IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 147 ACR 794/12

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	JONATHAN ADOLPH Appellant
AND	ACCIDENT COMPENSATION CORPORATION First Respondent

Hearing: 30 June 2022
Heard at: Auckland/Tāmaki Makaurau

Appearances: Mr P Schmidt for the appellant
Mr L Hawes-Gandar and Ms F Becroft for the respondent

Judgment: 26 July 2022

RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Employment, s 6 Accident Compensation Act 2001]

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[1] This is an appeal against a decision by the Accident Compensation Corporation dated 13 May 2009 revoking an earlier decision and declining the appellant weekly compensation on the basis that he was not an earner.

[2] The issue for determination is therefore whether the appellant was an earner on 17 November 2006 when he suffered his personal injury, an ankle injury suffered as a result of an assault. The appellant's position is that at the time of the injury, he was involved in work or pecuniary gain as a self-employed person.

[3] The background to this matter is that Mr Adolph claimed to be an employee for the purposes of obtaining weekly compensation. That was not true, and he was convicted of fraud on that basis. The appellant's position however is that he was involved in several self-employed activities at the time of the accident including the repair and sale of second-hand goods, setting up a second-hand goods sale and repair shop, and property speculation. The appellant's position is that, because he has cover for his injury caused by an accident on 17 November 2006, cover and incapacity are not in dispute, and therefore, on this basis, he should be entitled to weekly compensation.

[4] For this hearing, the appellant provided a brief evidence dated 26 November 2021. In it he says that prior to the accident, he had been working investigating matters relating to his father's business partner. He said this ended two weeks prior to his accident.

[5] He said he had decided to open a shop selling second-hand goods and audio systems and undertaking electrical repairs. He says that at the time of this injury, he was repairing and selling electrical goods on an ad hoc basis. One example was the sale of a glass door refrigerator to Peter Rhodes.

[6] The appellant produced a "tax invoice/statement" dated 15 November 2006 evidencing this sale.

[7] He said he had large amount of second-hand goods in storage including clothing, tools and stock from his previous audio business as well as bar chattels.

[8] He says he managed to find a suitable shop for the business at 229 Commerce Street, Frankton. The appellant says the premises were listed for lease with Lodge Real Estate Commercial and that he met the landlord and obtained a copy of the lease agreement.

[9] Annexed to the appellant's statement is an email from Mr Corkill of Lodge Real Estate Limited who says:

> Mr David Simpson, a commercial agent, listed the property for lease and did deal with Mr Adolph… I do recall an accident as I think Mr Simpson visited Mr Adolph in hospital. We have no record of any offer or lease agreement being signed, but that will not mean that an offer was not drawn up.

[10] The appellant says that he had also been looking for real estate opportunities and had come across a property at 1247A Victoria Street, Hamilton. He said he wanted to renovate the property and then sell it for a profit. He said:

> [9] As I was intending to be based in Frankton for work, I made an appointment with Frankton Law. I attended a meeting at Frankton Law office in early November 2006 and met with Mr Galt, a lawyer at the firm. At this meeting we discussed the purchase of the house and the lease of the shop. He discussed the structure of these two ventures as a result of that I requested that Mr Galt form two companies.

[11] The appellant went on to say that the first company (Thirsten Properties Ltd) was to be a property development business and the second company (Thirsten Group Ltd) would trade as "Funky Junction" for the second hand shop business and as "Knight Audio" for the car/home audio business.

[12] The appellant says that night he went to see Mr Hobday, the owner of the Victoria Street property, and a Sale and Purchase Agreement was signed. A copy of the agreement, dated 10 November 2006, is before the court. The purchaser is shown as Mr Adolph or nominee. An initial deposit of $1000 was payable on execution, to be followed by a further payment of $10,000 on 1 February 2007. Settlement date is shown as 29 September 2007, "or such earlier date as agreed between the parties". Possession date is shown as 10 November 2006.

[13] The Sale and Purchase Agreement provided:

> 14.1 For the period from possession date until settlement date the purchaser shall pay to the vendor a rental of $400.00 per week in advance with the first payment due on 10 December 2006.

[14] Also annexed to the appellant's brief is a copy of a letter from Frankton Law dated 20 November 2006 headed "Hobday to Adolph – 1247A Vitoria Street, Hamilton". The letter referred to a trust account cheque for $1,000 in payment of the deposit.

