

Edmund Chalecki
Appellant

**ACCIDENT COMPENSATION
CORPORATION**
Respondent

Before:	D J Plunkett
Counsel for the Appellant:	W Forster, T Barraclough
Counsel for the Respondent:	I Hunt
Date of Hearing:	9 December 2014
Date of Decision:	4 February 2015

DECISION

INTRODUCTION

[1] This is an appeal by Edmund Chalecki against the decision of a review officer on 22 October 2013.

[2] Mr Chalecki injured his back working as a builder more than 30 years ago. At the time of his injury, he had a small hobby farm running pigs. He was unable to work effectively as a builder after the accident, so he received earnings-related compensation from the respondent Corporation. Accordingly, he built up the farm as the appropriate form of rehabilitation in order to become independent of the Corporation.

[3] A self-employment grant from the Corporation was sought. While this was eventually declined, Mr Chalecki put considerable money into the farm, even buying a bigger farm in an attempt to become self-sufficient. He was never able to do so and incurred considerable expenses and losses in his attempt to become self-sufficient. He now seeks to recover those costs or losses, or at the very least

the self-employment grant to which he says he is entitled.

[4] The essential issues for me are whether Mr Chalecki has ever made a claim, other than recently, for specific costs or losses and whether he had at any time a feasible plan to become self-sufficient from his farming operations.

BACKGROUND

[5] On 23 November 1984, Mr Chalecki injured his back lifting steel and corrugated iron when working as a builder for a hospital board. He was not able to undertake heavy lifting work again or even to sit or stand for long periods. He was effectively unable to work as a builder, though he did resume some building work in 1985. This did not last long, as he was certified unfit for work from 29 July 1986 (see Financial Documents file at 004).

[6] A claim for coverage under the accident compensation scheme had earlier been accepted by the Corporation and his ongoing treatment costs accordingly paid. Additionally, from July 1986 he received earnings-related compensation ("ERC"), based on his work as a builder and, as far as I am aware, continues to receive it.

[7] At the time of the injury, Mr Chalecki had a small hobby farm with pigs.

[8] According to Mr Chalecki, the Corporation did not have a rehabilitation officer on the West Coast of the South Island until 1987. The newly appointed officer visited him at his home on 17 December 1987. In her memorandum of 22 December to the district manager, she said she expected Mr Chalecki to make a decision as to whether he would put everything into self-employment (the farm) or work or perhaps do both. He said he wanted to become self-sufficient on the farm but all the money being made was being returned to it.

[9] The officer's memorandum stated that Mr Chalecki was interested in becoming self-sufficient with pigs, chickens and perhaps horticulture, such as lettuces and cabbages in raised beds. She reported to the manager that if he was still interested in the New Year, she would return and go through it thoroughly with him. She would see if he still wanted financing and how far he had progressed with his proposal.

[10] Mr Chalecki duly completed the 'Fit for Selected Work' form left with him by the officer and returned it to the Corporation, bearing the date 17 December (though it is clear from his annotations that it was sent later). He advised what he

had done to seek work and, in respect of “alternative work”, he was in the process of making the farm work more easily manageable.

[11] The rehabilitation officer visited Mr Chalecki again on 4 February 1988, recording this visit in a memorandum to the manager on 5 February. She said that he had no definite ideas about his future and was thinking of doing a correspondence course on pig raising and possibly horticulture. He intended to approach the Pork Board for a feasibility study and might even shift to Canterbury where farms were cheaper. He did not want to do this for the following two or three years because he felt his house (which was not situated on the small farm) would rise in value. The officer recorded that she would like to see him start an access course to get into the routine of working five days a week. She would put this to him and would follow it through over the following few months.

[12] The officer left another form with Mr Chalecki, who completed it on 23 February. He advised that he intended to visit (or had visited) the regional development council to obtain a grant for a feasibility study for full-scale pig farming.

[13] Mr Chalecki completed further forms for the Corporation on 21 March and 12 April. In the latter, he advised that he had attempted to purchase another farm, but somebody else had bought it.

[14] The rehabilitation officer had visited Mr Chalecki on 7 April 1988, as recorded in her memorandum to the manager on 14 April. She advised that he had looked at pig farming on the West Coast and in Canterbury but felt that he would have to borrow too much money for the venture to become self-sufficient. He would investigate making white moccasins for the Japanese market and selling them on the Nelson wharf to Japanese boats. Mr Chalecki had also thought of a work training programme in milking cows because he could still see a future for himself on the farm. If everything went well, she thought that the Corporation should offer him a contribution towards petrol as the dairy farm where he trained could be some distance away. She would obtain particulars on a milking venture and would put it to him.

[15] Further forms were completed by Mr Chalecki on 18 May and 9 June. In the first one, he advised that the Ministry of Agriculture and Fisheries was doing a feasibility study for him on setting up glasshouses for horticulture. In the later one, he said he had contacted the New Zealand Poultry Board concerning the sale of eggs.

Possible self-employment grant

[16] In a further memorandum to the manager on 27 June 1988, the rehabilitation officer recorded a telephone conversation with Mr Chalecki on 15 June. She said she would like him to attend a polytech pre-course meeting, as all his self-employment ideas had not come to fruition. However, he had expressed concern about leaving his pigs unsupervised and a lack of transport. She had pointed out to him that he would be making himself unavailable for rehabilitation if he did not attend. In a conversation on 17 June, Mr Chalecki had said it would be a while before he bought hens because the levy was going to be reduced or abolished.

[17] In the memorandum of 27 June, the officer recorded offering a self-employment grant of up to \$5,000, after submissions and a feasibility study. She told Mr Chalecki he would stay on full ERC for six months, which would include reinstating the 10 per cent being deducted "off his pigs ERC". The following three months would then be at 60 per cent (of the ERC at 80 per cent), then three months at 40 per cent. The deduction would be made regardless of his income from the pigs for that 12-month period. The Corporation would remain responsible for his medical expenses. Mr Chalecki responded that he would not accept the proposal and that his lawyer had said the Corporation could not stop payments to him if he did not attend the polytech course. The memorandum recorded that he attended the pre-course meeting.

