IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 161 ACR 256/20

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	HUME PACK N COOL LTD Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 11 August 2022
Held at: By AVL

Appearances: L Findlater for the Appellant
C Hlavac for the Respondent

Judgment: 18 August 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for back-dating of multiple classification levy units for previous years – ss 170 and 237, Accident Compensation Act 2001]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 6 November 2020. The Reviewer dismissed the review of the Corporation's decision dated 9 September 2019 reclassifying a levy system for Hume Pack N Cool Ltd ("Hume") and determining from when the new classification should operate.

Background

[2] Hume operates a kiwifruit orchard, packing and cool-storage business.

[3] Up until 2019, Hume had been assigned the Classification Unit (CU) 1170 - Kiwifruit growing, for ACC levy purposes. This classification had been in place for a number of years, and ACC levy invoices were issued and paid based on that CU.

[4] On 23 July 2019, Simon Penness, the financial controller of Hume, advised the Corporation that its operations involved more than one separately identifiable business activity, and, on that basis, sought to be assigned to Multiple Classification Units (MCUs) for ACC levy purposes. In addition, Hume advised that it may have had an incorrect coding for a number of years, and asked whether Hume could look retrospectively at its returns to amend allocations between ACC codes.

[5] On 26 August 2019, Mr Penness advised the Corporation that he had not yet fully investigated the state of Hume's earlier records and whether they were adequate for a revised claim, so he asked that they proceed with the claim for the current year and, if successful, consider the prior year as a separate exercise. The Corporation agreed to proceed on this basis.

[6] On 9 September 2019, the Corporation wrote to Hume advising that having considered the company's business activities, the Corporation approved the following levy classifications:

> 1170 - Kiwifruit growing.
>
> 47150 - Fruit and vegetable wholesaling.

[7] In its letter, the Corporation advised that these classifications were based on its understanding that Hume carried out:

(a) growing of kiwifruit (via leased and managed orchards); and

(b) packing and cool-storage of kiwifruit (for leased, managed and independent orchards).

[8] The Corporation advised that the new MCU classifications would apply onwards from the 2020 financial year.

[9] In subsequent correspondence, Hume sought to have the above MCUs retrospectively backdated for a period of eight years. The Corporation declined to do so. A review application was then lodged by Hume in relation to the Corporation's decision of 9 September 2019.

[10] As a result of the review application, the Corporation developed an internal Operational Policy to provide guidance when exercising its discretion when an employer requested the retrospective application of MCUs. The policy was framed in the context of sections 170 and 237 of the Accident Compensation Act 2001 (the Act), and in light of the following organisational and operational considerations:

> **Organisational Considerations**
>
> The Levy Classification team (within Business Customer Operations) are responsible for reviewing MCU requests. When a Levy Classification Advisor considers a retrospective MCU reassessment, they are to consider the following:
>
> - Fairness. Employers have a range of reasons for requesting the retrospective application of MCU. Appropriate communication and rationale is therefore required to provide transparency to employers when a decision is made on their retrospective request.
>
> - Defining an error in relation to section 170(3). ACC is the only Government entity that collects information relevant to an employer's MCU eligibility. The organisation 1s only aware an error has occurred in applying section 170{3) after the employer supplies information to satisfy the legislative requirements (including the request for MCU).
>
> - Impact on prior levy payable by an industry (or a levy risk group within the industry). Retrospective reassessments of a single employer's levy payable and workplace claims alters the industry's claims experience in a prior penod. This in turn impacts the accuracy of the industry's levy rates and the Experience Rating modifiers applied to the industry's employers. The organization is limited in its ability to resolve this inaccuracy, as prior years' levy rates cannot be altered. In addition, there would be an organizational cost from recalculating Experience Rating modifiers for eligible employers in an industry, and reputational risk in the event ACC elects to issue a revised levy to reflect the recalculated modifier.
>
> - Risks associated with granting a retrospective reassessment. Granting an employer's specific request could trigger subsequent retrospective requests from other employers. risking ACC to the following
>
> - Financial implications if subsequent requests are granted. An unpredicted volume of approved, retrospective MCU requests might cause a misalignment of historical claims experience and levy payable in multiple industries. Significant unpredicted volume may impact the Work Account funding in a prior period.

