three things:
>
> (a) that the particular consideration was in fact taken into account;
>
> (b) that the consideration was irrelevant, in the sense that under the applicable statutory provisions the taking into account of the consideration was impermissible; and
>
> (c) that the applicable statutory provisions have the effect that taking the consideration into account will result in invalidity.
>
> The first of these requirements needs no further discussion. The second requirement is stated by Aronson, Dyer and Groves in their leading Australian work on administrative law as follows:
>
> > "Not only must the consideration have been irrelevant, but the Act must have *forbidden* its consideration."
>
> ...
>
> The third requirement is stated by Aronson et al in the following terms (with equal application to the ground of failing to take into account relevant considerations):
>
> > "Relevancy and its opposite are defined ultimately by the Act which prescribes what must or must not be considered. More than that, for these grounds to apply, the Act must be seen to stipulate that breach of such of its relevancy criteria as are in question is meant to result in invalidity."

102 Further, in *Ballantyne v Workcover Authority of New South Wales*, Basten JA summarised the principle as follows:

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73 [2009] VSC 215, [191] (citations omitted).

> [Irrelevant considerations] are factors which are extraneous to the proper exercise of the power, so that to take them into account will also reveal legal error.[74]

103 I consider that the Panel did take the plaintiff's literacy into account in reaching its conclusion as to her suitability for the customer service position. It mentioned that matter in its reasons. However, I am not persuaded that it thereby took into account an irrelevant consideration. The plaintiff's literacy was a relevant factor for the Panel to consider in determining the suitability of employment options, as part of the holistic assessment of a role's suitability. Further, computer literacy falls within the scope of a worker's 'education, skills and work experience', which are express mandatory factors in s 5(1) of the AC Act.

104 However, to reach that conclusion is not to respond to the way in which the plaintiff put this ground in submissions. The plaintiff's argument was not that literacy itself was an irrelevant consideration, but rather that the conclusion reached by the Panel that her literacy was excellent so departed from the materials and evidence before the Panel that it ought not to have been considered. It was in this manner that the plaintiff advanced ground four and sought to impugn the Panel's evaluative factual finding, that the plaintiff's literacy was 'excellent'. I consider that this ground, as argued, was a challenge to the merits of the Panel's finding and not a basis for a jurisdictional error. A Panel's finding concerning a mandatory relevant factor cannot be said to be irrelevant, instead the plaintiff's case really was that its finding was incorrect. In *Karabinis v Bendrups & Ors* ('*Karabinis*'), J Forrest J outlined when a mistake as to fact will amount to a jurisdictional error:

> The end result of all this, I think, is that a Medical Panel will fall into jurisdictional error if it makes a fundamental mistake of fact which goes to a central issue in determining the answer to a medical question. Minor, and perhaps moderate, errors of fact do not mean that a Panel has fallen into jurisdictional error. It is, therefore, a question of fact and degree in each case as to whether an established mistake or omission goes so far as to constitute jurisdictional error. This must be assessed in light of the ultimate decision and the basis for it, as articulated by the reasons.[75]

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74 [2007] NSWCA 239, [113].
75 [2017] VSC 648, [62].

105 In order for the plaintiff's challenge to the Panel's finding of 'excellent literacy' to succeed, she must first establish that the conclusion was in fact mistaken, as outlined J Forrest J in *Karabinis*:

> First, the evidence that the Panel 'got it wrong' must be cogent. The reviewing court is entitled to assume that the contents of the reasons (or, in this case the reasons supplemented by the contemporaneous notes) are correct unless persuaded otherwise.[76]

106 The plaintiff principally relied upon Mr Hartley's opinion that she had 'compromised literacy' due to poor school performance and attendance,[77] and her statement to the vocational assessor in the Konekt report that she had 'below average literacy and numeracy skills…'.[78] On the other hand, Mr Hartley recorded that the plaintiff does 'enjoy recreational reading… [and] has written letters previously…' and that she could 'read and interpret a street directory'.[79] Her work history and her gaming licence and responsible service of alcohol certificate[80] must also be considered.

107 In view of there being differing evidence about the plaintiff's standard of literacy, and the lack of 'cogent evidence' offered by her to prove that the Panel was clearly mistaken, I consider that it was open for the Panel to conclude that she had excellent literacy skills and that lack of literacy did not restrict her employment options. The words 'excellent' standard of literacy were followed by the words 'which does not limit employment options' and those options were mainly in areas of employment for which high standards of literacy were not required.

108 Furthermore, even if the Panel was mistaken about the plaintiff's level of literacy, I am not satisfied that it would have been a 'fundamental mistake of fact which goes to a central issue in determining the answer to a medical question'.[81] This is because even if, on the evidence, the proper conclusion was that the plaintiff had moderate literacy, the Panel's mistake would have been immaterial as at no stage was it suggested that

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76 Ibid [69].
77 CB 274
78 CB 258.
79 CB 274.
80 Reasons, 8.
81 [2017] VSC 648, [62].

the customer service representative role required 'excellent' literacy. The Panel concluded that she had sufficient literacy skills for the customer service role, in conformity with the Konekt report and the view of Dr Slesenger. Her level of literacy was sufficient for that role.