[18] There is another memorandum from the rehabilitation officer to the manager on 30 June 1988, following a meeting the previous day. A "final" decision was made that Mr Chalecki had to produce a feasibility study showing the hens to be a worthwhile venture, or he would have to attend the polytech course. This had been agreed. There is a handwritten annotation from the officer stating that if he attended the course, he would receive the "full 80 per cent of ERC for his pigs". The annotations added that if he applied for the self-employment grant of \$5,000, he would have full ERC for six months (based on his carpentry pay) and then 60 per cent for three months, followed by 40 per cent for three months.

[19] A visit from the rehabilitation officer to Mr Chalecki on 27 October 1989 is recorded in a memorandum to the manager on 16 November. Mr Chalecki had decided to look at free run hens to supply eggs while running down the pig farming. As for a self-employment grant, he was informed that it would be necessary for him to have a cash flow feasibility study before the Corporation could consider a grant. The officer recorded that she would contact him within a

few weeks to see what decision he had made and if he required the grant, she would forward the necessary forms to him.

[20] A further visit on 20 November 1989 was recorded in a memorandum to the manager of 1 December. Mr Chalecki was still looking at chickens and "Hydro Glass Housing". He was also thinking of approaching a local gold dredging operation and seeking work.

[21] There was another visit from the officer on 8 February 1990, recorded in a file note dated 16 February. Mr Chalecki had bought another 200 hens which were laying well and was looking at selling his pigs, in order to increase the hens. This was more profitable and easier to run than pigs. He thought this was a more viable proposition and he was wondering if he was eligible for a self-employment grant to help him put up a further shed for the hens. The officer recorded that she would look at this and get back to him but would require a "cash flow etc" from him.

[22] A record was made of a telephone call between the rehabilitation officer and Mr Chalecki on 12 July. He advised that he would be shifting in August to another farm on the West Coast and would be increasing the number of free range chickens from 400 to about 2,000. He again enquired about a self-employment grant to help him set up the egg farming and was advised that he would need a "[projected] cash flow, viability and feasibility study".

[23] The officer visited Mr Chalecki on 17 July, as recorded in a file note of 25 July. He advised that he was due to shift to another house, regardless of whether or not he sold his present house. His proposal for self-employment centred around the new farm because he hoped to increase the chickens from 500 to 2,000. He envisaged a clear profit of about \$17,000 annually, but would still need a \$5,000 grant. The officer recorded having asked him for submissions in the past which had not been sent. Mr Chalecki said that he had posted them two weeks previously but they must have been lost in the mail.

[24] Mr Chalecki provided a report dated 18 December 1990 from "Pigtech". It set out details of the budget, financial assumptions, income and expenses and gross margin for pig farming. It was a detailed report dealing with breeding and fattening weaners. It showed gross margins of the order of \$21,000 to \$26,000, based on around 500 pigs.

[25] Another visit from the rehabilitation officer on 28 February 1991 was

recorded in a file note of 8 March. Mr Chalecki presented a cash flow which the officer described as a costing in relation to chickens, rather than a proper cash flow. She explained to him what was required for a self-employment grant and had again given him all the forms. He was finding it very difficult to set up as the house had still not been sold and was only being rented out. An undated handwritten one page document headed "Proposed Egg Producing Operation", showed a profit of approximately \$19,000, based on 2,000 birds.

[26] The officer visited again on 11 April, as recorded in a file note on 17 April. Mr Chalecki had still not prepared the cash flow for his egg farming venture required for the self-employment grant, but he hoped to have it in a few weeks. He was going ahead with a lot of development on borrowed money, the officer noting that the amount borrowed was far larger than the grant could ever be.

[27] There was a telephone discussion with a client officer of the Corporation on 22 August 1991. Mr Chalecki stated that he was not happy with the rehabilitation officer as he had not been given all the relevant information needed for the grant. He wanted an officer from another district. He was in a financial bind at that time as he had borrowed money for more land and had not been able to sell his house.

[28] There is a four-page handwritten proposal from Mr Chalecki concerning a possible egg producing operation, which appears to have been provided in about September or October 1991. It duplicated the one page document handed over earlier and added three pages with detailed costing. On the basis of 1,600 birds, Mr Chalecki estimated just over \$14,000 in profit before tax.

[29] There is a statutory declaration from Mr Chalecki (dated 2 October 1991). He declared being the half-owner of a residence which was on the market, as well as the half-owner of another property in which he resided. That second property had been purchased with a bridging loan and he had also borrowed \$20,000 from a savings bank to develop a poultry unit, in order to become self-employed. Once the first property had been sold, the proceeds of sale would be used to pay off the bridging finance and the \$20,000 loan. He declared that he had no involvement in any other businesses nor shares in any companies nor interest in any other property.

[30] The Corporation sent the information concerning the poultry farm to a firm of accountants in Greymouth, Devlin Wilding & Co. This firm had previously been the accountants for Mr Chalecki but were not retained by him at that time. A form (undated) completed by Mr Chalecki at about the same time set out his

employment background, relevantly stating that he had 10 years' experience breeding pigs and then had a few hundred free-range chickens.

Accountant's feasibility report

[31] The report from Mr Gunn at Devlin Wilding & Co provided to the Corporation is dated 6 March 1992. It recorded that the firm had been instructed to assess an application for financial assistance of \$5,000 to enable Mr Chalecki to become self-sufficient. His proposal was to establish a free-range poultry farm, commencing with 1,600 laying hens and building it up to 2,000 hens. He also intended to breed pigs for the local market for additional income. There was already a substantial poultry shed on the property, in which he had 900 laying hens purchased from his own resources. He wished to apply the grant of \$5,000 to establish a chick-rearing shed, which would cost \$5,000 (\$2,000 for timber and \$3,000 for labour).

