IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 202 **ACR 272/20**

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

Submissions: The Appellant is self-represented
D Russ for the Respondent

Hearing: On the papers

Judgment: 20 October 2022

JUDGMENT OF JUDGE P R SPILLER
[Leave to Appeal]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour Judge McGuire, delivered on 19 May 2022.[1] At issue in the appeal was whether the Corporation's decision of 30 October 2019, on the calculation of Mr Black's entitlement to weekly compensation, was correct. The Court dismissed the appeal, for the reasons outlined below.

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1 *Black v Accident Compensation Corporation* [2022] NZACC 94.

Background

[2] On 25 January 1997, Mr Black was the victim of an assault. He suffered serious head injuries and was hospitalised. It is accepted he was incapacitated from the date of injury.

[3] On 31 January 1997, because Mr Black was unable to communicate, his father, on his behalf, completed an application for entitlement to weekly compensation, transport costs and treatment costs. His father listed Canterbury Cartons as Mr Black's employer.

[4] On 5 February 1997, Canterbury Cartons Limited completed an employee earning certificate. The certificate noted that Mr Black started with Canterbury Cartons Limited on 14 October 1996 as a full-time employee and that, if it were not for the injury, he would have continued to receive earnings for another 52 weeks.

[5] On 7 February 1997, Mr Black's father made a call to the Corporation. The note of the call reads:

> Father rang for Jeremy. He is off work and queried for weekly compensation. They completed forms at the hospital with case manager. I advised I would request the file and send an ARC/3 to Jeremy's employer. Jeremy has another ARC/18 and they will post this in. IP (injured person?) is residing in Rolleston. Employer Canterbury Cartons Co Ltd 122 Antigua St, ChCh. DOI 25-1-97 according to father.

[6] The Corporation file contains a short-term assessment of weekly compensation dated 12 February 1997, effective from 1 February 1997 to 28 February 1997, and a long-term assessment of weekly compensation, effective from 1 March 1997 to 18 April 1997.

[7] On 12 February 1997, the Corporation issued a decision on weekly compensation assessment, advising Mr Black that his short-term and long-term gross weekly rates were $413.13 and $339.01 respectively.

[8] On 2 June 1999, the Corporation noted that an internal audit had identified errors in the calculation of Mr Black's weekly compensation and, as a result, the Corporation credited his bank account with a difference on Monday 19 July 1999.

[9] In 2016 or 2017, Mr Black requested and received his Corporation file and began enquiring about the calculation of his weekly compensation payments.

[10] From 19 April 2018, there were numerous communications between Mr Black and the Corporation. In its correspondence with Mr Black, the Corporation set out the way in which it had carried out the calculations for weekly compensation, and noted that it was based on employment with Canterbury Cartons Limited where he had commenced full time employment on 14 October 1996. The Corporation noted that Mr Black had worked a total of 15 weeks before his injury on 25 January 1997 and set out various calculations of how the weekly compensation calculation was reached.

[11] On 21 December 2018, Mr Black provided an IRD earning summary for the years commencing 1 April 1990 through to 31 March 1999. For the tax year ended 31 March 1996, Mr Black received accident compensation corporation claimant's compensation of $3,347.89, income support service benefits of $3,887.36, and income from Kiwi Packaging Limited of $619.65. For the following tax year ended 31 March 1997, Mr Black received accident compensation corporation claimant's compensation of $2,406.84, New Zealand income support service benefits of $4,471.16, income from New Zealand Carton Company Limited of $6,558.65, and income from AC Body in JEK Peters of $642.50.

[12] On 30 October 2019, the Corporation issued a decision that Mr Black be paid arrears of $60,446.70. On 1 November 2019, Mr Black sought review of the Corporation's decision.

[13] The Corporation sought information from Kiwi Packaging and Mr Black to clarify the time period during the tax year ended 31 March 1996, that he worked for Kiwi Packaging Limited.

[14] The matter was considered by the Corporation's weekly compensation discussion panel (the Panel), who issued comment on 22 July 2020. The Panel referred to two prior accidental injuries claimed by Mr Black that saw him paid weekly compensation from 11 April 1995 to 17 April 1995 and 30 April 1995 to

30 July 1995. The only income disclosed for the purpose of those payments was that from Kiwi Packaging. The Panel concluded that Mr Black could have qualified for the level of payments that he received only if income in the 1996 tax year had been earned in April 1995 well before the commencement of the critical 12-months period preceding his injury on 25 January 1997. Mr Black was advised by the Corporation that, if he were able to supply information which would enable the period of earnings for Kiwi Packaging Limited to be determined, the Corporation would reinvestigate the matter.

[15] On 8 October 2020, review proceedings were conducted. On 5 November 2020, the Reviewer dismissed the appeal on the basis that there was insufficient evidence that Mr Black was employed at Kiwi Packaging and was an earner for the period between 25 January 1996 and 24 January 1997, and so the Corporation's calculation of his weekly compensation was correct. On 21 December 2020, Mr Black lodged an appeal against this decision.

[16] On 28 April 2022, Mr Black's appeal was heard by Judge McGuire. On 19 May 2022, Judge McGuire dismissed the appeal for the reasons outlined below.