- Reputational risk if subsequent requests are not granted. Employers who receive unfavourable decisions would raise concerns of consistency and fairness through dispute resolution processes, which may result in Court action against ACC.

Operational Position

ACC expects that in the majority of approved requests, it would be appropriate to apply the retrospective MCU for the immediately preceding levy year only. This position balances our legislative obligations to reassess prior periods against our organisational responsibility to manage the Scheme (particularly with consideration to risk mitigation, fairness and financial impact across levy payers). In addition, this position reflects the invoices that an employer will generally receive in the levy year that the request was made (both the Provisional invoice for the current year and a Final invoice for the immediately preceding year).

However, in situations where the existence of error extends beyond ACC's application of section 170(3), ACC has the ability to determine a reassessment period that extends beyond the immediately preceding levy year.

Operational Implementation

When retrospective MCU requests are applied Levy Classification Advisors review the following:

- Information supplied by the employer (relating to the employer's retrospective MCU eligibility and the rationale for a retrospective request)

- Organisational/Company structure (to confirm how their activities have changed over time)

- Past customer interactions (to determine whether other ACC service errors have occurred)

With this information, the Advisor will determine an appropriate reassessment period, confirmed in a decision to the employer. In most circumstances, Advisors may apply multiple classification units for the immediately preceding year if the employer satisfies all aspects of the MCU test under section 170(3) and,

- The employer requests a retrospective reassessment (by virtue of considering their activities to meet the MCU criteria); or,

- The employer did not have the opportunity to request multiple classification units in the previous year (eg. They did not receive an invoice from ACC. or engage ACC relating to their levy activity)

If the Advisor considers the errors made warrant a further retrospective reassessment, this would require discussion with both the Levy Classification Manager and Commercial Advisors.

[11] Following development of the Policy, the Corporation reconsidered Hume's request for retrospective application of MCUs.

[12] On 2 July 2020, the Corporation wrote to Hume advising that its request to apply multiple classifications retrospectively for the eight levy years prior to 2019/20 did not align with the Corporation's Operational Position, which generally would only allow retrospective MCUs to be applied in the immediately preceding levy year. The Corporation therefore agreed to apply retrospective MCUs for the 2018/19 year, provided that Hume was able to supply the relevant accounting records to establish that it met the criteria in section 170(3) of the Act for that year. However, the Corporation did not agree to revise its decisions regarding levies payable for the 2011/12 to 2017/18 levy years.

[13] On 29 October 2020, review proceedings were held. On 6 November 2020, the Reviewer dismissed the review, on the basis that Hume was not entitled to have MCU for previous years.

[14] On 3 December 2020, a Notice of Appeal was lodged.

Relevant law

[15] Section 6(f) of the Act provides that a decision includes a decision relating to a levy payable by a particular levy payer.

[16] Part 6 of the Act provides for the accounts to fund the ACC scheme. Section 167(1)(a) states that the Work Account is used to finance entitlements provided under the Act to employees, private domestic workers and self-employed persons for work-related personal injuries. Section 168(1) provides for the collection of levies for the Work Account from employers.

[17] Section 170 of the Act provides:

> (1) For the purpose of setting levies payable under sections 168, 168B, and 211, the Corporation must classify an employer and a self-employed person in an industry or risk class that most accurately describes their activity, being an industry or risk class set out in regulations made under this Act.

(2) If an employer is engaged in 2 or more activities, the Corporation must classify all the employer's employees in the classification unit for whichever of those activities attracts the highest levy rate under the regulations.