[32] The accountant considered that, given Mr Chalecki's experience and obvious determination to become self-reliant, the proposal was feasible. The poultry farm would be viable in its second year of operation. There would be a net profit of "about \$25,145". The projected revenue and itemised expenses for Year 1 (but not the subsequent years) are detailed in the documentation made available to me, showing a projected net profit before depreciation of \$11,645. Mr Chalecki had advised the accountant that he was physically capable of maintaining the day-to-day operation. Mr Gunn recommended that the grant of \$5,000 be made to Mr Chalecki for the establishment of the chick-rearing shed. Furthermore, his ERC should be continued for a minimum of six months to allow for the establishment of the poultry unit. In his view, the Corporation should also consider a vehicle grant. As to the latter, I observe that the matter of a vehicle grant is not an issue before me.

[33] There is a dispute about whether Mr Chalecki was given this report at that time. I accept his evidence that he was not provided with the report at the time it was produced and did not see it until early 1994 (see his affidavit sworn 11 August 2014, consistent with the Corporation's file note of 22 June 1992). The undated file summary suggesting otherwise (at p097 of the Bundle of 8 April 2014) is vague and is not contemporary with the events recorded. The reference to Mr Gunn's statement of expenses in the file note of 11 March 1992 (p073 of Bundle) does not persuade me that the formal report was the subject matter of a discussion with Mr Chalecki around that date.

[34] On 11 March 1992, a different rehabilitation officer recorded in a file note her "initial suggestion" in relation to the proposal for a self-employment grant. The proposal was that Mr Chalecki would continue to receive ERC at 100 per cent for six months, reducing by one third at the end of that period and also at the end of each six months for the following 12 months. Mr Chalecki would not accept this. He said that he had been in a lot of pain and felt that he may not be able to become self-sufficient within the two-year time frame. According to the officer, he wanted to stay on full ERC, with the Corporation to find him a job. He had said he was prepared to become as independent as possible but because of his chronic pain, he was wary of the termination of his entire ERC after two years.

[35] The officer's further proposal, as recorded in the file note, was that on acceptance of the self-employment grant of \$5,000 (and a car grant of possibly \$4,000), Mr Chalecki's ERC would immediately reduce by 20 per cent. At the end of six months, it would reduce by a further 20 per cent, then at the end of 12 months by a further 40 per cent.

[36] The rehabilitation officer made a file note on 23 March 1992 stating that Mr Chalecki had decided that he was unable to accept the proposal until his house was sold. He owed too much money to have his ERC cut in any way.

[37] There was another visit by a rehabilitation officer, as recorded in a file note on 16 May. The officer recorded that the self-employment farming venture involved pigs and chickens, but that Mr Chalecki had said that he received a more consistent income from chickens than pigs. He required a renovated chicken shed and a milking shed to produce milk to feed the pigs. Mr Chalecki was advised that the closer his request was to \$5,000 the more quickly it could be processed. He was also assured that his ERC would not be reduced until he showed an earning capacity.

[38] On 22 June, Mr Chalecki telephoned a client officer at the Corporation enquiring as to the delay concerning his self-employment project. He was advised that the Corporation was waiting for a report from Devlin Wilding before consideration could be given to his rehabilitation. This file note confirms to me that Mr Chalecki, along with the officer he had spoken to, had not seen the accountant's report which had already been produced in March.

[39] The rehabilitation officer phoned Mr Chalecki on 3 July 1992, recording the conversation in a file note of the same date. She advised him that the Corporation would not accept his self-employment proposal, as it was too much money to pay

out with no foreseeable reduction in ERC. She would like to look at further treatment options and would pay for his travel and treatment costs. Mr Chalecki explained that he had just increased his overdraft and had 400 chickens arriving the following day. He was not prepared to leave as he did not want to lose one chicken. He was told that after 1 July he may have no option but to consider further treatment (the relevance of this date being that the new accident compensation legislation of 1992 had come into effect then). He said he was suffering from pain caused by earlier rehabilitation and asked for further claim forms.

[40] The Corporation wrote to Mr Chalecki on 12 August 1992 advising that those in receipt of a vocational rehabilitation allowance, as he was, had to be on an approved individual rehabilitation programme. The aim of the programme was to increase independence from the Corporation within one year. He was now required to develop such a programme. A further letter was sent to him on 13 August requiring a programme, the overall goal of which was reduced dependency upon the Corporation. It would have to set out intermediate goals, if compensation was to continue. He could develop his own programme if not happy with that of the Corporation.

[41] The rehabilitation officer made a file note on 25 August. She had begun working on a vocational rehabilitation programme, but Mr Chalecki had continued to be negative towards all rehabilitation assistance. He had always turned down the Corporation's proposals regarding self-employment. His requests for financial assistance were in excess of what the Corporation was prepared to pay. He received a "fully unfit work certificate", yet he milked eight cows twice a day and cared for 400 chickens, intending to have 800 chickens within six months. He additionally cared for pigs. Despite being self-employed on the farm, there was no reduction in his weekly compensation. The officer commented that Mr Chalecki was not prepared to increase his independence from the Corporation.

[42] Also on 25 August, in a memorandum to another officer, the rehabilitation officer recorded that as Mr Chalecki had failed to come up with a rehabilitation programme, all payments should cease until he had prepared a programme.

[43] On 26 August, the Corporation advised Mr Chalecki that it was entitled to stop rehabilitation assistance and compensation if a person refused to develop a rehabilitation programme. Accordingly, his vocational rehabilitation allowance was in jeopardy. He was invited to give reasons for his failure, otherwise consideration would be given to ceasing compensation.

[44] According to a file note, Mr Chalecki spoke to a client officer on 28 August. She advised him that he was responsible for his own rehabilitation and that the reasons for his failure to develop a programme had to be submitted by 9 September.

