IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

[2021] NZACC 26 **ACR 230/18**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	M HAUGH Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing:	14 July 2020
Held at:	Wellington/Te Whanganui-a-Tara
Evidence and supplementary submissions completed	29 October 2020
Appearances:	A C Beck for the appellant I G Hunt for the respondent
Judgment:	4 February 2021

RESERVED JUDGMENT OF JUDGE DENESE HENARE
[Recovery of overpayment, s251 Accident Compensation Act 2001]

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[1] The appellant, Mark Haugh is a self-employed locksmith. He injured his back in January 2015 and was paid weekly compensation by the Corporation.

[2] This appeal concerns the overpayment and recovery of weekly compensation in the amount of $19,969.34, for the period 30 March 2015 to 27 March 2016. The overpayment raised is based on the Corporation's position advised in an internal memorandum dated 13 September 2016 that:

> The client was paid weekly compensation based on the 2014 tax return. ACC then paid estimated weekly compensation to the client as he returned to work on

reduced hours. The estimated payments were reassessed after receiving the 2016 tax return details, this creating an overpayment.

The overpayment occurred because the estimated weekly compensation made to the client was in excess of the client's actual entitlement to weekly compensation after considering the client's 2016 tax return.

[3] The Corporation's Overpayment Unit sought repayment from Mr Haugh on 14 September 2016:

We need you to repay an overpayment

Referring to ACC's letter dated 01 September 2016 and your discussion with Case Manager (Jenni) on 31 August 2016, we have reassessed your weekly compensation entitlement and found that we've overpaid your weekly compensation by $19,969.34.

Details of the overpayment

Amount we overpaid	$19,969.34
Period of overpayment	30/03/2015 – 27/03/2016
Type of compensation overpaid	Weekly Compensation

According to Schedule 1, Clause 50 of the Accident Compensation Act 2001, where the earnings of a self-employed are not readily ascertainable, ACC may estimate the amount that represents reasonable weekly compensation for the client.

As required by the legislation (Clause 51 of the AC Act 2001), ACC is required to reassess and reduce the weekly compensation entitlement when the client has earnings during periods of incapacity in order to ascertain the client's actual entitlement.

The overpayment occurred because you were being paid estimated weekly compensation and when ACC received the 2016 tax return details, this estimated amount was in excess of your actual entitlement to weekly compensation for the period mentioned.

I have included a copy of the Weekly Compensation Assessment issued to you on 24 August 2016 confirming these calculations. I have also included a copy of the ACC 206 form and ACC's letter dated 01 September 2016 for your reference.

Agreed facts

[4] The parties have filed an agreed statement of facts, reproduced as follows:

- Mr Haugh suffered an injury to his back in January 2015.

- On 21 February 2015 the Corporation issued a weekly compensation decision, on an interim basis, advising Mr Haugh that he was entitled to weekly compensation at the rate of $1,077.17 gross from 23 January 2015.

- This amount was based on Mr Haugh's 2014 shareholder earnings of $70,016 gross, divided by 52 weeks (or $1,346.46 gross per week, equating to $16.83/hour on the basis of an 80 hour week).

- On 23 February 2015 the Corporation advised Mr Haugh that following discussions with his accountant who had advised that he did not take PAYE and that his income was based on the end of year salary allocation, his weekly compensation had been set up based on his 2014 tax return.

- Regular weekly compensation payments of $1,077.17 gross continued from 2 March 2015 to 6 April 2016, which were not abated.

- On 17 March 2015, after an exchange of emails between Mr Haugh and the Corporation, he was provided with an ACC206 form for him to complete on a weekly basis relative to the hours of work completed by him.

- Mr Haugh acknowledged his understanding of what was required in terms of the ACC206 declarations and his obligation to advise the Corporation of any work undertaken.

- On 26 March 2015 the Corporation received the first of 48 ACC206 forms, each of which contained the same particular form of declaration.

- On 29 April 2015 the Corporation sent an email to Mr Haugh stating in part:

> Thanks for the ACC form with your work hours. Will the work hours remain around the 10 hour mark or will you be looking to increase these hours? At this time I have not been adjusting your weekly compensation payments however if they increase over the 10 hours I will need to do this.

- Subsequently the Corporation received an ACC165 form completed by Mr Haugh identifying his rights and responsibilities and noting, in part, that:

> The amount of weekly compensation you receive depends on a number of things. We ask that you let us know:
>
> - If you receive any money, such as payment for work done, a pay increase or holiday pay.