109 The plaintiff's fourth ground does not succeed, as her literacy standard was not an irrelevant consideration, and the Panel's conclusion that she had 'excellent literacy' was an evaluative finding of fact made within jurisdiction. The plaintiff did not establish that the Panel's conclusion was a fundamental mistake amounting to a legal error.

Ground five: inadequacy of reasons

110 The duty to provide written reasons is set out in s 313 of the *Workplace Injury Rehabilitation and Compensation Act 2013* as follows:

> **313 Opinions**
>
> (1) Subject to section 312, a Medical Panel must form its opinion on a medical question relating to a claim for a benefit under Part 5 referred to it—
>
> (a) within 60 days after the Medical Panel receives from the Convenor the documents relating to the medical question; or
>
> (b) within such longer period as is agreed by the Conciliation Officer, a court, VCAT, the Authority or the self-insurer.
>
> (2) The Medical Panel to whom a medical question is so referred must give a certificate as to its opinion and a written statement of reasons for that opinion.

The plaintiff argues that the Panel's reasons were inadequate and did not comply with this provision.

111 The High Court decision in *Wingfoot* establishes that a Panel's statement of reasons must explain the actual path of reasoning by which it reached its opinion. That path of reasoning must be explained in sufficient detail to enable a court to see whether the opinion does or does not involve any jurisdictional error or error of law. However, a Panel need not explain why it did not reach an opinion it did not form.

112 The High Court stated that:

> The statement of reasons must explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law.[82]
>
> ...
>
> A Medical Panel explaining in a statement of reasons the path of reasoning by which it arrived at the opinion it formed is under no obligation to explain why it did not reach an opinion it did not form, even if that different opinion is shown by material before it to have been formed by someone else.[83]

113 In *Gruma Oceania Pty Ltd v Bakar*, where the Court of Appeal applied *Wingfoot* and stated:

> As a medical panel is an administrative tribunal whose members are not lawyers, its reasons are entitled to a 'beneficial construction' in the sense that they should 'not ... be scrutinised ... over-zealous[ly] ... by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.' In *Gamble v Emerald Hill Electrical Pty Ltd*, this Court reaffirmed the following principles that apply to judicial review of a medical panel's reasons:
>
> > The court on judicial review should not be 'concerned with looseness in the language ... nor with unhappy phrasing' of the reasons of an administrative decision-maker, and should not construe the reasons for decision 'minutely and finely with an eye keenly attuned to the perception of error'.
> >
> > ...
> >
> > [A] court hearing a judicial review application in relation to a Victorian medical panel will ordinarily view with disfavour grounds of review which rely on mere looseness in the language or unhappy phrasing in the Panel's reasons. Such grounds usually fail, and their inclusion tends to suggest that the judicial review application as a whole lacks legal merit.[84]
>
> ...
>
> It is important to bear in mind that the question for the Court when considering whether a medical panel's reasons are adequate is not whether the reasons positively disclose that the panel erred in law, but whether the reasons are sufficient to enable the Court to determine whether the panel's opinion does or

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82 (2013) 252 CLR 480, 501 (French CJ, Crennan, Bell, Gageler and Keane JJ).

83 Ibid 502.

84 [2014] VSCA 252, [29] (Neave, Santamaria and Kyrou JJA), citing *Gamble v Emerald Hill Electrical Pty Ltd* (2012) 38 VR 45, 48 [9], 51 [20] (Maxwell P and Cavanough AJA) (citations omitted).

> does not involve any error of law. If the reasons are such that the Court is left in real doubt about whether the panel correctly performed its statutory functions, the reasons will not comply with s 68(2).[85]

114 To establish an inadequacy of reasons amounting to an error of law on the face of the record, it is not enough to point to a mere failure to refer to particular evidence or a vagueness in wording. The Court would need to be persuaded that the reasons are so inadequate that they do not permit consideration of whether the Panel's opinion and reasons contained a jurisdictional error. As stated in *Gruma*, there must be a 'real doubt' about whether the Panel performed its statutory function. That is not the present case as the Panel's reasons are clear enough: suitable employment was available even though it was not the kind of work that the plaintiff had previously performed. I have concluded that the path of reasoning did involve a jurisdictional error, but it does not follow that the reasons were inadequate in the legal sense.

115 The fifth ground is not established.

Conclusion

116 The plaintiff has established ground 2. I consider that judicial review orders in the nature of certiorari and mandamus should issue, in terms that I will discuss with the parties.

CERTIFICATE

I certify that this and the 36 preceding pages are a true copy of the reasons for Judgment of Ginnane J of the Supreme Court of Victoria delivered on 18 October 2019.

DATED this eighteenth day of October 2019.

SUPREME COURT OF VICTORIA
Certificate of a Judge of the Court

.....
Associate

85 [2014] VSCA 252 [47].