[45] Mr Chalecki then submitted a one page "Projected Income for Poultry/Pig Farm Operation" on 1 September. Based on 800 chickens and six sows, there was a projected net profit before depreciation of \$4,000. He would also milk eight cows in order to feed the pigs. In the second and subsequent years, the net profit would be \$10,800. In the same document, Mr Chalecki advised that he was presently repaying a loan to build the poultry sheds. He required reinvestment to replace and improve the pig housing to a more permanent low maintenance facility, which was less labour intensive for feeding and cleaning.

[46] The Corporation wrote to Mr Chalecki on 30 September advising that it had considered his projected income sheet and the accounts submitted by his accountant. The letter enclosed a copy of his individual rehabilitation programme and he was advised that if he was dissatisfied with it he could submit one of his own, with the aim being independence from the Corporation. The Corporation's plan showed the long-term goal being independence "with regards to his secondary employment compensation within 10 months". The intermediate goals were a reduction of secondary weekly compensation by 30 per cent on 30 October 1992, and then progressively up to 100 per cent on 30 July 1993.

[47] Mr Chalecki replied on 6 October 1992, with his own plan. He advised that he did not expect to achieve 100% independence in his secondary employment within 10 months. He maintained his present farming operation with the help of his father and wife, although he hoped to be able to cope with more of the workload in the future, once the animal housing had been developed. He did not envisage complete independence in his secondary employment for a long time, if at all. He pointed out that he had been unemployed for approximately seven-and-a-half years and had cooperated with the Corporation's efforts to rehabilitate him. He had come to the conclusion that employing himself in the manner which he had undertaken was the only way of becoming semi-independent financially from the Corporation.

[48] In the plan, Mr Chalecki set out his long-term goal as becoming as independent as possible with regards to his secondary employment compensation. His intermediate goals were a reduction in the secondary weekly compensation by 25 per cent by 1 June 1993, with further reductions leading up to 65 per cent by

March 1994.

Corporation decision on self-employment grant

[49] On 14 April 1993, the Corporation wrote to Mr Chalecki advising that it was unable to accept his request for a self-employment grant. This confirmed verbal advice given on 3 July 1992. According to the relevant legislation, the Corporation had the responsibility of restoring an injured person to the fullest vocational and economic usefulness of which they were capable. The “guideline” set out the circumstances in which the Corporation could give such assistance. The purpose of the assistance was to promote opportunities for financial independence through self-employment. Furthermore, ERC would continue for a period to enable the injured person to become established in self-employment.

[50] The Corporation wrote to Mr Chalecki on 21 April advising that it accepted the individual rehabilitation programme that he had presented on 6 October. The intermediate deductions he had set out would be made.

[51] In reply, Mr Chalecki wrote on 26 April advising that he had not proceeded with the programme because of the absence of the Corporation’s consent to his goals. His letter presented a new set of deductions, starting with 25 per cent by 1 December 1993 and leading to 65 per cent by September 1994.

Review of Corporation’s decision sought

[52] On 27 April 1993, Mr Chalecki sought a review of the Corporation’s decision of 3 July 1992, notified to him by post on 14 April 1993, to decline a rehabilitation grant in order to help him establish a self-employed farming operation. He advised that several years previously he was told that he was basically a labouring person but due to the injury would no longer be able to cope with that type of work. The Corporation had never properly assessed his vocational or economic usefulness. He personally went over all the options available to find one suitable, even unsuccessfully applying for jobs. He came to the conclusion that self-employment as a farmer was his only option, as he had been farming part-time prior to the accident.

[53] However, due to his injury, Mr Chalecki said he realised that the farm had to be less labour intensive and therefore required increased capital to establish it. He had sold the smaller piece of land and the family home, to buy a larger property. He had done this to increase the stock of laying hens from 50 to 1,000 and setting them up in laying cages. He also wished to have a few cows to feed

the pigs.

[54] According to the review application, Mr Chalecki said he had used his own money and personal loans. When he approached the Corporation for a possible grant to set up the milking operation, he was asked about a quote for a small milking shed and plant. He had not actually asked to be provided with the full cost but had requested any funding, however this had been declined. Mr Chalecki said he had not been informed of the exact amount available for the grant. In order to give himself at least partial employment, he had gone from being debt free to now having a \$20,000 loan from a bank and owing his parents \$10,000. He also had a lot of ongoing costs associated with the farming venture which would not have been incurred if he had been 100 per cent physically able.

[55] A file note from a rehabilitation officer dated 3 May 1993 stated that Mr Chalecki had been advised on 15 May 1992 that a grant in the region of \$5,000 would be considered on receipt of “quotes and evidence of increased independence”. According to the note, his response at the time was to produce three estimates of costs between \$11,000 and \$16,000 (for a milking shed), but this was deemed to be unrealistic and he was advised of this on 3 July 1992. No evidence had been submitted regarding viability, nor was there any written application for self-employment assistance. The officer remarked that there had been changing statements from Mr Chalecki about the work he could do on the farm.

[56] In response to the review application, an internal administrative review was carried out by a branch manager. She advised Mr Chalecki on 5 May 1993 that no evidence had been submitted to the Corporation regarding the viability of his venture, which he had estimated would cost between \$11,000 and \$16,000. She confirmed that the self-employment grant would not be allowed, as advised on 3 July 1992. He was advised that he was entitled to have the review proceed to a hearing, if he wished.

Agreement regarding rehabilitation grant and reduction in ERC

[57] A district manager visited Mr Chalecki on 11 May. The manager recorded in his memo of 12 May that there was to be a new agreement, with the Corporation accepting the revised changes to compensation payments set out in Mr Chalecki’s letter of 26 April.

[58] Officers of the Corporation met with Mr Mr Chalecki on 3 June 1993, as

recorded in a letter to him of the same date. The letter stated that Mr Chalecki's concern was focused more on the percentage reductions in his weekly compensation, rather than the self-employment grant. He wanted the Corporation to review his balance sheets in order to make deductions based only on his earnings. He is recorded as having accepted the decision that he would not get the grant if the Corporation made deductions based on his actual earnings, rather than enforcing percentage reductions in advance (irrespective of his earnings).

