

**IN THE DISTRICT COURT  
AT WELLINGTON**

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

**[2022] NZACC 184      ACR 70/21**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL UNDER SECTION 162(1) OF THE ACT
BETWEEN	ALBERT SIMPSON Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing:            On the papers

Submissions:      B Hinchcliff for Mr Simpson  
                         L Mailand for the Respondent

Judgment:         27 September 2022

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**JUDGMENT OF JUDGE P R SPILLER  
[Leave to Appeal]**

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**Introduction**

[1] This is an application for leave to appeal against a judgment of His Honour Judge McGuire, delivered on 4 July 2022.<sup>1</sup> At issue in the appeal was the Corporation's decision, dated 19 October 2021, determining that Mr Simpson was not entitled to payment of weekly compensation, as he was not in receipt of any earnings at the material time. The Court dismissed the appeal, for the reasons outlined below.

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<sup>1</sup> *Simpson v Accident Compensation Corporation* [2022] NZACC 128.

## **Background**

[2] On 26 November 2019, Mr Simpson had a cardiac and wound infection treatment injury. On 17 February 2020, the Corporation advised Mr Simpson that he was entitled to cover for the treatment injury.

[3] On 17 February 2020, an ACC 18 medical certificate was completed, certifying that Mr Simpson had been unfit to work for the period from 21 November 2019.

[4] On 2 March 2020, Mr Simpson advised the Corporation that he was working for Discovery River Cruises Limited, and he had been working six days a week for about 6 to 8 hours per day up to the date of his incapacity.

[5] The Corporation received information from IRD that Mr Simpson, who was then aged 76 years, had been receiving a pension, but had not declared any earnings from employment for the period from 2018 to 2020.

[6] On 28 April 2020, the Corporation issued a decision declining Mr Simpson's application for weekly compensation.

[7] Following communication from Mr Simpson's lawyer in August 2020, the Corporation obtained advice from Mr Nick Eaden, Technical Specialist, in respect of Mr Simpson's claim for weekly compensation. On 27 August 2020, Mr Eden's advice included the following:

The client is a shareholder-employee of Discovery River Cruises Limited. As reported, see weekly compensations script 1/4/20, that the client normally works 40 hours per week across a six-day work pattern.

To be considered an earner, a client is only required to be engaged in work immediately prior to their injury for the purposes of pecuniary gain. There does not have to be earnings lodged with the IRD to establish this.

In this case, being a shareholder-employee, if it's accepted that the client's business was ongoing and he would have returned to it following recovery from this operation, then he would be considered an earner at the date of injury.

However, to be eligible for weekly compensation, there must be earnings derived from that employment, which in this case, would be either PAYE income payments or all income of the person that is deemed to be income

derived, otherwise then from PAYE income payments from s RD 3B or RD 3C of the Income Tax Act 2007 (s 15(2)(a) Accident Compensation Act 2001).

The IRD earnings check and the client themselves (see client email 26/5/20), have confirmed that there are no such earnings.

The client is therefore not eligible to weekly compensation.

[8] On 30 September 2020, Mr Hinchcliff lodged a review application in respect of the April 2020 decision. On 19 October 2020, the Corporation issued a further decision declining Mr Simpson's application for weekly compensation on the basis:

To be eligible for weekly compensation, there must be earnings derived from an employment, and as you have not lodged tax returns, ACC have no relevant year's earnings to assess and calculate for weekly compensation.

[9] A review application was lodged.

[10] On 22 February 2021, Mr Simpson provided an affidavit stating that he was a 50% shareholder and director of Discovery River Cruises Limited and worked an average of 42 hours per week. He said:

The work I performed at Discovery River Cruises includes all maintenance on the boat including the supervision of contractors, working with Marine New Zealand's (complex compliance and documentation issues), planning of the duration, timing, direction and operation of each cruise depending on weather, tide and river conditions, promotions with many NZ, Australian organisations plus the internet, deck work including anchoring of mooring of the vessel and being used on commercial cruises, as well as all external cleaning of the 20 by 8.5 meter vessel and setting up for events.

While it would be very difficult to employ someone able to perform the work I do at Discovery River Cruises Limited, especially the Maritime New Zealand compliance work that also requires the person in my position to obtain their approval as an acceptable person. I would expect that reasonable earnings would be a minimum of \$80,000 per year.

[11] Financial information was supplied for the relevant tax years for Discovery River Cruises Limited. It was apparent from the contents that the company's income was well below its expenses and, thus, the company operated at a significant loss each year. Mr Simpson was not allocated any earnings in the 2016, 2017, 2018 or 2019 tax years.

