

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2022] NZACC 183      ACR 275/19**

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

Hearings:	10 November 2020 and 21 June 2021
Heard at:	Nelson/Whakatu
Memoranda completed:	2 August 2022
Appearances:	Mr S Zindel for the appellant Mr H Evans for the respondent
Judgment:	21 September 2022

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**RESERVED JUDGMENT OF JUDGE DENESE HENARE**  
**[ Allowances under the Accident Compensation Act 1982; Jurisdiction; Decision**  
**ss 6, 134 of the Accident Compensation Act 2001]**

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[1] The appellant, Peter Firmin is a former soldier in the New Zealand Army. He sustained a back injury while he was stationed in Singapore in December 1986. Subsequently, Mr Firmin returned to New Zealand with a prolapsed disc at L5/S1, and he received cover for a lumbar spine injury.

[2] There is no doubt the accident in 1986 cut short Mr Firmin's expectations and aspirations for his military career. It is the case too that Mr Firmin can take pride in the service he gave to his country.

[3] In 1988, Mr Firmin was discharged from military service on medical grounds.

[4] Subsequently, Mr Firmin sought information about his entitlements. Mr Firmin filed review applications and appeals between 2008 and 2019<sup>1</sup>, including to the former Accident Compensation Appeal Authority (Appeal Authority).<sup>2</sup>

### **Review**

[5] In the appeal as filed, Mr Firmin challenged a review decision dated 27 September 2019 dismissing his claims to entitlement to seven allowances under the Accident Compensation Act 1982. The review applications referred to a decision dated 2 February 2019. At review, it was common ground there was no such decision on this date. The Reviewer then considered whether there was an unreasonable delay by the Corporation in issuing a decision on the seven allowances being: Taxable field allowances from twelve months prior to the injury on 4 December 1986; Fuel allowance (withdrawn on appeal); Dry cleaning and uniform upkeep allowance; Superannuation; Adverse working conditions allowance; Accommodation and Gymnasium and pool facilities allowances.

[6] The Reviewer concluded there had not been unreasonable delay. For these reasons, the Reviewer declined to direct the Corporation to issue a reviewable decision and all seven review applications were dismissed.

### **The appeal hearings**

[7] At the first hearing, the Court was informed of the plethora of processes involving Mr Firmin, the Corporation and the NZ Defence Force (NZDF) that did not always coincide. In consequence, opportunities for mediation and negotiation of matters were missed.

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<sup>1</sup> *Firmin v Accident Compensation Corporation* [2018] NZACC 112.

<sup>2</sup> *Firmin v Accident Compensation Corporation* [2013] NZACAA 15; [2013] NZACA 15.

[8] Mr Firmin enlisted as a Private in the army in 1985. Unfortunately, the accident in 1986 cut short his expectations and aspirations for his military career. Mr Firmin can take pride in his service to country.

[9] Mr Firmin gave evidence at hearing regarding his deployment in Singapore, including his pay details and his understanding of how the allowances applied or should be applied in his case. Affidavit evidence was filed by George Nepata and Jason McOmish dated 6 June 2020 respectively in support of Mr Firmin's case.

[10] Counsel worked co-operatively through bundles of documents comprising some 8,000 pages to make sense of the factual matrix spanning thirty-five years since the accident in December 1986. Some material was not available or incomplete. It was unsurprising then that some evidence shed light and other evidence appeared contradictory. The Court directed counsel to confer whether the matters could be narrowed for determination.

[11] Supplementary submissions were filed for the second hearing on 21 June 2021. Mr Zindel and Mr Evans agreed the issues arising from the review decision dated 27 September 2019 whether:

- [a] The Corporation made a decision or decisions in respect of the matters raised at review by Mr Firmin;
- [b] There was any unreasonable delay;
- [c] If the issues raised were the subject of earlier decisions, whether the principle of res judicata or issue estoppel applies.