[59] Mr Chalecki countersigned the letter of 3 June, with his wife annotating a copy of the letter advising that he would no longer maintain pigs or milking cows, since his father who had assisted him had died suddenly. Her husband would concentrate on battery egg production. The first 400 hens would be producing by the end of June, with the next 400 due to arrive at the same time. He hoped to increase to approximately 1,000 birds in production in 1994. He had sufficient sheds to do this, but needed to purchase more cages and attachments.

[60] An internal Corporation memorandum of 29 October 1993 recorded that Mr Chalecki had made losses on his farming venture every year from 1985 to 1992, with \$3,927 lost in the last year ending 31 March 1992. In accordance with the agreement, he received full weekly compensation and would continue to do so while the business ran at a loss. Mr Chalecki was not pursuing the decline of the self-employment grant in light of the agreement of 3 June.

[61] The Corporation wrote to Mr Chalecki on 21 January 1994, advising that the then current accident compensation legislation (the Accident Rehabilitation and Compensation Insurance Act 1992) did not provide for rehabilitation grants. He was invited to discuss his rehabilitation concerns with the acting branch manager. He did so and was informed by the manager on 27 January that he could proceed with a review of the decision to decline the rehabilitation grant.

[62] There continued to be discussions and correspondence between Mr Chalecki and the Corporation regarding rehabilitation and ERC. In particular, Mr Chalecki made a formal complaint about documentation he considered was missing from the Corporation's file.

[63] In a letter to the Corporation on 8 March 1994 (not 1995 as recorded on the letter), Mr Chalecki advised that he had discontinued the poultry side of the business, but maintained pigs. Accordingly, he pointed out, not all components of self-employment had failed. It is apparent from this letter that he had seen Mr Gunn's report by then.

[64] In a long letter on 31 May 1995, Mr Chalecki set out his attempts at rehabilitation. He had not made a profit to date because of the large initial capital outlay. When his father died, he had ceased the poultry operation as his father had lifted the bags of food and collected the eggs.

[65] On 3 November 1995, the Corporation stated in a letter to Mr Chalecki that it accepted the 1993 rehabilitation programme and saw no reason to make unnecessary changes. The letter additionally stated that even if the further information which he had complained was missing from the Corporation's file had been on the file, it was unlikely that a rehabilitation grant would have been approved. This was because the Corporation "felt" the grant would not have led to his increased independence.

Civil proceedings against Corporation

[66] In about 1996, Mr Chalecki sued the Corporation in a civil action for breach of statutory duty, negligence and misfeasance. He alleged that the Corporation had pressured him into self-employment thereby causing him wasted financial expenditure and further injuries and nervous shock. He claimed general damages of \$100,000 and exemplary damages of the same amount.

[67] The action was struck out by the District Court on 22 January 2001 (*Chalecki v Accident Rehabilitation and Compensation Insurance Corporation* DC Greymouth NP29/97). The judge found that the Corporation did not owe a duty of care to him and that the 1992 Act provided a bar for damages arising directly or indirectly out of personal injury. Any action for compensatory damages was precluded by the 1992 Act. Furthermore, the Corporation's conduct was incapable of amounting to a flagrant disregard of Mr Chalecki's rights required by law to found a claim for exemplary damages.

[68] An application to the High Court for special leave to appeal against the decision of the District Court was dismissed on 10 October 2001 (*Chalecki v Accident Rehabilitation and Compensation Corporation* HC Greymouth AP 28/01). By this stage, the causes of action in breach of statutory duty and misfeasance had been discontinued. There was no allegation of bad faith. The judge found there was no duty of care owed by the Corporation.

[69] Further proceedings were commenced by Mr Chalecki against the Corporation in the High Court alleging "systemic misfeasance" due to a "covert policy" of the Corporation. This was alleged to arise out of a failure to disclose

relevant files and the existence of secret documents. On 27 April 2004, these proceedings were struck out against two defendants, but not the Corporation (*Chalecki v Accident Compensation Corporation* HC Christchurch CIV 729/03). I do not know what ultimately happened to these proceedings.

Pursuit of review application

[70] Presumably following the failure of the civil proceedings at common law, Mr Chalecki returned to his statutory remedy. He commenced what eventually became a resumption of the review sought of the Corporation's decision of 14 April 1993 to decline the self-employment grant, initiated earlier by him on 27 April 1993.

[71] I am not sure when or how the review was restarted. A fresh review application was filed by Mr Chalecki on 27 November 2007 seeking a decision from the Corporation on compensation for expenditure on vocational rehabilitation, being building up the hobby farm to a fully economic unit (review no. 112740). It is not against any specific decision of the Corporation and appears to have been pursuant to the Accident Compensation Act 2001. Neither Mr Chalecki nor his then lawyer attended the hearing. At an earlier mediation, Mr Chalecki's lawyer had agreed to particularise the claim, but this had not occurred. The grounds for review were found to be vague and general, so the review was dismissed on 1 April 2009.

[72] There is a reviewer's decision dated 18 December 2009 in the documents filed with the Authority (review nos. 154956-154959). It had followed a hearing on 23 November. The decision deals with four review applications made by him on 31 July 2009, one of which concerned rehabilitation costs in setting up the farm. I have not seen this application. The reviewer declined jurisdiction, as he found that Mr Chalecki had not identified any specific decision by the Corporation against which he sought review. I note that the 14 April 1993 decision is not referred to.

[73] A reviewer's decision on 4 August 2011 stated that Mr Chalecki lodged an application for review on 19 October 2010 (review no. 194611). I have not seen this review application. It concerned decisions allegedly made by the Corporation not to rehabilitate him. A hearing before the reviewer had occurred on 14 July 2011. In her decision declining jurisdiction, she found that there was no reviewable decision since the Corporation's "inaction" did not amount to such a decision. I note the Corporation's decision of 14 April 1993 is not referred to at all in the reviewer's decision, so it may not have been the focus of Mr Chalecki's

attention at that time.