- A contact note made by the Corporation following a discussion with Mr Haugh on 20 August 2015 recorded:

> Spoke with Mark regarding the WC issue CM advised not spoken with accountant as he had not returned call. He confirmed that he felt it was not needed to send the info in the post as he understood it it [sic] is that he just wants to changed [sic]. CM explained not able to have it changed due to legislation, CM to email details of this part of legislation. Discussed abatement and CM confirmed that if he is able to work 10 hours per week without it affecting his WC and the $ amount he is earning is N/A as we understand being self employed he has expaenses[sic] etc that need to be taken off hence we do the hours as a percentage. Hence based on a 50hrs week he can work 10 hrs per week without it affecting his WC. Mark asked if he could have in writing and CM confirmed will email with legislation details.

- Subsequently Mr Haugh requested the Corporation to recalculate his weekly compensation entitlement based on his 2015 earnings, which were $92,000.

- On 24 August 2016 the Corporation issued an ACC600 weekly compensation assessment decision, providing abatement details for the period 30 March 2015 to 27 March 2016 based on Mr Haugh's average weekly earnings of $769.23 gross for the 2016 tax year.

- On the same date, an overpayment of $19,969.34 net weekly compensation relating to that same period, was raised in respect of Mr Haugh's claim.

- On 14 September 2016 the Corporation issued a decision advising that it required Mr Haugh to repay the amount of the overpayment, that letter recording, inter alia, that:

> [T]he overpayment occurred because you were being paid estimated weekly compensation and when ACC received the 2016 tax return details, this estimated amount was in excess of your actual entitlement to weekly compensation for the period mentioned."

- The Reviewer held, in a decision dated 29 June 2018, Mr Haugh had not satisfied the requirements of s 251 of the Accident Compensation Act 2001.

Post hearing

[5] The Court noted evidence of Mr Haugh's appointments with a psychologist and her reporting to the Case Manager. The Court requested a copy of the claimant schedule at hearing which was provided by Mr Hunt post hearing. The schedule noted claims for mental disorder and cerebral anoxia.

[6] The Court issued a minute on 3 September 2020 seeking information regarding the cognitive abilities of Mr Haugh and their relevance in the appeal, if any. Mr Hunt responded that a claim for mental injury submitted in July 2015 was declined on 5 November 2015 and cover was granted for cerebral anoxia. Both claims have an accident date of 19 January 2008.

Supplementary submissions

[7] Counsel filed supplementary submissions addressing the issue of cognitive functioning. Mr Beck raised a question whether a fair and appropriate process had been adopted by the Corporation when making the decision to recover overpayment. Mr Beck submitted the Corporation dealt with Mr Haugh in a "compartmentalised way rather than taking a whole person approach".

[8] Mr Hunt rejected this submission noting the Corporation had adopted a fair and appropriate process in its dealings with Mr Haugh. Mr Hunt submitted cognitive abilities do not have any relevance to the criterion whether Mr Haugh altered his position in such a way as to make recovery of the overpayment inequitable pursuant to s 251(2)(b) of the Act.

[9] The background to the claims for cerebral anoxia and mental injury is reproduced from Mr Beck's supplementary submissions as follows:

Cerebral anoxia

[10] Cerebral anoxia is a form of hypoxia. It occurs when the brain is completely deprived of oxygen for a period. Mr Haugh suffered hypoxia following a respiratory arrest when he was in hospital in 2008 after an accident. He was described as "profoundly hypoxic".

[11] Following this event, Mr Haugh continually suffered from persistent lethargy and fatigue as well as headaches and poor ability to concentrate. He was seen by Professor Macleod, who noted that depression is a common complication of brain injuries and referred him for a comprehensive neuropsychological assessment.

[12] A neuropsychological report was prepared by Dr Mortlock following assessment on 27 and 28 November 2012. He concluded there were some areas of cognition below expected levels, and this was consistent with long term effects of hypoxic brain injury. General cognitive abilities were in the average range, but some specific issues were identified. He also noted symptoms of a mood disorder.

[13] The Corporation accepted there had been a degree of brain injury. Professor Macleod identified enduring cognitive deficits which were typical of hypoxia.