[12] The Corporation arranged for its internal technical accounting specialist, Ms Erica Roets, to consider the financial information. On 5 March 2021, Ms Roets advised that the relevant year for the purposes of calculating Mr Simpsons weekly earnings was the tax year ending 31 March 2019. She discussed the financial information, noting that, with respect to the tax years of 2016 to 2020, Mr Simpson received a pension and no earnings had been allocated to him for any work activity. With respect to the financial information for Discovery River Cruises Limited, Ms Roets noted from a review of the financial statements:

The sales income decreased from \$54,766 in the 2016 tax year to \$24,957 in the 2019 relevant year.

The purchases look reasonable, there was an insignificant change in the gross margin percentage, decreasing from 79% in the 2016 year to 71% in the 2019 relevant year.

The expenses decreased from \$181,019 for the tax year 2018 to \$117,798 for tax year 2019. A large portion decrease in expense are linked to survey and valuation fees as well as repairs and maintenance. The remaining expenses look reasonable for the industry that the client is involved in.

The company incurred trading losses for the tax years ending 31 March 2016 to 31 March 2019. No shareholder salary was allocated to shareholders for the above tax years. If a client, in the years prior to his incapacity, freely chooses to forgo a shareholder salary from his loss-making companies and did not suffer an incapacity injury, he would likely again have chosen to forgo a shareholder salary in the year of incapacity.

[13] Ms Roets recommended that the Corporation accept nil earnings for the 2019 tax year and, as such, advised that Mr Simpson was not entitled to an uplift to the minimum rate under Clause 42 of the First Schedule of the Act.

[14] On 14 April 2021, the Reviewer dismissing the review application. On 14 April 2021, Mr Simpson filed a notice of appeal to this Court.

### **Relevant law**

[15] Section 162(1) of the Accident Compensation Act 2001 (the Act) provides:

A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with leave of the District Court, appeal to the High Court.

[16] In *O'Neill*,<sup>2</sup> Judge Cadenhead stated:

[24] The Courts have emphasised that for leave to be granted:

- (i) The issue must arise squarely from 'the decision' challenged: ... Leave cannot for instance properly be granted in respect of *obiter* comment in a judgment ...;
- (ii) The contended point of law must be “*capable of bona fide and serious argument*” to qualify for the grant of leave ...;
- (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed ...;
- (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law ...;
- (v) A decision-maker's treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision ...;
- (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law ... .

[25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law ... .

[17] Section 100 of the Act provides that entitlement to weekly compensation depends on a claimant's incapacity for employment and vocational independence:

- (1) A claimant who has cover and who lodges a claim for weekly compensation—
  - (a) is entitled to receive it if the Corporation determines that the claimant is incapacitated within the meaning of section 103(2) and the claimant is eligible under clause 32, 44, or 44A of Schedule 1 for weekly compensation:

[18] Section 103 of the Act provides:

- (1) The Corporation must determine under this section the incapacity of—
  - (a) a claimant who was an earner at the time he or she suffered the personal injury:

...

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<sup>2</sup> *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

- (2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.
- (3) If the answer under subsection (2) is that the claimant is unable to engage in such employment, the claimant is incapacitated for employment.

[19] Clause 32 of the First Schedule of the Act provides:

- (1) The Corporation is liable to pay weekly compensation for loss of earnings to a claimant who—
  - (a) has an incapacity resulting from a personal injury for which he or she has cover; and
  - (b) was an earner immediately before his or her incapacity commenced.

[20] Section 15 of the Act provides for earnings as a shareholder-employee:

Earnings as a shareholder-employee

- (1) Earnings as a shareholder-employee, in relation to a person who is a shareholder-employee and any tax year, means—
  - (a) the amount described in subsection (2) (the subsection (2) amount); or
  - (b) the amount described in subsection (3) (the subsection (3) amount), if the Corporation decides that the subsection (2) amount is not a reasonable representation of the person's earnings as a shareholder-employee in the tax year.
- (2) The subsection (2) amount is—
  - (a) all PAYE income payments of the person for the tax year derived from a company of which the person is a shareholder-employee; and
  - (b) all income of the person that is deemed to be income derived otherwise than from PAYE income payments under section RD 3B or RD 3C of the Income Tax Act 2007.
- (3) The subsection (3) amount is an amount determined by the Corporation in the following way:
  - (a) first, determine each of the following amounts:
    - (i) an amount that represents reasonable remuneration for the services that the person provides to the company as an employee of the company in the tax year; and

- (ii) an amount that represents reasonable remuneration for the services that the person provides as a director of the company in the tax year; and
- (b) second, add the amounts described in paragraph (a)(i) and (ii), and the result is the subsection (3) amount.