[74] There was a second decision by the same reviewer on 4 August 2011 in relation to rehabilitation costs (review no. 181544). It concerned alleged unreasonable delay by the Corporation in making a decision. The reviewer found to be invalid the application for review made on 5 January 2010 (not seen by me). Again, I find no reference to the 14 April 1993 decision.

[75] The first decision of 4 August 2011 (194611) was challenged by Mr Chalecki before the Authority. There was a hearing on 6 September 2012. The previous Authority (Ms Bedford) issued a decision on 26 October 2012 allowing the appeal in certain limited respects (*Chalecki v Accident Compensation Corporation* [2012] NZACA 15).

[76] The appeal was dismissed in respect of Mr Chalecki's medical rehabilitation and treatment, but his appeal in relation to vocational rehabilitation was successful "to the extent only that the appellant has the right to a formal review in respect of the decision of 14 April 1993 and the application for review dated 27 April 1993" (at [52]). The previous Authority made orders requiring disclosure of documents by the Corporation, to be followed by an independent review. It added that the review process was "to be utilised only for the purpose of conducting the review of the decision declining the appellant's self-employment grant... the issue on review is strictly limited to the decision of 14 April 1993..." (at [50]).

[77] Accordingly, there followed a hearing before a reviewer on 24 September 2013, with a decision issued on 22 October 2013. The reviewer found that Mr Chalecki had originally sought a grant to fund the construction of a new milking shed. He had provided an estimate of the costs. However, by the time the Corporation made its decision, his proposal had changed to one involving poultry. He provided estimates of the returns expected but the Corporation did not regard the information as sufficient. The Corporation required that any grant should result in a reduction of Mr Chalecki's entitlement to ERC. The Corporation's rehabilitation officer had noted on 3 May 1993 that no evidence had been provided in relation to the viability of the venture proposed by him.

[78] The reviewer did not accept that the Corporation should be liable for these rehabilitation costs. In particular, Mr Chalecki had not shown that the Corporation had made an error of law, nor that any material factor had been overlooked when considering the grant. The reviewer considered that the Corporation's requirement that his reliance on ERC decrease if a grant was made was consistent with the law

and policy at that time. Furthermore, there had been changes in Mr Chalecki's circumstances since 1993 such that the request for a self-employment grant was no longer relevant, given that he no longer lived on a farm (while not recorded in the decision, I am informed Mr Chalecki gave up farming in 2000 or 2001).

[79] In conclusion, the reviewer found that Mr Chalecki had not identified an error of law or that any essential factor had been overlooked in the Corporation's decision. He therefore dismissed the application for review.

[80] It is the decision of the reviewer of 22 October 2013, which Mr Chalecki has appealed to the present Authority.

THE CASE ON APPEAL

[81] The Authority received from the appellant's counsel written submissions (2 May 2014) and an affidavit from Mr Chalecki (sworn 11 August 2014). A number of bundles of bound and unbound documents were provided to the Authority. There were oral submissions made in support at the hearing.

[82] Counsel for the respondent provided written submissions on 27 February and 18 August 2014. There were also oral submissions presented at the hearing.

THE LAW

[83] An appeal lies to the Authority against certain decisions of a review officer (sections 101, 107 Accident Compensation Act 1982 – "the 1982 Act"). Such an appeal lies in this case. An appeal is by way of a rehearing (section 109(1) of the 1982 Act). The Authority can confirm, modify or reverse a decision, or refer the matter back to the Corporation (section 109 (7) & (8) of the 1982 Act).

[84] Notwithstanding the repeal of the 1982 Act (and its predecessor, the Accident Compensation Act 1972), the Authority continues to have jurisdiction over certain claims arising from personal injury by accident occurring on or before 30 June 1992 (section 391, Accident Compensation Act 2001). It is the 1982 Act that is applicable, given the date of Mr Chalecki's injury and rehabilitation (self-employment grant) claim.

[85] The relevant provision of the 1982 Act primarily at issue here is section 36:

36 Corporation to promote rehabilitation –

- (1) The Corporation shall place great stress upon rehabilitation and shall take all practicable steps to promote a well co-ordinated and vigorous programme for the medical and vocational rehabilitation of persons who

have cover and who become incapacitated as a result of personal injury by accident and are for the time being in New Zealand.

- (2) The rehabilitation programme in relation to those persons shall have as its objectives –
 - (a) Their restoration as speedily as possible to the fullest physical, mental, and social fitness of which they are capable, having regard to their incapacity; and
 - (b) Where applicable, their restoration to the fullest vocational and economic usefulness of which they are capable; and
 - (c) Where applicable, their reinstatement or placement in employment.

...

[86] Section 37 of the 1982 Act sets out further detailed provisions in relation to the Corporation's rehabilitation functions. They show the breadth of those functions. It is not contended that any particular provision in this section gives rise to an entitlement relevant to Mr Chalecki, over and above whatever rights he has under section 36. In fact, neither section provides for specific claims for rehabilitation costs, but such claims have in practice been accepted by the Corporation and the Authority arising out of sections 36 and 37.

Principles concerning rehabilitation

[87] The Authority, in the past, developed legal principles applicable to the Corporation's obligations in relation to rehabilitation under sections 36 and 37. I accept Mr Forster's submissions that I am not bound by these precedents but I consider them highly persuasive and I will follow them.

[88] In *Re Wright* [1979] 2 NZAR 211, the Authority (Judge Blair) was faced with a carpenter who had injured his back and was no longer able to continue working as a carpenter. He had a flair for art, so moved to another city and enrolled in an art course. He claimed certain expenses from the Corporation (then known as the Commission), including removal costs. Judge Blair had the following to say (at pp 214-215):

With respect I take the view that the Commission could have, and should have, utilised its rehabilitation powers in the unusual circumstances of this case. This is not to suggest that it should accept total responsibility for the whole of the arts course or the travelling expenses. On the contrary, the emphasis is on rehabilitation and the encouraging of independence and it would be wrong for the appellant to think that with his relatively minor disability he can rely on the public purse to meet all his expenses over a period of years.