[17] On 28 May 2022, Mr Black sought leave to appeal the Court's decision.

Relevant law

[18] 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.

[19] In *O'Neill*,[2] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:
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> (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 …;

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2 *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

(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 … .

The Court's judgment of 19 May 2022

[20] Judge McGuire noted that while the issue on appeal was whether the Corporation's calculation of Mr Black's weekly compensation was correct, the specific focus of the appeal was on whether the amount of $619.65, earned by Mr Black from Kiwi Packaging Limited during the tax year 1 April 1995 to 31 March 1996, should be included in the Corporation's calculation of weekly compensation payable to Mr Black following his injury on 25 January 1997.

[21] Judge McGuire noted that the Inland Revenue summary provided on 21 December 2017 disclosed that Mr Black worked for Kiwi Packaging Limited as follows:

- for part of the year ended 31 March 1992, earning $7,291.12;
- in the year ended 31 March 1993, earning $10,279.41; and
- in the year ended 31 March 1995, earning $9,501.40.

[22] Judge McGuire added that such records that the Corporation had been able to find disclosed that, in the tax year ended 31 March 1996, Mr Black earned a total of $619.65 from Kiwi Packaging Limited.

[23] Judge McGuire noted that section 40 of the Accident Rehabilitation and Compensation Insurance Act 1992 provided that entitlements to weekly compensation were based on the person's earnings in permanent employment for the 52 weeks immediately before the commencement of the incapacity. The enquiry was whether or not Mr Black earned the $619.65 from Kiwi Packaging Limited during the period 25 January 1996 (12 months prior to the injury) to 31 March 1996, in which case, it would be included in the calculation of weekly compensation, or whether it was earned prior to 25 January 1996, in which case it would be excluded from weekly compensation consideration.

[24] Judge McGuire observed that, because of the paucity of information that was available now, relating to the relevant period for calculation of Mr Black's earnings for weekly compensation (for the period 25 January 1996 to 24 January 1997), the Corporation had made attempts, conscientiously and in good faith, to understand what occurred back during that period.

[25] Judge McGuire noted that, in a memorandum dated 26 June 2019, Mr Palmer, Technical Specialist of the Corporation, recommended that enquiries be made as to whether Kiwi Packaging still existed and whether it still held any earnings information from 1996 and 1997. However, Judge McGuire noted that no such information became available, and that Mr Palmer said:

> In the absence of information from Kiwi Packaging Limited, it is difficult to ascertain whether the $619.65 earned between 1 April 1995 and 31 March 1996 on the Inland Revenue record lies within the relevant earnings period of 25 January 1996 to 24 January 1997.

[26] Judge McGuire recorded that the matter was referred to the Corporation's Weekly Compensation Discussion Group, and its recommendation of 22 July 2020 included the following:

> ... The weekly compensation discussion group has been asked to consider this issue again, following conciliation and following a code complaint finding.
>
> The weekly compensation discussion group noted that the client received weekly compensation on two prior accidental injury claims. On Claim B1502729007, the client was paid compensation from 11 April 1995 to 17 April 1995 (gross weekly compensation of $335.70 per week); on Claim B1502729008, the client was paid weekly compensation from 30 April 1995 to 30 July 1995 (gross weekly compensation of $301.97 per week from 30 April

> 1995 to 26 May 1995 and gross weekly compensation of $200.48 per week from 27 May 1995 to 30 July 1995).
>
> The information from Inland Revenue department shows that the only earnings as an employee the client had in the 1996 tax year were the earnings from Kiwi Packaging of $619.65. The weekly compensation discussion group concluded that the client could only have qualified for weekly compensation on Claim B1502729007 and Claim B1502729008 by virtue of his earnings from Kiwi Packaging, they being the only earnings as an employee the client had in the 1996 tax year. This would place the client's earnings from Kiwi Packaging in and around April 1995, well before the period 27 January 1996 to 24 January 1997.
>
> Given that the amount paid to the client by Kiwi Packaging was $619.65, and given the weekly compensation rates paid to the client by ACC in 1995, these earnings are very likely to have been for a matter of a number of weeks' work, not a matter of a number of months' work. That is, it is not considered likely the earnings were earned in April 1995 and then at some date on or after 27 January 1996.

[27] Judge McGuire found that given the extremely scant information available, the Panel's conclusion was not unreasonable.

[28] Judge McGuire noted that the information available also invited the inference that Mr Black, having earned a total of $9,501.40 working for Kiwi Packaging Limited in the year ended 31 March 1995, was working for Kiwi Packaging at the end of that 1995 financial year and continued this employment into April 1995 until he received the injury for which he was then paid weekly compensation commencing 11 April 1995.

[29] Judge McGuire recorded that the calendar for 1995 showed that, between the beginning of the month and the 11th of the month, the date on which weekly compensation was first paid, there were six weekdays available for work assuming a five-day working week. The amount that Mr Black was actually paid by way of weekly compensation for the period commencing 11 April 1995 was $335.70 per week representing 80% of weekly income. On these figures, Mr Black's weekly income would have amounted to $419.62 per week. For reasons that were now unclear, there was a break in weekly compensation from 17 April until 30 April 1995 when it commenced again and continued until 30 July 1995. Judge McGuire observed that these figures would mean that the total amount earned by Mr Black

from Kiwi Packaging Limited of $619.65 for the year ended 31 March 1996 would equate to approximately a week and a half's full-time employment.