### **Post hearing pathways**

[12] Following the hearings, counsel continued to work with purpose to achieve a negotiated outcome which the Court encouraged. The Corporation issued two decisions dated 10 May 2022. The first decision concerns superannuation which is now the subject of a review application.

[13] The second decision provides that a payment of \$750 per annum together with backdated interest to 1986 covers three allowances being adverse working conditions, gymnasium and dry-cleaning allowances. The decision also set out a separate figure for field allowances. The decision stated:

As part of your settlement ACC and Steven Zindel have come to an agreement in regard to the following:

The parties agree that ACC will pay a one-off payment of \$750 per year from the date of accident, 04.12.1986, to the date of the settlement agreement. This payment to cover the adverse working conditions, gym and dry-cleaning allowances. ACC agrees to pay backdated interest on this payment.

The parties have also agreed that Mr Firmin will receive 86 days' worth of field allowances at \$4.29 per day, for a total of \$368.94.

[14] Subsequently, Mr Zindel acknowledged a communication mistake and gymnasium and pool allowances should not have been included in the \$750 payment.

[15] The Court issued a Minute dated 20 July 2022 summarising the discussion with counsel at the case conference regarding the status of the appeal, particularly concerning the allowances where agreement had not been achieved.

[16] By memorandum dated 2 August 2022, Mr Zindel confirmed that:

- [i] Field taxable allowances were resolved;
- [ii] A review application had been filed against the decision dated 10 May 2022 relating to superannuation;
- [iii] Dry cleaning and uniform upkeep allowances were agreed at \$0.14 a day. However, the Corporation had revisited the issue because of new evidence, being a letter dated 29 May 2006 from NZ Army to Mr Firmin;
- [iv] The adverse working condition allowances were accepted at \$750 per annum. Due to a communication mistake by counsel, Mr Firmin claimed the gymnasium and pool facilities costs should be compensated at \$50 per week (\$25 each) and not included in the \$750 figure.

[v] The accommodation allowance is not agreed. Mr Firmin claims \$65 per week. The Corporation had offered \$20.64 and now says this is a mistake, because RQC was not deducted from Mr Firmin's earnings in Singapore.

[vi] Costs were resolved.

[17] I now turn to consider the outstanding three claims to allowances.

**First claim: Dry cleaning and Uniform upkeep allowances**

*The position of the parties*

[18] Mr Zindel submitted:

- The 27 September 2019 review decision held the dry cleaning and uniform upkeep allowances had been the subject of a previous decision. Specifically, that of the Appeal Authority and the review decision dated 19 April 2016 in relation to "Clothing and footwear". The Reviewer concluded there was no evidence to quantify the expenditure nor indication from NZDF that any expenditure formed part of an allowance or a claim on the NZDF.
- Uniform upkeep and dry-cleaning allowances were accepted in the 8 November 2013 Appeal Authority decision as totalling \$339.45 per year. The question at that stage was whether the amount was included within Mr Firmin's gross pay or was surplus to his salary.
- An enclosure document, titled "Summary of Pay and Allowance Conditions for P757196 P.J. Firmin, RNZIR", dated 29 May 2006, details allowances including a "Rations and Quarters Charge", "Uniform Upkeep Allowance", "Dry Cleaning Allowance" and "Location Allowance". In this document, the uniform upkeep allowance was at the value of \$0.79 per day from 1 July 1986. The dry-cleaning allowance was \$0.14 per day from 1 April 1986. Together (\$0.93 per day) they amounted to \$339.45 per annum.

[19] Mr Evans submitted in his memorandum dated 28 June 2022 that:

- The enclosure document was attached to a complete copy of a letter dated 29 May 2006 from Brigadier Vryenhoek, Deputy Chief of NZ Army addressed to Mr Firmin. This letter confirms:

In a letter dated 8 February 2005 to Peter Devine of the Accident Compensation Corporation, Army restates that the Uniform Upkeep and Dry Cleaning Allowances were taxable and therefore “included as part of the individual’s taxable income”. This statement is inaccurate. Neither of these allowances are included as part of an individual’s taxable income because they are non-taxable allowances.