[15] With regard to his intention to renovate the property and sell it at a profit, the appellant says:

> With that in mind once the purchase went unconditional, I called Mario Vesely from Harcourts and arranged to have the house listed for a resale by auction in approximately three-month time.
>
> …
>
> This gave me time to renovate the property.

[16] The appellant also says that on 16 November 2006, he sold a laptop that he had repaired to Adrian Owens, and while waiting for Mr Owens to come over to collect it, he was attacked and injured by Mr Hobday and his associate. He said that after that Mr Hobday illegally cancelled the agreement on the property and sold it for a higher price in June 2007.

[17] Paragraph 20 of the appellant's brief of evidence reads:

> In summary, at the time I was injured, I was repairing and selling electrical equipment on an ad hoc basis. I was in the process of setting up a shop to continue this work. I had run a shop previously on the same basis. I had significant stock in the storage and was also looking to buy, renovate and sell property which is why I purchased the Victoria Street property. Most of my life I have been self-employed, and I was involved in self-employed activity at the relevant time.

[18] In evidence given at the appeal hearing, Mr Adolph acknowledged that he was bankrupted in 2007 and that on his bankruptcy, there was a debt owing to Placemakers of $8,562.20 for painting material, switches, power points and drapes. He points to this as further evidence that he was an earner. He said that a lot of it was for painting and decorating supplies for the house that he purchased in Victoria Street.

[19] In response to questioning from Mr Hawes-Gander, the appellant agreed that he was paying about $700 a month to store his items.

[20] He agreed that as at the date of his injury no company had been incorporated.

[21] Mr Adolph acknowledged that, at his criminal trial, he said:

> I had just started self-employment and hadn't actually done any work as yet.

[22] Mr Adolph also agreed that he had ceased to be employed in July 2006 and following that he "sort of took a bit of a break".

[23] The appellant acknowledged that Mr Rhodes, who had purchased the glass door fridge, was a friend and his panel beater and that Mr Owens, who purchased the laptop, was another friend.

[24] In answer to Mr Hawes-Gander's question:

> *"Ok, just confirming though, you hadn't – you never did at the time, until some years later, declare any income to IRD from any sales, did you?"*
>
> No, well, I was unable to because I didn't have any records.

[25] The appellant agreed with Mr Hawes-Gander that his plan was to purchase the property in Victoria Street through Thirsten Properties Limited. The appellant also agreed that he would probably pay himself a salary from that company. In re-examination, Mr Schmidt referred to the tax invoice for the glass door fridge with the provider shown as Knight Audio. He also referred to a similar tax invoice from 12 August 2005 for a total sum of $816.98 for work done at the hotel Alcamo. On this latter invoice, however, the amount of $816.98 was payable to Rocket Audio.

[26] The appellant responded:

> I had personalised number plate "rocket" so I used that as my company – well my trade as name, and then I sold the plates so I didn't have it anymore.

[27] As to the reference in the lawyer Mr Gault's notes to Thirsten Properties Limited, the appellant said that Thirsten Properties was going to be the company to do the property transactions. The appellant also said that so far as the Victoria Street purchase was concerned, his lawyer Mr Galt had said:

> We'll just put it under your name for now and because it's all (inaudible), we can change it at any time.

[28] Mr Adolph agreed that the Sale and Purchase Agreement for the property had his name on it, but the intention was that it would be transferred into a company.

Appellant's submissions

[29] Mr Schmidt acknowledges that his client has been convicted for dishonesty and making misleading statements to ACC about being an employee. Mr Schmidt submits however that if the statutory criteria is satisfied, the appellant has rights to entitlements.

[30] Mr Schmidt says that there are few documents in support because the appellant had only just restarted his self-employed activity. He says that the evidence of the sale of the fridge and the laptop support the appellant's position that he was self-employed. He submits that the appellant was a good way through the process of setting up his own shop and in this regard is the evidence that the agent visited the appellant in hospital to progress the execution of a lease agreement.

[31] Mr Schmidt says the issue on the appeal is whether the appellant was involved in work for pecuniary gain. He notes that the appellant has a record of self-employment in earlier years and that he already had a volume of goods in storage and was well on the way to leasing a shop prior to his injury.

[32] Mr Schmidt submits that the decision in *Lough*[1] supports his client's position.