(3) Despite subsection (2), the Corporation may classify the employer's employees in separate classification units for different activities if the employer meets the threshold (if any) specified in regulations and if—

(a) the employer so requests; and

(b) the employer is engaged in 2 or more distinct and independent activities; and

(c) each of those activities provides services or products to external customers in such a way that each activity could, without adaptation, continue on its own without the other activities; and

(d) accounting records are maintained by the employer to the satisfaction of the Corporation that—

(i) demonstrate the separate management and operation of each activity; and

(ii) allocate to each activity the earnings of employees engaged solely in that activity.

[18] Section 236 provides:

(1) Any person who is dissatisfied with any decision of the Corporation in respect of any levy paid or payable or claimed to be payable under this Part by that person may seek a review by the Corporation of that decision within 3 months after the person is notified of the decision. …

[19] Section 237 provides:

(1) If the Corporation considers it made a decision in error about levies payable by a person, it may, subject to section 243(3), revise the decision at any time, whatever the reason for the error.

(2) A revision may-

(a) amend the original decision; or

(b) revoke the original decision and substitute a new decision.

(3) An amendment to a decision, and a substituted decision, is a fresh decision.

[20] Section 243 provides:

(1) The Corporation may determine the amount of levy that ought to be or to have been paid in any case where-

(a) an accurate statement of the matters required to be stated in relation to earnings under this Act or regulations made under this Act has not been made; or

(b) the Corporation is not satisfied with the statement; or

(c) the Corporation is not satisfied that the proper levy has been paid.

(2) Subject to subsection (3), the Corporation may at any time alter or add to the determination made under subsection (1) if such action is necessary to ensure its correctness.

(3) If a statement has been delivered in respect of any period and a levy has been paid in respect of that period, the Corporation has no power to make a determination (if a determination has not been made), or alter a determination (if a determination has been made), after the expiration of 4 years beginning on the close of the tax year in which the statement was made unless that statement was, in the opinion of the Corporation, fraudulent or wilfully misleading.

(4) The Corporation must give written notice of the determination or alteration of the determination under this section to the person or persons to whom it applies and that person or persons are liable to pay the determined or altered levy, and any specified penalty, on the date specified in the notice of decision.

[21] Section 251 provides:

(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.

(3) The Corporation may not recover payments to which section 65(2) (revision of deemed decisions) applies.

[22] Section 255 provides:

(1) If the Corporation is satisfied that a levy payable under this Act has been paid in excess of the amount properly payable, the Corporation must-

(a) refund the amount paid in excess; or

(b) credit any amount so paid in excess on account against the amount of any other levy or other amount that may for the time being be due and payable by the person by whom the payment in excess was made, and notify the person accordingly. …

(2) No amount collected under this Act by the Commissioner may be refunded or credited under this section after the expiration of the period

> of 8 years immediately after the end of the year in which the relevant levy was payable.

Discussion

[23] The issue in this case is whether Hume is entitled to have multiple classification units (MCU) backdated for previous years, having regard to the following questions:

Is the Corporation's decision of 9 September 2019 a decision which concerns only the levies payable by Hume for the 2019/20 levy year?

[24] On 9 September 2019, the Corporation issued a decision approving Multiple Classification Units for the 2019/2020 levy year onwards for Hume, it having been previously classified in a single Classification Unit (CU 1170 – Kiwifruit growing). The Corporation advised that it would reassess Hume's levies from the 2020 financial year onwards, and a reassessed invoice would be sent within the next few days.

[25] Counsel for Hume submits that it was clear from the commencement of Hume's application for reclassification that it intended to seek reimbursement for earlier years' levy overpayments. Thus, the decision issued on 9 September 2019 was a revision of the earlier invoices/decisions, in light of the provision of new evidence about the correct classification units. The Corporation's statement that it would reassess Hume's levies from the 2020 financial year onwards, was a choice not to decide on the earlier years' levy overpayments. In the matter of *Hamilton*,[1] Judge Barber found that the choice not to decide could be seen as a decision.