[14] In 2014, Professor Macleod recorded Mr Haugh suffering from migrainous headaches and ongoing issues with fatigue. He recommended an MRI scan to identify the cause of headaches.

Mental injury

[15] Mr Haugh applied for cover for mental injury in 2015, and identified difficulties in concentration, fatigue and migraines as well as anxiety and depression.

[16] A second neuropsychological assessment was carried out by Dr Morrison on 7 and 8 September 2015. This found results similar to those of the assessment in 2012. Mr Haugh's cognitive abilities were generally within the average range, with

some residual impairment of complex verbal memory. A recommendation for further psychological treatment was made.

[17] A psychiatric assessment was carried out by Dr Turner on 15 October 2015. She concluded there was no significant cognitive impairment. While there were ongoing mental issues, she considered they were not related to the 2008 event. She recommended a further psychiatric assessment after surgery that was pending.

[18] The Branch Psychologist, Dr MacNiven, concluded there were residual cognitive symptoms from the hypoxic brain injury, but these would not hinder Mr Haugh's ability to work. The threshold for mental injury was not reached. He recommended a pain management programme.

[19] The Corporation declined cover for mental injury on 5 November 2015.

[20] A comprehensive pain assessment was carried out by Dr Anderson on 1 September 2015 and 30 June 2016.

[21] A psychological action plan was developed by Kirsten Holm on 16/5/2016. This involved psychological support and coping strategies.

Relevant statutory provisions

[22] The test for recovery of payments is set out in s 251(2) of the Accident Compensation Act 2001(the Act):

> **251 Recovery of payments**
>
> (1) If a person receives a payment from the Corporation in good faith, the Corporation may not recover all or part of the payment on the ground only that the decision under which the payment was made has been revised on medical grounds under section 65.
>
> (2) The Corporation may not recover any part of a payment in respect of entitlements that was paid as a result of an error not intentionally contributed to by the recipient if the recipient—
>
> (a) received the payment in good faith; and
>
> (b) has so altered his or her position in reliance on the validity of the payment that it would be inequitable to require repayment.

[23] There are four requirements that have to be met:

[i] Payment in error;

[ii] No intentional contribution to the error;

[iii] Receipt in good faith; and

[iv] Alteration of position so as to make repayment inequitable.

[24] The approach to the section was considered by the High Court in *Karl*.[1] The Court said:

> [55] … In the ordinary way, a defendant relying on the statutory defence must show that to order repayment would leave the defendant in a worse position than if payment had never been made: *MacMillan Builders (at p 17),* Scottish Equitable *(at p 832).*
>
> [56] Second, fault is unlikely to be a significant consideration. It is the alteration of position that must make repayment inequitable. On the defendant's side, the Court reaches the point of balancing the equities only if the defendant received the money in good faith and did not intentionally contribute to the error. On ACC's side, the usual explanation is likely to be mundane clerical error, as in this case…

[25] In *Jones,*[2] it was held that the mere fact of general financial hardship is not sufficient to show that it would be inequitable to require repayment of an overpayment, with inequity only arising in the circumstances of an altered position.

The position of the parties

[26] Mr Beck submitted Mr Haugh was incorrectly advised by the case manager the basis on which weekly compensation was calculated. Specifically, Mr Haugh was told his weekly compensation was to be calculated on 50 hours a week and 20% of that was 10 hours a week. On the basis of what he was told, Mr Haugh's understanding was his weekly compensation would be adjusted if he worked for more than 10 hours a week. Mr Beck submitted these were errors on the part of the Corporation and had they not been made; the overpayment would not have occurred.

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1 *Karl v Accident Compensation Corporation* [2005] NZAR 97.

2 *Jones v Accident Rehabilitation and Compensation Insurance Corporation* [1998] NZACC 219 (13 October 1998)

[27] On the question of cognitive issues, Mr Beck submitted during 2015 Mr Haugh underwent extensive assessments, with Dr MacNiven reporting residual cognitive symptoms.

[28] Mr Beck submitted no consideration was given to Mr Haugh's mental health or the way the Corporation's communications might have been received by him.

[29] Mr Hunt submitted no error was made by the Corporation. Mr Hunt submitted if there was error, it had been made by Mr Haugh. It had always been made clear to Mr Haugh that reassessment of weekly compensation would occur when the relevant year's tax information became available. In Mr Hunt's submission, the Corporation had communicated this advice on several occasions that weekly compensation payments could not exceed pre-incapacity earnings. Mr Hunt submitted that any advice by the case manager regarding hours worked would, whether correct or not, alter the basic understanding.