...Having elected to do an unpaid arts course he must rely on the rehabilitation provisions. As I see it this means that the Commission, if it accepts that it can recognise the reasonableness of this form of retraining. I think this must mean *contributing* towards his fees and living expenses. Of course the appellant must be

willing to help himself – this is part of his rehabilitation. Like most other students he should do part-time work when he can and full-time work during vacations. He may be able to earn money through the sale of paintings. Were the paintings that he exhibited sold? It is suggested that if the Commission accepts that it is reasonable to retrain this applicant in an arts course it should act as a prudent father would, ie supplement the bursary and other income which the appellant is capable of earning with a reasonable contribution which would approximate what an ordinary student working his way through an arts course would receive. As regards the cost of shifting to Dunedin the Commission could consider making a reasonable contribution towards this cost pursuant to s49(2).

[89] The principle that the Corporation should make a “reasonable contribution” and not finance the whole cost of retraining was applied by the Authority (Judge Blackwood) in *Stevenson v Accident Compensation Corporation* ACA Wellington Decision No 219/88, 10 October 1988 at p7 and *Lauder v Accident Compensation Corporation* ACA Rotorua Decision No 48/90, 7 February 1990 at p7.

ASSESSMENT

[90] I record at the outset of this assessment that it is my understanding that Mr Chalecki has other proceedings regarding rehabilitation in the District Court under the 2001 Act. I have not seen this claim and do not know the matters being contested in that court.

[91] Mr Chalecki was injured more than 30 years ago and has had an extensive and somewhat acrimonious relationship with certain officers of the Corporation. They have each been suspicious of the other. Not only does Mr Chalecki blame the Corporation for his farm losses since he says it forced him to build up his farm but he has persistently complained about missing documents and files, the latter containing secret documents according to him. The Corporation for its part did not consider Mr Chalecki was doing enough to achieve independence from the Corporation’s earnings related compensation and certain officers regarded him as abusive, aggressive and potentially violent.

[92] I acknowledge this unhappy history and have been taken through some of the relevant documents by both counsel but I do not consider the disputes or accusations material to the issues before me. Mr Forster makes a general complaint about the accuracy and completeness of the Corporation’s file. There is some justification for this. Given the long history of the relationship, that is unsurprising. I have also seen Corporation documents unfortunately marked “Not for the File”. However, I accept the documents made available to me for what they are or purport to be. In my view, they are consistent and give me a clear picture of the narrative over the relevant years.

[93] In 1984, Mr Chalecki was injured. By July 1986, he was unable to work effectively as a builder. That is not contested by the Corporation. My understanding is that he has been certified fully unfit for work (perhaps only as a builder) since July 1986. The medical reports I have been given show a disability of 20 to 30 per cent (see Talbot 24 November 1988). He received ERC from 1986 and so far as I am aware, continues to receive full ERC to date.

[94] The Corporation was keen to reduce Mr Chalecki's dependence on it and therefore reduce or eliminate the ERC payments to him. At the time of his injury, he had a small "hobby farm", as it has been described. He bred pigs. This was seen as the most promising source of independence from the Corporation.

[95] Mr Chalecki alleges the Corporation forced him to build up the farm, but I do not accept this. While it put reasonable pressure on him to rehabilitate, which it was entitled to do, it is clear from his review application of 27 April 1993 that it was a mutual decision to focus on the farm. It is probable that the farm was first proposed as the preferred rehabilitation by Mr Chalecki himself:

I personally went over all the options available to me to find suitable, even unsuccessfully applying for jobs and came to the conclusion that self-employment was my only option. Prior to my accident I had started part-time farming.

[96] This brings me to what it is that Mr Chalecki seeks now. He contends that the Corporation, given the obligation to rehabilitate him ("to the fullest vocational and economic usefulness" – section 36(2)(b)), was required to fund the expansion of his then hobby farm as the identified rehabilitation programme. Accordingly, he says the Corporation is responsible for his actual and reasonable expenses from January 1988 to April 1993 as he built up the farm (actually buying a larger one) and/or his losses on the farm, attributable to his injuries. In the alternative, he seeks the self-employment grant (of at least \$5,000) in line with the accounting advice the Corporation received from Mr Gunn, contending there is no statutory maximum amount (see appellant's synopsis of submissions 2 May 2014, paras 10, 32, 34, 38, 41).

Principles concerning the Authority's jurisdiction

[97] An issue arose during the hearing as to the nature of my jurisdiction. It concerns whether I may substitute my assessment of what Mr Chalecki should have been provided by way of rehabilitation under sections 36 and 37 of the 1982 Act, irrespective of what the Corporation and the reviewer found, as counsel for Mr Chalecki submits. Alternatively, the Corporation contends, my jurisdiction is narrower and I can only intervene if I find that the Corporation (and/or reviewer)

made an error of law or process error or the like. In other words, the issue is whether an appeal to the Authority concerning rehabilitation is a general appeal or an appeal from the exercise of a discretion, with the latter giving rise to a narrower appeal jurisdiction.

[98] Turning to the 1982 Act, I observe that section 109 provides that an appeal is by way of a rehearing with a full power to receive further evidence. Such an appeal would tend to indicate that it is a general appeal with no restriction on the Authority's jurisdiction.