[33] Mr Schmidt notes that Mr Lough had stopped work as an employee in the advertising business and was in the process of starting work on a freelance basis after being made redundant.

[34] Mr Lough was injured over the Christmas holiday break.

[35] In that case, no transactions had been done, but there were good records of him starting his self-employed work, making list of potential clients and the court found these were genuine self-employment endeavours.

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1 *Lough v Accident Compensation Corporation* [2019] NZACC 68.

[36] Mr Schmidt acknowledges that here there are only ad hoc sales prior to the intended lease of a shop. However, he says that the appellant had "started" and this is shown by the objective evidence.

Respondent's submissions

[37] Mr Hawes-Gander submits that the question is whether or not the appellant was an earner at the date of his accident.

[38] He submits that even if the evidence put forward is accepted as accurate, the appellant was not an earner from a common-sense or legal perspective. The question relating to s 6 is:

> Was he engaged in employment meaning work engaged in or carried out for the purposes of pecuniary gain or profit?

[39] Mr Hawes-Gander refers to *Beel*[2] and *Lough*.[3]

[40] Mr Hawes-Gander submits that in these two cases, the claimants were found to be earners because they were actively engaged in work for the purpose of pecuniary gain, even though they were not obtaining pecuniary gain at the relevant time.

[41] He notes that both cases involved unusual circumstances where, amongst other things, the claimants had extensive histories of successful involvement (and pecuniary gain) in the same type of work which they were engaged in at the date of their injury, even though at that particular point in time, they were not making money from it.

[42] In *Beel*, the appellant had relocated from Palmerston to Christchurch and was in the process of obtaining new customers but had not started any paid work.

[43] In *Lough*, the appellant had long history of working in advertising and was in the process of starting work on a freelance basis after having been made redundant from his previous employment. As with *Beel*, Mr Lough was not yet engaged in paid

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2 *Beel v Accident Compensation Corporation* [2008] NZACC 252.
3 See *Lough* note 1.

work at the time of his injury, but he was in the process of researching and identifying freelance opportunities. In finding that Mr Lough was an earner, Judge Sinclair noted he had been in the industry for more than 20 years; had established a pattern of working on a freelance basis in between positions of permanent employment; that researching and finding opportunities was an integral part of freelance work; and that Mr Lough did in fact go on to engage in paid freelance work for the clients he had been researching.

[44] Mr Hawes-Gander refers to *Khan*,[4] where Judge Beattie said:

> Quite frankly, if people operate business activities on a cash basis and on non-complying tax and GST basis and without basic business records or structure, they cannot complain if they are unable to prove that they had work status at a particular time.

[45] Mr Hawes-Gander also refers to *Smithson*.[5] In that case a self-employed car mechanic had been performing limited work and the business had not been profitable for some time. Judge Joyce QC said:

> [51] His financial account vividly illustrates that such business as he had previously done – thus such employment as he had before then enjoyed – had been minimal over the periods that the accounts brought to light.
>
> [52] He may have spent time occupying himself with this and that in the workshop, but when his admitted charge out rate of $65 per hour is related to the figures in his financial account, it is obvious that actual customers were few and far between.
>
> [53] He was not, so I find, truly engaged in employment…

[46] *Khan* confirms that the onus is on the claimant to establish that he or she is an earner and that this will be difficult to establish in the absence of legitimate business records and compliance with tax and GST obligations.

[47] Mr Hawes-Gander says the circumstances of the appellant at the time of his injury "could not be more different from those in *Beel* and *Lough* where the claimants both had long consistent histories of profitable engagement in the same time of work".

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4 *Khan v Accident Compensation Corporation* [2005] NZACC 231 at [88].
5 *Smithson v Accident Compensation Corporation* [2014] NZACC 125.

[48] Accordingly, he submits that the appellant has failed to establish that he was actively engaged in work for the purpose of pecuniary gain immediately prior to his injury.

Decision

[49] In this case, it is for the appellant to prove on the balance of probabilities that at the time of his accident, he was an earner for the purposes of s 6 of the Accident Compensation Act 2001, that is to say a natural person who engages in employment.

[50] Employment is further defined in s 6 as meaning work engaged in or carried out for the purposes of pecuniary gain or profit.