[26] However, the Court notes that the Corporation's decision letter of 9 September 2019 referred only to levy classification for the 2019/2020 levy year onwards, and did not refer to classification and levies payable in previous years. The reason for this was that, on 26 August 2019, Mr Penness, Hume's financial controller, advised the Corporation that he had not yet fully investigated the state of Hume's earlier records and whether they were adequate for a revised claim. He therefore asked that

---

1 *Hamilton City Council v Accident Compensation Corporation* [2004] NZACC 79, at [47].

they proceed with the claim for the current year and, if successful, consider the prior year as a separate exercise. The Corporation agreed to proceed on this basis.

[27] Further, notwithstanding the District Court judgment in *Hamilton*, it is doubtful whether, even if the Corporation's silence on levies payable in earlier years can be seen to be a refusal to make a decision, this refusal constitutes a decision in terms of the Act, giving rise to review and appeal rights. Section 6(f) of the Act provides that a decision includes a decision relating to a levy payable by a particular levy payer. In the High Court judgment in *Estate of Waenga*,[2] it was held that the Corporation's decline to reconsider or revise its original decision is not a decision that is subject to review.

[28] The Court concludes that the Corporation's decision of 9 September 2019 was a decision which concerned only the levies payable by Hume for the 2019/20 levy year.

Is Hume able to review the Corporation's levy decisions in previous years, which were made outside the three-month time limit for lodging an application for review?

[29] Counsel for Hume concedes that, if the Court finds that the decision of 9 September 2019 pertains only to the 2019/2020 levy year, then it is clear that the statutory challenge period has expired.

[30] Section 236(1) of the Act provides that a person who is dissatisfied with the Corporation's decision in respect of any levy paid or payable may seek a review by the Corporation of that decision within three months after the person is notified of the decision. There is no provision in the Act for the three-month period to be extended.

[31] The Court concludes that Hume is not able to review the Corporation's levy decisions in previous years, which were made outside the three-month time limit for lodging an application for review.

---

2 *Estate of Waenga v Hamilton City Council* [2006] NZAR 390, at [26].

If not, is the Corporation able to revise those earlier levy decisions by exercising its discretion under section 237 of the Act?

[32] Section 237(1) of the Act provides that, if the Corporation considers it made a decision in error about levies payable by a person, it may, subject to section 243(3), revise the decision at any time, whatever the reason for the error.

[33] In *Bartels*,[3] the High Court held that the Corporation can revise a decision in reliance on material not available to it at the time of its original decision, but which has become available since, and where, in light of that new material (and any other available material), the Corporation is satisfied that its earlier decision was made in error.

[34] Counsel for Hume submits that the error on the Corporation's part here involves an unintentional deviation from accuracy, and an act through deficiency which fails to achieve what should be done. The Corporation is obliged, as a Crown Entity, to be reasonable in its dealings with levy payers, and, if an error can be shown, it is appropriate for the Corporation to rectify it. The Corporation should be able to reimburse levy payers where, as here, there is fresh evidence of how a company's categorisation should be separated according to its discrete functions.

[35] The Court concludes, in light of section 237(1) and the judgment in *Bartels*, that the Corporation is able to revise earlier levy decisions by exercising its discretion under section 237(1) of the Act.

If the Corporation has a discretion whether or not to revise earlier levy decisions under section 237, has the Corporation properly exercised that discretion?

[36] On 2 July 2020, the Corporation declined Hume's request to apply multiple classifications retrospectively for the eight levy years prior to 2019/20. The Corporation advised that such retrospectivity did not align with the Corporation's (newly developed) Operational Position, which generally would only allow retrospective MCUs to be applied in the immediately preceding levy year. The Corporation therefore agreed to apply retrospective MCUs for the 2018/19 year,

---

[3] *Accident Compensation Corporation v Bartels* CIV-2005-486-2072, Wellington Registry, 14 August 2006, Gendall and Ronald Young JJ, at [34].

provided that Hume was able to supply the relevant accounting records to establish that it met the criteria in section 170(3) of the Act for that year.

[37] Counsel for Hume submits that the Corporation has a duty to act reasonably, and its choice to ignore or *de facto* decline Hume's application for backdated or retrospective reimbursement is unreasonable. Counsel submits that there is little to no evidence that Hume has been afforded the sort of discretion that its loss of an opportunity to otherwise spend the funds they overpaid in levies is commensurate with.