[30] On the question of cognitive functioning, Mr Hunt submitted various reports from mental health specialists in July 2012, November 2012, January 2013 and August 2014 are outside the timeframe of relevance to the Court's consideration of Mr Haugh's cognitive functioning.

[31] Mr Hunt referred to specialist reports, noting the symptoms, including mood and pain did not meet the threshold of a mental injury due to physical injury. Mr Hunt noted Dr Holm's report in May 2015 is primarily based on pain intensity and other aspects of functioning including mood and anxiety.

[32] Mr Hunt submitted it is not fair to suggest the Corporation did not deal with Mr Haugh appropriately. In Mr Hunt's submission, Mr Haugh did understand what he was being told, but he did not like what he was hearing.

Agreed issues

[33] The parties agree the key issue is whether the Corporation is entitled to recover the accepted overpayment of weekly compensation. In particular, whether the overpayment:

[i] Received is as the result of an error;

[ii] Was not intentionally contributed to by the appellant;

[iii] Was received by the appellant in good faith; and

[iv] Did the appellant so alter his position in reliance on the validity of the payment that it would be inequitable to require repayment.

[34] A question arises from the supplementary submissions of counsel addressing cognitive issues whether the Corporation adopted a fair and appropriate process in reaching its conclusion and making the decision to recover overpayment.

Discussion

[35] There is no dispute that an overpayment occurred.

[36] The dispute largely focusses on the question of error and what Mr Haugh was told by his case manager regarding the basis on which weekly compensation was calculated..

[37] In an internal memorandum dated 13 September 2016 issued the day before the letter requiring overpayment was sent by the Corporation to Mr Haugh, senior analysts responded to the question whether the payment was made in error and commented:

> The estimated payments were made based on the estimated earnings/working hours declarations (ACC206) given by the client. As defined on Clause 51 of the Accident Compensation Act 2001, ACC is required to reassess and reduced the weekly compensation entitlement when the client has earnings during the periods of incapacity in order to ascertain the client's actual entitlement to weekly compensation. The overpayment occurred due to legislative requirements.

[38] In response to the question whether Mr Haugh intentionally contributed to the error, the analysts noted "As above, no error had occurred".

[39] Mr Beck submitted the Corporation's communications regarding overpayment due to legislative requirements failed to take into account what Mr Haugh was told by his case manager and his reliance on her advice.

[40] Mr Hunt submitted overpayment was not caused by error of the Corporation. Rather, the calculation of the overpayment arose in the normal process of reassessment of entitlement once the relevant year's tax information became available. Mr Hunt pointed to the 48 declarations Mr Haugh signed which provided that a reassessment of weekly compensation would be made at the end of a financial year.

[41] Mr Hunt detailed the legislative context. Under clause 50 of Schedule 1 of the Act, when the Corporation cannot easily ascertain a claimant's actual earnings during incapacity, it may estimate an amount that represents reasonable remuneration for abatement purposes. To do this, the Corporation must have regard to the evidence available of a claimant's earnings, and the nature of his employment during the period of incapacity. The Corporation must also take into account any tax return unless satisfied that it has been unreasonably influenced by incapacity.

[42] Clause 51 requires the Corporation to reduce the amount of weekly compensation paid to a claimant "so as to ensure that the total of the claimant's weekly compensation and earnings after his or her incapacity commences does not exceed the claimant's weekly earnings as calculated under Clauses 33 to 45 or 47".

[43] Here, the Corporation estimated Mr Haugh's post incapacity earnings based on his pre-incapacity earnings of $70,016.00 divided by his usual work hours of 80 hours per week. Mr Hunt submitted the case manager then advised Mr Haugh that calculation of his post -incapacity earnings was based on pre-incapacity work hours of 50 hours per week., not the pre-incapacity work hours of 80 hours per week. Using the (incorrect) 50 hours per week calculation, the level of remuneration is $26.93 gross, and using the (correct) 80 hour per week calculation the level is $16.83 gross per hour.

[44] Mr Hunt submitted a 10 hour working week based on the correct calculation does not result in the maximum earnings of $269.29 gross per week that would lead to abatement of weekly compensation. He said though the case manager's calculation was at the upper limit of the range of what hours Mr Haugh could have worked, her advice would still have spared him from an overpayment, had his post-incapacity hourly rate remained the same as his pre-incapacity hourly rate.