[51] In this case, a number of matters are put forward in support of the appellant's case that he was an earner as at 16 November 2006, the date of the accident.

[52] Evidence in the form of a tax invoice/statement dated 15 November 2006 has been put forward showing that on 15 November 2006, the appellant sold a commercial glass door fridge to his panel beater friend for $400. The tax invoice is from an entity "Knight Audio". The address is given as 1247A Victoria Street, Hamilton. A cell phone number for "Knight Audio" is also included. No GST number is shown.

[53] The address of the vendor, 1247A Victoria Street, is the address of a property that the appellant had signed up to purchase on 10 November 2006, some five days before. Settlement of the purchase was not due until 29 September 2007.

[54] The Sale and Purchase Agreement for this property required a deposit to be paid immediately on execution of the agreement. The deposit of $1,000 was paid with the appellant's lawyer's letter of 20 November 2006. That is four days after the appellant's an ankle injury of 16 November 2006, caused when the vendor of the property pushed the appellant off the deck at the property.

[55] It seems common ground that at the time of the accident, the appellant had already moved into the property at 1247A Victoria Street in spite of not, at that stage, having paid the purchase deposit.

[56] Therefore, to craft a tax invoice/statement as the appellant has done in such circumstances and to style the vendor of the fridge as "Knight Audio" is frankly bizarre.

[57] The appellant says in his statement:

> My intention was to renovate the property and sell it on for a profit. With that in mind, once the purchase went unconditional, I called Mario Vesely from Harcourts and arranged to have the house listed for resale by auction in approximately three months' time. The proposed auction date was 22 February 2007.

[58] The Court was also shown evidence that the property was indeed listed for sale by auction on 22 February 2007 as the appellant said. The record of this listing that is before the Court is dated 15 January 2007.

[59] The Sale and Purchase Agreement was due to go unconditional with the payment of a further amount of $10,000 on 1 February 2007. This did not occur. So, the purchase was not unconditional when it was listed for resale by auction by the appellant.

[60] Furthermore, the requirement in the agreement that the appellant pay $400 per week rental in advance was not met. In his letter to the appellant dated 29 November 2006, his lawyer Mr Galt said this:

> We have made promises on your behalf that the rental would be brought up to date and we have stressed to you the essentiality of making these payments.
>
> We have some difficulties with continued excuses and in the circumstances would prefer not to act for you further.
>
> Please instruct fresh solicitors.

[61] The Sale and Purchase Agreement was finally cancelled on 9 February 2007 for non-payment of the further sum of $10,000 required by the agreement to be paid on 1 February 2007

[62] The conclusion, in regard to the attempted purchase of the property at 1247A Victoria Street is that, based on what in fact occurred, it had no hope of being concluded for the least of reasons being that the appellant had insufficient funds to pay the further $10,000 and to pay the rent for his occupation.

[63] Therefore, I find it cannot be regarded as work engaged in or carried out for the purposes of pecuniary gain or profit.

[64] Although we are told that the appellant had a substantial quantity of goods in storage to be used in the business he was setting up, in a shop he was intending to rent, apart from the fridge referred to earlier, there is no objective evidence of this.

[65] There is the limited evidence of the appellant being visited in hospital relating to the proposed lease of premises. The matter went no further. In his statement, the appellant says that there was in fact to be two businesses, a second-hand shop business which would trade as "Funky Junction" and a car/home audio business trading as "Knight Audio".

[66] While the Court is prepared to accept that these were the appellant's intentions, the objective reality was different. He plainly had no financial ability to advance any of these projects. They did not proceed.

[67] The appellant's position is different from that in the cases of *Beel* and *Lough* where both these claimants had long consistent histories of profitable engagement in the work they were again preparing to undertake.

[68] In addition, as Judge Beattie bluntly put it in *Khan*:

> Quite frankly, if people operate business activities on a cash basis and on non-complying tax and GST basis and without basic business records or structure, they cannot complain if they are unable to prove that they had work status in a particular time.

[69] For the foregoing reasons therefore, I find that the appellant has failed to establish on the balance of probabilities that for the purpose of s 6 of the Act, he was an earner engaged in employment. Accordingly, the appeal is dismissed.

[70] There is no issue as to costs.

Judge C J McGuire
District Court Judge

Solicitors: Medico Law Limited, Ponsonby
Schmidt and Peart Law, Ellerslie