## **Discussion**

[20] A review of the evidence shows that the dry cleaning and uniform upkeep allowances were referred to as the clothing allowances by the Appeal Authority in 2013 and Reviewer Dunn in 2016 and treated as excluded:

[68] I agree with Mr Hunt that the clothing allowances should be excluded because they are properly classified as reimbursement allowances and do not form part of Mr Firmin’s “earnings as an employee”. ACC was correct to exclude the allowances and this part of the decision of 24 February 2004 stands.

[21] The review decision dated 27 September 2019 noted a decision was being sought on matters that have already been determined. The Reviewer declined to direct the Corporation to issue a further decision.

[22] In his initial submissions, Mr Evans submitted it is difficult to imagine a more clear-cut case of res judicata or issue estoppel. The specific issue before the Appeal Authority was a claim for uniform upkeep and dry-cleaning allowances which is the same issue that Mr Firmin is asking the Court to determine.

[23] The Court observes the Summary of Pay enclosure document referred to in the initial submissions of Mr Zindel is in fact the enclosure attached to the letter of 29 May 2006 from Brigadier Vryenhoek which provides full explanation of the enclosure.

[24] Mr Zindel submitted the revisiting of the allowance amounted to a “volte-face” given the agreement at \$0.14 per day. Certainly, the agreement is revisited

given the explanatory letter from Brigadier Vyrenhoek that came to light late in the appeal.

[25] The letter from Brigadier Vyrenhoek is clear that the dry-cleaning and uniform upkeep allowances are non-taxable allowances and did not form part of the basic pay. The letter stated Mr Firmin did not receive the dry-cleaning allowance during his time in Singapore.

[26] The Brigadier (then Deputy Chief of the New Zealand Army), apologised for the administrative error in the information earlier provided in February 2005 to the Corporation.

### **Decision**

[27] The Court is unable to overlook the clear evidence of 29 May 2006 from the Deputy Chief, New Zealand Army addressed to Mr Firmin. In the Court's opinion, the letter alone means there is no further basis for the claim for the dry cleaning and uniform upkeep allowance to be pursued.

[28] However, in the circumstances of agreement, since the Corporation's decision of 10 May 2022 provides for dry cleaning and uniform upkeep allowance within the figure of \$750 per annum, the Court considers this agreement should be upheld.

### **Second claim: Gymnasium and pool costs**

#### *The position of the parties*

#### *Gymnasium and pool costs*

[29] Mr Zindel submitted:

- Mr Firmin accepted \$750 pa for adverse working condition allowance referred to in the Corporation's 10 May 2022 decision. There was a communication mistake with counsel about gymnasium and pool facilities costs.

- Mr Firmin seeks the gym and pool costs should be compensated at \$50 per week (\$25 per week each) and not included in the \$750 pa which Mr Zindel submitted “is an approximation of costs back in 1986 but gym memberships were more costly back then.” Both the gym and the pool costs were for training in Singapore, as Mr Firmin indicates that he was “headhunted” by his SAS sergeant to train other special forces in Southeast Asia, then later going to England to undertake their SAS selection course; not just for enjoyment but for necessary fitness.

[30] Mr Evans submitted:

- This allowance falls into the same category as the adverse working conditions allowances. The Corporation had never previously issued a decision.

### *Discussion*

[31] In the September 2019 review decision, the Reviewer determined the Corporation should not be directed to issue a decision on gymnasium and pool facilities costs due to a lack of evidence.

[32] However, the evidence at appeal shows the existence of both the gymnasium and pool facilities allowance as well as the regular access of Mr Firmin and his fellow servicemen and women have not been disputed. Reference was particularly made to the affidavit evidence of Mr George Nepata and Mr James McOmish. The affidavits confirm the regular access to gymnasium and pool facilities during service in the Army, that they used them on a daily basis and Mr Nepata considered them a fringe benefit of employment.