[45] The evidence is clear, Mr Haugh was concerned from the outset about what he was permitted to do so that his weekly compensation was not affected, and he engaged with his case manager on this question. The early emails place importance on the hours of work not exceeding the 10 hour mark. The evidence shows the numerous questions Mr Haugh raised, and his understanding that if he exceeded the 10 hours then "you do what you need to… and I have no interest in twiddling them [the hours] as I've got enough dramas without creating more!"

[46] Many of the notes recorded by the case manager address weekly compensation as well as multiple topics regarding appointments and referrals arranged regarding scans undertaken, diagnoses of physical injuries and treatment in consequence. The Court observes the notes are of telephone discussions and emails. The evidence before the Court shows Mr Haugh did not meet with the case manager until April 2016 and the note records a myriad of issues they discussed.

[47] Mr Haugh's responses under cross examination by Mr Hunt at review, are consistent with the advice he said he was given regarding the yardstick of 10 hours he could work, and if he went over 10 hours he accepted there would be an adjustment made. Mr Haugh said in evidence he disregarded the written advice in the many forms he signed because he relied on what he was being told by the case manager to ensure the payments were correct. Under cross examination that Mr Haugh understood from the declaration he signed his weekly compensation could change, Mr Haugh replied:

> Well, in the-once again, in the beauty of hindsight, I did have confusion as to why I'm signing a document that seemed to pertain to finance but had assurances from my case manager that I was a different circumstance because I was self-employed and then it-it was based on hours.

[48] Likewise, the Reviewer noted:

> The thrust of Mr Haugh's case is that he relied on the advice given to him by his Case Manager that the payments were correct. She had advised him the calculations were based on the declaration of the hours he worked. **I accept his evidence on these points**.
>
> [Emphasis added]

[49] On questioning, Mr Haugh admitted he signed a form in which he was asked to notify the Corporation "if you receive any money, such as payment for work done, a pay increase or holiday pay". Mr Haugh responded in the transcript of review:

> Yeah, once again, I was only working on what I was being advised, which was because I was self-employed that the-a lot of those statements applied to wage earners and, therefore, weren't applicable to me. The only concern I had was not go over ten hours and that was nice and simple and-I liked that option and that's the one I followed to the letter of the law….
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> **Mr Hunt**: Are you telling me you didn't understand that increases in income by you whilst you were receiving weekly compensation would not be taken into account when assessing at the end of each financial year what your entitlement was?
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> **Mr Haugh**: I.. I guess, no, would have to be the answer because I relied solely on the hours.

[50] On the question of the 50 hours, Mr Haugh said at review "Jenny came up with that figure".

> **Mr Hunt**: Right, so that was her mistake, that she-that-that it was 50 hours a week…
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> **Mr Haugh**: Yeah, because I did- I did question that I did work more than 50 hours pre-injury but she seemed to think that figure was appropriate and applied it. It-there was never-that was actually never actually confirmed why it was - was introduced. It just was and we all just followed it.

[51] Mr Hunt submitted the Corporation was not advised of the hourly rate increase in the 2016 financial year and by Mr Haugh failing to disclose he was being paid at a different rate to that pre-incapacity, the hours he worked generated greater income. Mr Haugh's evidence on this point is that his rate changed per job, not that he had been paid a lower hourly rate.

[52] It is apparent that Mr Haugh raised the question of the relevant tax return year as the basis for assessment. The Court observes in the first email from the case

manager to Mr Haugh, she advised she had spoken to Mr Haugh's accountant and as a result weekly compensation was set up on the basis of the 2014 tax return and she subsequently sent a form for him to complete his work hours. In August 2015 Mr Haugh was advised the 2014 tax return was applicable based on the legislation and she said "there is only $16 difference between the two tax years so would not make a difference". The case manager noted she would write to Mr Haugh and his accountant.

[53] On 28 August 2015 the case manager noted she was unable to contact Mr Haugh's accountant and she would forward details of the relevant part of the legislation to Mr Haugh. She recorded:

> Discussed abatement and CM confirmed that he is able to work 10 hours per week without it affecting his WC and the $ amount he is earning is N/A as we understand being self employed he has expenses…. Hence based on a 50hrs week he can work 10 hrs per week without it affecting his WC. Mark asked if he could have that in writing and CM confirmed will email with legislation details.