[21] In *Truscott*,<sup>3</sup> Judge Beattie stated:

It is well established that if a claimant organises his affairs to suit his own or his business's purposes he is stuck with that situation for the purposes of calculating weekly compensation. ... What the statutory regime for weekly compensation requires is that the claimant have earnings as opposed to an expectation of same which might not be realised.

[22] In *Rowe*,<sup>4</sup> Judge Middleton stated:

[26] I agree with Mr Barnett that the intention of the Act so far as the provision of weekly earnings is concerned is that it is to compensate an employee for loss of earnings brought about as a result of personal injury. It is quite clear on the evidence that this appellant had no "earnings as an employee" and therefore had no loss of earnings as a result of his incapacity.

[23] In *Pratley*,<sup>5</sup> Judge Barber stated:

[43] It was argued for the appellant that, at material times, he was an earner (and I accept that he was within that definition set out above) but that his earnings were "zero". I consider that he had no earnings so there is nothing to be compensated for by ACC. If a person structures his (or her) affairs to result in there being no income earned by that person at material times, then entitlement to earnings-related compensation is lost. Also, there could be avoidance of income tax.

### **The Court's judgment of 4 July 2022**

[24] Judge McGuire referred to the factual background of Mr Simpson's claim. His Honour then noted that in *Hamilton*,<sup>6</sup> where a hairdressing business was highly profitable, Justice Edwards said:

[40] To recap, I consider s 15(3) requires the Corporation to first determine the services provided as employee and as director, and then to assess the reasonable remuneration for those services. That sum must then be deducted from the total

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<sup>3</sup> *Truscott v Accident Rehabilitation and Compensation Insurance Corporation* [1998] NZACC 134.

<sup>4</sup> *Rowe v Accident Compensation Corporation* [2003] NZACC 65.

<sup>5</sup> *Pratley v Accident Compensation Corporation* [2010] NZACC 42.

<sup>6</sup> *Hamilton v Accident Compensation Corporation* [2019] NZHC 3109.

payments received by the claimant with the “dividends” balance excluded from the assessment of reasonable remuneration.

[25] Judge McGuire did not understand the *Hamilton* decision to be asserting a principle that where, as here, the appellant has received no earnings for the years 2016 to 2019 inclusive, he is nevertheless entitled to weekly compensation during the period of his incapacity, of \$80,000.

[26] Judge McGuire adopted the reasoning of Judge Middleton in *Rowe*,<sup>7</sup> as Judge Barber did in *Pratley*,<sup>8</sup> that the intention of the Act is that the provision of weekly earnings is to compensate an employee for loss of earnings brought about as a result of personal injury. Judge McGuire noted that Judge Middleton was of the view that, on the evidence, the appellant had no earnings as an employee and therefore there was no loss of earnings as a result of his incapacity. Judge McGuire then referred to Judge Barber’s statement in *Pratley* (noted above).

[27] Judge McGuire noted the Oxford English Dictionary’s definition of compensation as “the action of compensating, or condition of being compensated; counterbalance, rendering of an equivalent, requital, recompense”. His Honour observed that, in order to achieve this “rendering of an equivalent” for claimants, Schedule 1 Part 2 of the Act dealt comprehensively and in detail with how weekly compensation was to be calculated for earners, in all categories, including the self-employed, shareholder employees, those on parental leave, part time employees and even those who are recuperating organ donors. His Honour noted that the Schedule set out the formulas for calculating weekly compensation in these contexts, and one such was that of the person who was incapacitated by injury and who was an earner immediately before his incapacity.

[28] Judge McGuire further noted that Schedule 1 also dealt with claimants who were no longer employees and employees on unpaid parental leave. His Honour observed that Schedule 1 in essence, spelt out how specifically the social contract that underpins the legislation is to work to achieve fairness in a variety of circumstances for a person incapacitated by injury.

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<sup>7</sup> *Rowe*, cited n4 above.

<sup>8</sup> *Pratley*, cited n5 above.



[29] Judge McGuire was unable to find anything in Schedule 1 or in the Act itself, in particular in Section 3 where “Purpose” is set out, that would allow for weekly compensation to be paid, whether as an employee or as a shareholder employee, when the claimant himself had earned nothing in the years preceding. His Honour therefore dismissed the appeal.

### **Submissions for Mr Simpson**

[30] Mr Hinchcliff submits that even though Mr Simpson’s earnings were nil, the Corporation should have accepted a salary of \$80,000 as the basis for a calculation of his weekly compensation. The High Court judgment in *Hamilton*<sup>9</sup> required the Corporation to look beyond the applicant’s tax records and, instead, consider what would have been reasonable remuneration for his work as a shareholder-employee. Section 15(1)(b) of the Act states that section 15(3) applies if the income information is not a reasonable representation of the person’s earnings as a shareholder-employee. Zero earnings for working more than 40 hours per week is not reasonable.