[33] The Corporation’s decision of 10 May 2022 is clear that the \$750 per annum includes “gym” though pool is not expressly mentioned. However, taking into account the agreement by counsel, Mr Evans’ memorandum dated 14 June 2021 notes gymnasium and pool facilities costs were to be referred back to the Corporation for a primary decision. Mr Zindel’s submission at hearing on 21 June 2022 also confirms that the gym and pool facilities costs were referred back for decision. For



these reasons, the Court treats the reference in the decision to gym as including pool facilities costs.

[34] Mr Zindel's memorandum of 2 August 2022 provides that Mr Firmin seeks the gymnasium and pool facilities costs should be compensated at \$50 per week (\$25 per week each) and not included in the \$750 figure. The basis for this figure is not stated.

[35] Mr Zindel's submission is that the amounts claimed by Mr Firmin for gymnasium and pool costs represent "an approximation of costs". For this reason, the Court has no clear basis to assess Mr Firmin's proposal for the gymnasium and pool facilities costs.

[36] Mr Evans has chosen not to reply to Mr Firmin's proposal, leaving the 10 May 2022 decision to stand.

### **Decision**

[37] The Court has not been informed as to the calculation of the amount specified for gymnasium and pool facilities costs included in the figure of \$750 per annum because three allowances have been brought together by the Corporation.

[38] Mr Firmin's proposal represents an approximation as submitted by Mr Zindel, with Mr Zindel also noting memberships were more costly back in 1986.

[39] It is the case too that the affidavits of Mr Nepata and Mr McOmish do not specify a figure for gymnasium and pool facilities.

[40] The Court has no basis to pluck figures out of the air.

[41] For this reason, given the acknowledged mistake by Mr Zindel, the Court considers it is sensible that it directs the Corporation to separately consider Mr Firmin's proposal and determine a separate figure for gymnasium and pool facilities costs.

### **Third claim: Accommodation allowance**

#### ***The position of the parties***

[42] Mr Zindel submitted:

- The Corporation's memorandum dated 24 December 2004 noted the cost of accommodation was deducted from Mr Firmin's pay and this fact had been confirmed by the NZDF. However, Mr Firmin's pay details document shows "Nil" deducted for RQC (rations and quarters charge). It is also Mr Firmin's evidence that he was never paid "out of pocket" for accommodation. This position is supported by the affidavit of Mr Nepata, who attests he too was never "paid out of pocket" for accommodation and received accommodation in his time in the Defence Force.
- A note in the Pay Details sheet records there was no deduction for rations and quarters for the periods spent by Mr Firmin in Singapore. On this basis, it is submitted the correct conclusion should be that an allowance for accommodation should be compensated for the proportion of a year when Mr Firmin was stationed in Singapore.
- In *Peter John Firmin v Accident Compensation Corporation*<sup>3</sup> the Authority held:

"the waiver of the RQC deduction while Mr Firmin was stationed in Singapore amounted to a tax-free allowance for that period and it is a benefit that must be valued under s 59(8) included in assessing Mr Firmin's earnings at the time of his injury. As Mr Firmin only received the waiver for four months of the 12 months prior to the time of his injury, then the value of the CQC tax-paid deduction will also have to be ascertained to establish the value of any benefit he received during that period."
- This is submitted to be the correct interpretation. However, the Corporation has failed to calculate and compensate Mr Firmin for the loss of accommodation following his injury, on that basis.

[43] In his memorandum dated 2 August 2022, Mr Zindel submitted:

- Mr Firmin claims \$65 per week for accommodation allowances and the Corporation says \$20.64 per week is in keeping with the amount referred to as the “rations and quarters charge” (RQC) referred to in the Corporation’s letter of 24 December 2013 to him. IRD had told Mr Firmin that board and lodgings in 1986 may have a value of \$150 pw.