[54] The email of the same date in follow up to Mr Haugh, refers to the relevant legislative links and confirmation of the 10 hours per week as 20% of a 50 hour week, noting also that the dollar amount earned is "not a true reflection of the amount earned (expenses need to be deducted)." Mr Hunt referred to this advice as reflecting

[55] Having read through all the evidence carefully, my impression is of a claimant without guile who accepted what he was told as to the hours worked, understanding that if he increased his hours, there would be adjustment. The Reviewer found the advice on the declarations of hours he signed, counted against him. The Reviewer accepted Mr Haugh would have been signing the declarations by rote, however he said they were clear indication of reassessment at the end of a financial year. There were a number of questions on the wording in the declaration forms that Mr Hunt put to Mr Haugh that should have alerted Mr Haugh to the fact he would have understood the effects of reassessment, whether underpaid or overpaid.

> **Mr Haugh**: I was never described it in that simple a fashion if it-basically the sentence that you have just said, if I was given that I would have had to have changed how I was doing things completely. That wasn't the information I was

> given- I was given because I'm self-employed that it works differently for me than-than a normal wage earner and that-
>
> **Mr Hunt**:I'm just really just focusing on whether you are prepared to accept that you indicated to ACC that you understood 48 times when you signed this form that there would be reassessment of your compensation at the end of each financial year.
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> **Mr Haugh**: Well, no, I didn't understand that because otherwise I would have realised that at the end of the year there was going to be trouble and I wouldn'y have gone down that road. I was confused by that form because it said something different to how I was advised to fill it out. So, once again, I seek clarification from my case manager-and to my detriment I-I believed what she said 100% over any forms I was signing.

[56] In my view, it is plain all communications were trammelled by what Mr Haugh was told about the hours he was permitted to work. Whilst reference to 50 hours may have started off as an example, the focus on this issue reduced the effect of other communications that Mr Haugh acknowledged he had signed. In a note of a discussion dated 28 September 2016, the Case Manager referred to the 50 hours that "we agreed":

> Mark queried why abatement based on 50 Hrs. **CM advised it was something we agreed at the start of the claim.** We agreed to the 50 hrs as it was a reasonable estimation of what he was working pre-injury. Now Mark advised this was not the case as he used to work 70- 80 hours per week.
>
> [Emphasis added]

[57] This is not a case where a claimant receives an unexpected windfall and deliberately refrains from inquiry. It is apparent from the evidence Mr Haugh genuinely believed he was entitled to payments when he did not exceed the 10 hour mark as explained to him by the case manager.

[58] In the event, I find Mr Haugh was incorrectly advised by the case manager the basis on which weekly compensation was calculated. Specifically, Mr Haugh was told his weekly compensation was to be calculated on 50 hours a week and 20% of that was 10 hours a week. On the basis of this advice, Mr Haugh's understanding was his weekly compensation would be adjusted if he worked more than 10 hours a week. These were errors on the part of the Corporation and had they not been made, the overpayment would not have occurred.

[59] The Corporation submissions cite *Gear*,[3] where overpayments received were more than 25 percent of the proper entitlement. The Court decided a reasonable person in that position should have contacted the Corporation and inquired about the payments. The Court confirmed that a lack of good faith was demonstrated by a failure to contact the Corporation and query why the payments continued to be more than the advised entitlement.

[60] There are significant differences between *Gear* and the current case. Namely, the combination of Mr Haugh's inquiry of the case manager and his reliance on her advice, mean it is unreasonable to suggest, in this case, there is lack of good faith.

[61] The Court observes that while giving evidence, it was not put to Mr Haugh that he had acted otherwise than in good faith.

[62] Turning to the test whether the alteration of position makes repayment inequitable, in *Karl*, Miller J stated:

> [46] I also accept that an alteration of position requires a deliberate course of conduct following receipt of the overpayment: *Re Bee Jay Builders Ltd* [1991] 3 NZLR 560. That case dealt with voidable dispositions under the Companies Act 1955. Section 311A(7) provided that recovery might be denied wholly or in part if the property was received in good faith, the recipient had altered his position in a reasonably held belief that the transfer was valid and, in the opinion of the Court, it was inequitable to order recovery. Tipping J held that the essence of an alteration of position was a deliberate course of conduct following receipt of the impugned payment, which course of conduct the recipient would not have undertaken but for receipt of the payment. Accordingly, it would not suffice if the defendant simply banked the money.
>
> [47] I find that expenditure on daily living may involve an alteration of position in reliance on validity of an overpayment. It may involve a conscious course of action, and the money is used in a way that creates no asset the defendant can use to repay ACC. Alteration of position may take the form of failure to claim other state benefits to which the defendant would have been entitled but for the overpayment. The defendant may be able to point to financial commitments assumed in reliance on validity. It is also possible that the defendant can show that, but for a belief in validity, the money would have been dealt with in a way that made it possible to repay. While the burden of proof rests on the defendant, the Court must recognise that it may be unrealistic to expect the defendant to produce conclusive evidence: *Philip Collins* (at p 827), *Scottish Equitable* (at para [33]).

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[3] *Gear v Accident Compensation Corporation* DC Palmerston North NZACC 250/03, 10 October 2003.

[63] In *Bayliss*,[4] Judge Cadenhead noted that:

> The essence of an alteration of position is a deliberate course of conduct following receipt of payment which course of conduct the recipient would not have undertaken but for receipt of the money.

[64] Mr Haugh's evidence at review is that had the true position been known he would have structured his affairs differently and made different life decisions. Mrs Haugh too confirmed in evidence at review she would have had to return to work and there was no question she would have had to do this.

[65] Mr Hunt submitted Mr Haugh could not rely on the validity of the payment because he understood that if he received an overpayment, it was refundable.

[66] However, I have found the overriding advice was from the case manager. It was in the nature of a representation which reassured Mr Haugh that if he increased his hours over the 10 hour mark, there would be adjustment of his weekly compensation.

[67] I take into account all of the evidence including that Mr Haugh put weekly compensation on hold in April 2016 as soon as his hours exceeded the 10 hour limit. This action attests to the fact Mr Haugh acted consistently with what he was told by the case manager. That is, the number of hours was the critical factor.

[68] The Court is able to balance the inequities if a person received the money in good faith and did not intentionally contribute to the error. In this case, I find the balance lies in favour of Mr Haugh.

[69] For the sake of completeness, I turn to consider the issue of Mr Haugh's cognitive functioning.

[70] In my opinion, the evidence addressing cognitive issues is a relevant consideration regarding the Corporation's communications with Mr Haugh. Even if I disregarded the evidence referred to in the supplementary submissions of counsel,

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[4] *Bayliss v Accident Compensation Corporation* DC Wellington AC 35/08, 11 February 2008 at [56]

there is evidence that shows the case manager was aware of Mr Haugh's symptoms. Dr Holm reported these symptoms to the case manager in an email dated 21 April 2015:

> Just seen Mark for close to two hours for an initial assessment**. As you rightly assumed he presents very stressed. He also reported increasing headaches and fatigue and some impairment in his cognitive ability.** We are trying a few things to ease the symptoms and I have made an appointment with him …. for a follow up.
>
> [Emphasis added]

[71] A further email five days later from Ms Harman to the case manager noted Dr Holm had met with Mr Haugh 'on several occasions now' and "she has asked me to contact you and let you know she has met Mark H on several occasions" and "which she deemed necessary to stabilise his situation". There are continuing references to these symptoms in the evidence, even though they may not have been capable of diagnosis to meet the threshold for cover of a mental injury under the legislation.

[72] In my opinion, the Corporation needed to take extra care in its communications when dealing with Mr Haugh. It is acknowledged that Mr Haugh felt able to engage with his case manager. The subjective elements relating to understanding having regard to the aspects of cognitive functioning including pain intensity, add to the context in which the evidence of all the communications are viewed. This meant the Corporation had a higher standard of care to take in its dealings with Mr Haugh.

[73] In summary, I find on the particular facts of this case:

[i] The overpayment is an error made by the Corporation;

[ii] There was no intentional contribution by Mr Haugh who received the payment in good faith;

[iii] On balance, it would be inequitable to require repayment.

Result

[74] The appeal is allowed. The Corporation's decision dated 14 September 2016 is quashed and the review decision dated 29 June 2018 is set aside.

[75] The appeal is one of complexity and costs are awarded on a 3B basis under the District Court Rules.

Judge Denese Henare
District Court Judge

Solicitors: Andrew Beck, Barrister, Greytown for the appellant
Young Hunter, Wellington for the respondent