[38] This Court notes that the Corporation's Operational Policy was framed in the context of sections 170 and 237 of the Act, and in light of organisational and operational considerations noted above at paragraph [10]. The Court notes in particular that the policy was intended to ensure fairness and consistency for all employer levy payers seeking retrospective reclassification; and that relevant considerations included the impact on prior levies payable by an industry and risks associated with granting a retrospective assessment, including subsequent retrospective requests from other employers. The Court can find no fault with the provisions of the Operational Policy.

[39] This Court notes further that the issue at hand concerns the exercise of a discretion by the Corporation. The criteria for a successful appeal regarding the exercise of discretion are stricter than in the case of a general appeal. The criteria are: error of law or principle; taking account of irrelevant considerations; failing to take account of a relevant consideration; or the decision is plainly wrong.[4] This Court cannot discern that any of these criteria have been met in this case.

[40] The Court concludes that the Corporation properly exercised its discretion whether or not to revise earlier levy decisions under section 237.

---

4 *Kacem v Bashir* [2010] NZSC 112; [2011] 2 NZLR 1, at [32].

Does the Act otherwise allow for retrospective revision of levy classification decisions made by the Corporation in previous years?

[41] Section 243(1)(c) provides that the Corporation may determine the amount of levy that ought to be or to have been paid in any case where the Corporation is not satisfied that the proper levy has been paid. Section 243(3) provides that the Corporation has no power to alter a determination after the expiration of four years beginning on the close of the tax year in which the statement was made unless that statement was, in the opinion of the Corporation, fraudulent or wilfully misleading. Section 255(1) provides that, if the Corporation is satisfied that a levy payable under this Act has been paid in excess of the amount properly payable, the Corporation must refund or credit the amount paid in excess.

[42] Counsel for Hume submits as follows. Section 243(1) allows for the retrospective reimbursement for previous years following an adjustment to classifications of risk. This provision was applied in the case of *Jani-King*.[5] There is authority for payment to be made to Hume for the four years prior to reclassification, if the amount of levy can be shown to be in excess of the amount properly payable. Under section 255, the Corporation has an obligation to determine retrospectively the amount of levy that ought to have been paid in previous years and to issue a refund for excess payments.

[43] This Court accepts that there are situations where sections 243(1) and 255 of the Act may allow for retrospective revision of levy classification decisions made by the Corporation in previous years.

[44] However, once again, section 243(1) involves the exercise of a discretion by the Corporation, with stricter criteria for a successful appeal. As noted above, this Court cannot discern that any of the strict criteria have been met in the present case in relation to the exercise of the Corporation's discretion to decline retrospective reimbursement for previous years.

---

5 *Accident Compensation Corporation v Jani-King (NZ) Ltd* [2011] NZACC 295.

[45] In relation to the applicability of section 255, because the Corporation has not been satisfied that previous levies payable by Hume under this Act have been paid in excess of the amount properly payable, it follows that this section does not apply in this case.

[46] Overall, this Court adopts the following finding by Beattie J in *Jani-King*, in dismissing the contention that, with the change of classification unit, should come a reassessment of levies for past years:

> [22] In the circumstances I consider that the review procedure would have been the way that Jani-King could and should have gone at an earlier point if it was not satisfied with the classification units which had been assessed.

[47] This Court concludes that, while it is conceivable that the Act may allow for retrospective revision of levy classification decisions made by the Corporation in previous years, the relevant sections do not assist Hume in this case.

Conclusion

[48] In light of the above considerations, the Court finds that Hume is not entitled to have multiple classification units (MCUs) backdated for previous years. The decision of the Reviewer dated 6 November 2020 is therefore upheld. This appeal is dismissed.

[49] I make no order as to costs.

P R Spiller
District Court Judge

Solicitors: Laura Findlater Law for the Appellant.
Young Hunter for the Respondent.