[44] Mr Evans submitted:

- The Corporation was directed by the Appeal Authority to calculate Mr Firmin’s relevant earnings with reference to the accommodation allowance and it did so in the letter dated 24 December 2013. In that letter the Corporation informed Mr Firmin that his relevant earnings had been increased by \$26.06 per day for the posted abroad allowance, and \$20.64 per week, for meals and accommodation. Accommodation was referred to as being part of the Rations and Quarters Charge.
- In his memorandum dated 28 June 2022, that the December 2013 calculation of RQC of \$20.64 per week figure was an error having regard to Brigadier Vyrenhoek’s letter of 29 May 2006 that RQC was not deducted from Mr Firmin’s earnings when he was in Singapore. For reason of error, the Corporation determined it will not attempt to claim this money back from Mr Firmin.

### *Discussion*

[45] The Corporation calculated the relevant earnings with respect to the accommodation allowance in a decision issued on 24 December 2013, following the decision of the Appeal Authority. It is the case the Corporation confirmed Mr Firmin’s relevant earnings were to be increased by \$26.06 per day for the posted abroad allowance and \$20.64 per week for meals and accommodation. Accommodation was referred to in the Corporation’s letter as being part of his “rations and quarters charge” – RQC.

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<sup>3</sup> *Peter John Firmin v Accident Compensation Corporation* [2013] NZACA 15 at [67]

[46] The Corporation's internal memorandum of 13 December 2013 refers to the Corporation having received the decision of the Appeal Authority "telling us to add a Singapore allowance at \$26.06 per day and an amount for RQC". On this basis the calculations were made by the Corporation.

[47] It is not the case, as first contended, that the Corporation failed to calculate and compensate for the accommodation allowance as directed by the Appeal Authority.

[48] Mr Evans quite rightly submitted that it did not seek return of the \$20.64 per week figure which it had calculated by mistake. The error having been accepted the Corporation submits it has no further obligation to pay an accommodation allowance.

[49] The Court agrees for reasons that the Brigadier Vyrenhoek's letter of 29 May 2006 clearly provides:

Furthermore, the letter [dated 15 December 2004 from the Army to the Corporation] refers to accommodation and meals, asserting these would have been deducted from your fortnightly pay during your time in Singapore. Again this is inaccurate. If you check the Rations and Quarters charge column of your F5 pay statement printout for 1986, you will notice that this column does not register a deduction from the time you were posted to Singapore. Therefore you were not deducted the Rations and Quarters charge whilst serving in Singapore.....

As stated earlier, the Rations and Quarters charge was a deduction for accommodation and rationing, not an allowance paid to individuals. Regulations at the time meant that the Rations and quarters charge was not deducted for personnel rostered to Singapore.

## **Decision**

[50] The Court finds the letter dated 29 May 2006 from Brigadier Vyrenhoek is clear and compelling when weighed with other estimations in the available evidence including the IRD advice to Mr Firmin, noted by Mr Zindel. The Corporation's calculations were based on information provided by NZ Army in 2004 which were in error.

[51] Noting the error in its letter of 24 December 2013, the Corporation quite properly will not seek return of the payment made to Mr Firmin.

[52] In all circumstances, the Court determines that there is no basis for the accommodation claim to be pursued.

### **Result**

[53] The appeal is dismissed in respect to the first and third claims.

[54] In respect to the second claim, the Court directs the Corporation to separately consider Mr Firmin's proposal that he should be compensated at \$50 per week for gymnasium and pool facilities costs (\$25 per week each) and this figure not be included in the \$750 pa figure noted in the decision of 10 May 2022.

[55] Noting the submission made by Mr Zindel in his memorandum dated 2 August 2022, the Court records the parties have agreed costs in the appeal, and there is no outstanding issue for the Court to determine.



Judge Denese Henare  
District Court Judge

Solicitors: Zindels, Nelson for the appellant  
Mr Evans, Barrister, Christchurch for the respondent