[30] Judge McGuire found that it followed that he agreed with the Weekly Compensation Discussion Group's view that it was likely that the earnings totalling $619.65 (or at least most of those earnings) were earned in April 1995 (to qualify Mr Black for weekly compensation) which then commenced on 11 April 1995.

[31] Judge McGuire acknowledged that, although Mr Black passionately believed otherwise, he (Judge McGuire) was unable to agree, and, on the evidence that was presently available, no other conclusion was plausible. Accordingly, His Honour dismissed the appeal.

Discussion

Evidential standard of proof?

[32] Mr Black main submission is as follows. Judge McGuire applied the wrong evidential standard, placing a high burden on him but not on the Corporation. Judge McGuire did not take into account the fact that the Corporation repeatedly failed in its duty to him and was shown to have negligently managed his claim. Those historic failures compromised his ability to meet the evidence standard which the Court has applied. The Corporation cannot benefit from its own negligence in incorrectly obtaining and assessing the evidence which would have been available to the Corporation in 1997, between 1997 and 1999, and between 1999 and 2019.

[33] Mr Black, as an appellant in the District Court, was required to establish, on a balance of probabilities, that the calculation of his weekly compensation by the Corporation was wrong. In *Jackson*,[3] Priestley J referred to the need for a claimant/appellant to establish a nexus (link) between the evidence and the claim being brought, and noted that the claim/appeal will not succeed if the evidence falls short of establishing a nexus on the balance of probabilities.

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[3] *Jackson v Accident Compensation Corporation*, High Court, Auckland, AP404-96-01, 14 February 2002, at [39].

[34] This Court accepts that Mr Black faced difficulties in establishing that the Corporation's calculation of his weekly compensation was incorrect. Of significance here was the considerable time gap between the Corporation's calculation as finalised in July 1999 and the records of Mr Black's enquiries about the calculation some 17 years later.

[35] There is no indication from Judge McGuire's judgment that His Honour departed from the required evidential standard of proof as confirmed in *Jackson*. Judge McGuire carefully scrutinised the evidence made available to the Court. His Honour referred to the extremely scant information available to sustain Mr Black's claim, and observed that the conclusion reached by the Corporation on this information was the only reasonable/plausible conclusion that could be reached (see paragraphs [52], [58] and [59] of the judgment).

[36] This Court finds therefore that Judge McGuire did not make an error of law in relation to the evidential standard of proof applicable to Mr Black's appeal.

Corporation's breach of mediation agreement, negligence and/or breach of a statutory duty owed to Mr Black?

[37] Mr Black further submits that the Corporation breached the key provision of a legally binding mediation agreement in which he and the Corporation agreed how it would reassess the evidence on historic earnings information. Mr Black submits that he acted in reliance on an agreement which the Corporation has not honoured.

[38] Judge McGuire was required to decide whether the Corporation's calculation of Mr Black's entitlement to weekly compensation, was correct. In so doing, Judge McGuire noted that the Corporation's Weekly Compensation Discussion Group was asked to consider Mr Black's issue of compensation again, following conciliation and following a code complaint finding. Judge McGuire observed that this Group did indeed reconsider Mr Black's compensation issue. His Honour then outlined the Group's findings and found that its conclusions were not unreasonable. This Court notes that Judge McGuire's finding in this regard was one of fact that he was entitled to make.

[39] This Court finds therefore that Judge McGuire did not make an error of law in relation to Mr Black's mediation/conciliation agreement.

Effect of Mr Black's injuries?

[40] Mr Black also submits that the dispute process and hearing process failed to take into account all of his injuries (sleep disorder and mental injury) and aggravated these injuries. He submits that these injuries made it harder for him to obtain and keep legal counsel and compromised his ability to have a fair hearing.

[41] At the review hearing, Mr Black provided a joint written statement of himself and his wife, and submissions were made on his behalf by his advocate Mr Duncan. The Reviewer, in the review decision, expressly took into account the evidence of Mr Black and the submissions made by his advocate. At the appeal hearing, Mr Black represented himself. Judge McGuire recorded the submissions made by Mr Black (at paragraphs [27]-[33]) and noted in conclusion that he "passionately believed" in his entitlement to more weekly compensation (at paragraph [59]).

[42] This Court deduces from the above facts that Mr Black was provided, and took, the opportunity to present his evidence and submissions in support of his claim and appeal, and that his evidence and submissions were taken into account by both the Reviewer and Judge McGuire.

[43] This Court can discern no error of law made by Judge McGuire in this regard.

The Decision

[44] In light of the above considerations, the Court finds that Mr Black has not established sufficient grounds, as a matter of law, to sustain his application for leave to appeal, which is accordingly dismissed. Mr Black 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.

[45] There is no issue as to costs.

Judge P R Spiller,
District Court Judge