[31] Mr Hinchcliff advances two questions of law to be determined by the High Court:

- (a) What does “reasonable representation of the person’s earnings as a shareholder-employee” mean in section 15(1)(b)?
- (b) Can a person be an earner as a shareholder-employee if the company has earnings based on the person’s services, but the person does not receive income from the company?

### **Discussion**

[32] Mr Hinchcliff’s submission is essentially based upon s 15 of the Act, as applied in the judgment in *Hamilton* (noted above). Section 15 governs the assessment of earnings as a shareholder-employee of a company. Section 15(2) outlines the earnings of the shareholder-employee as reflected in income tax

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<sup>9</sup> *Hamilton* cited n6 above.

documents. Section 15(3) governs the assessment of earnings as a shareholder-employee if the Corporation decides that section 15(2) amount is not a reasonable representation of the person's earnings as a shareholder-employee in the relevant tax year.

[33] In *Hamilton*, Justice Edwards noted that the meaning of section 15 is to be ascertained from its text and in light of its purpose, and, in determining purpose, the court must have regard to both the immediate and general context.<sup>10</sup> In *Hamilton*, the appellant received considerable PAYE earnings and a shareholder-employee salary from a profitable company. Based on this information, the Corporation paid a substantial amount to the appellant by way of compensation. However, the Corporation's subsequent investigation led the Corporation to the conclusion that the appellant's earnings did not reflect her reasonable remuneration or true services to the company, in view of the appellant's complete control over the assets of the company. As a result, the Corporation abated Mrs Hamilton's weekly compensation payments, resulting in her receiving no further payments, and signalled an intention to recover overpayments made.<sup>11</sup>

[34] The case of Mr Simpson stands in clear contrast to the facts of *Hamilton*. Mr Simpson, having worked as a shareholder-director of a company, was certified as unfit to work for the period from 21 November 2019. He asserted that the work that he had done for the company would be a minimum of \$80,000 per year. However, the uncontradicted evidence of the company's financial and income tax records showed that, in the tax years 2017-2019, the company operated at a significant loss each year, and that Mr Simpson was not allocated, nor did he declare, any earnings from employment in these years. The Corporation's internal Technical Accounting Specialist, Ms Roets, reviewed the financial and tax information provided. She drew the conclusion that, if a client, in the years prior to his incapacity, freely chooses to forgo a shareholder salary from his loss-making company and did not suffer an incapacity injury, he would likely again have chosen to forgo a shareholder's salary in the year of incapacity. Ms Roets recommended that the Corporation accept nil

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<sup>10</sup> At paragraph [27].

<sup>11</sup> At paragraphs [7]-[13].

earnings for the 2019 tax year and, as such, advised that Mr Simpson was not entitled to weekly compensation.

[35] It is accepted by the Corporation that Mr Simpson should be classed as an earner, for the purposes of the Act. However, the reference in section 15(2) to “the amount” of the shareholder-employee’s earnings clearly presupposes that he or she received some income to qualify for weekly compensation. After all, the clear intention of the Act is that the provision of weekly earnings is to compensate an employee for loss of earnings brought about as a result of personal injury. As found in a clear line of judicial authority, where an appellant has no earnings as an employee, there is therefore no loss of earnings as a result of his incapacity.<sup>12</sup> It was within this legal framework that Judge McGuire was unable to find anything in the Act that would allow for weekly compensation to be paid to a shareholder-employee, such as Mr Simpson, who had earned nothing in the years preceding the incapacity.

[36] In light of the above considerations, this Court finds that there is no mistake of law evident in Judge McGuire’s judgment, and therefore the questions posed by Mr Hinchcliff do not reasonably arise from this judgment for consideration by the High Court.

### **The Decision**

[37] Mr Simpson has not established sufficient grounds, as a matter of law, to sustain his application for leave to appeal, which is accordingly dismissed. Mr Simpson has not established that Judge McGuire made an error of law capable of *bona fide* and serious argument. Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources. This Court is not satisfied as to the wider importance of any contended point of law.

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<sup>12</sup> See above *Truscott, Rowe and Pratley*, as cited in footnotes 3, 4 and 5.

[38] There are no issues as to costs.

A handwritten signature in black ink, appearing to read "P R Spiller". The signature is written in a cursive, flowing style with a large initial "P" and "R".

P R Spiller,  
District Court Judge