[99] Mr Hunt, for the Corporation, urges me to follow the principles developed by the Authority in decisions under the 1972 and 1982 Acts made at the time those Acts were effective. They are unanimous and very clear as to the narrow nature of the Authority's jurisdiction under sections 36 and 37 of the 1982 Act. In *Re Down* ACA Wellington Decision No. 242, 29 June 1979, Judge Blair said (pp 5-6):

"In my view the rehabilitation sections are not so much concerned with monetary payments as such, but rather with restoring an injured person as much as possible to the fullest physical, mental and social fitness of which he is capable. To achieve this the Commission is given extensive powers and, unlike the purely compensatory provisions of the Act, there are no restrictions as to the amounts which may be paid. The emphasis is on rehabilitation and the provision of financial aid is a means to this end. The means adopted in a particular case is necessarily a discretionary matter. The decision taken will be governed by the rehabilitation principles rather than monetary ones. To reach its decision in a particular case the Commission will naturally have to rely on the information it obtains and, in particular, the advice given to it by its medical and rehabilitation division. This is an area where, in my opinion, the Appeal Authority should be very cautious about interfering with the Commission's decisions. In rehabilitation decisions the Commission is not really acting in a quasi-judicial capacity. It comes to a decision based on medical and psychological grounds whether to give rehabilitation aid and, if so, to what extent. In this specialised field it is my opinion that the Appeal Authority should only intervene when an error of law has occurred or some essential factor has been overlooked."

[100] This was followed in *Stevenson v Accident Compensation Corporation* ACA Wellington Decision No. 219/88, 10 October 1988. The Authority (Judge Blackwood), accepted that the Corporation, in deciding whether to grant any form of rehabilitation, was not exercising a judicial function but one in which all kinds of factors had to be taken into account, such as the degree of injury, the claimant's present situation, his needs, the necessity to inculcate independence and the merits of the claim. Accordingly, in the "specialised field of rehabilitation decisions", the Appeal Authority should only intervene where there was an error of law or an essential factor had been overlooked (see pp 6-7).

[101] This approach was again followed by Judge Blackwood in *Lauder v Accident Compensation Corporation* ACA Rotorua Decision No. 48/90, 7 February

1990 at pp 6-7.

[102] This distinction between general appeals and those arising from the exercise of discretion has in more recent times been the subject of a number of higher court authorities.

[103] The Court of Appeal considered the distinction in *Wildbore v Accident Compensation Corporation* [2009] NZCA 34 in an accident compensation case concerning vocational independence and weekly compensation, not rehabilitation. The High Court, following *May v May* (1982) 1 NZFLR 165, had said that the correct threshold for the District Court on appeal was whether the reviewer had exercised his discretion to uphold the decision of the Corporation on a wrong principle or had not taken account of relevant considerations or had come to a decision that was plainly wrong. In the Court of Appeal, the Corporation had accepted that the relevant determination was not one of a discretionary nature and therefore the appeal to the District Court was of a general nature by way of a rehearing. It was conceded that the High Court had erred in relying on principles applicable to appeals from discretionary decisions.

[104] The Court of Appeal in *Wildbore* said that the District Court was required to come to its own conclusion on its assessment and evaluation of the evidence and the merits generally. It would be an error of law for the District Court to defer to a reviewer's assessment of the evidence or the weight to be accorded to it, rather than forming its own opinion. Those exercising general rights of appeal were entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involved an assessment of fact and degree and entailed a value judgment (see *Wildbore* [29]). Furthermore, the onus of establishing that the reviewer was wrong was on the applicant for review (*Wildbore* [30]).

[105] The Supreme Court considered the distinction in *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31] - [32], in a matter concerning the best interests of children. The Court observed that on a general appeal, the appellate court had the responsibility of considering the merits of the case afresh. It was required to reach its own conclusion. A court exercising a general right of appeal was entitled to give judgment in accordance with its opinion, even where that opinion involved an assessment of fact and degree and entailed a value judgment. This was to be distinguished from an appeal against the exercise of a discretion, where the criteria for a successful appeal were stricter, being confined to an error of law or of principle, taking account of irrelevant considerations, failing to take account of a relevant consideration, or the decision being plainly wrong.

[106] In *Kacem*, the Supreme Court observed that where the appellate court admitted further evidence, that evidence would necessarily require *de novo* assessment and consideration of how it affected the correctness of the decision under appeal. The Supreme Court considered that the distinction between a general appeal and appeal from a discretion was not altogether easy to describe in the abstract. The fact that a case involved factual evaluation and a value judgment did not mean that the decision was discretionary. In the case at hand, it found that an assessment of what was in the best interests of the children did not involve an appeal from a discretionary decision. It noted that the ability to rehear hear the whole or part of the evidence and receive further evidence available under the relevant legislation there, was a classic indicator of a general appeal.

[107] Having regard to these higher court authorities, I accept the earlier decisions of the Authority that an assessment of a claimant's rehabilitation needs and what form of assistance should be granted under sections 36 and 37 involves an exercise of discretion by the Corporation, with numerous factors to be taken into account. That is particularly so when the issue is one of retraining for alternative employment, given the myriad of possibilities. The Corporation's officers are experienced and specialise in making such assessments. Notwithstanding my statutory power to rehear and receive further evidence, I find the narrower criteria to be applicable here.

[108] It will be seen from the following analysis that the outcome of this appeal would have been the same, irrespective of my view of the Authority's jurisdiction.

Claim for expenses

[109] Turning then to Mr Chalecki's claim for the expenses and/or costs incurred in building up his farm, I consider this claim must fail as it is not a matter dealt with in the Corporation's decision of 14 April 1993. It is the correctness of that decision (and therefore also of the subsequent review decision of 22 October 2013 upholding the decision of 14 April) that the Authority (Ms Bedford) opened up on 26 October 2012.

[110] Ms Bedford's invitation (at [49] of her decision) for Mr Chalecki to file further evidence of his costs was to enable him to show that he might be able to exceed the limit of \$5,000 for the self-employment grant. The Authority was not opening up a general claim for costs independent of the self-employment grant. My jurisdiction is limited to claims made by Mr Chalecki which were the subject of the 14 April 1993 decision, or claims which should have been decided then as part of

rehabilitation. That decision solely concerned the self-employment grant request.

[111] The claim for expenses was not dealt with in the 14 April decision because Mr Chalecki had made no such claim. While he had repeatedly sought a contribution towards his costs in expanding the farm, he never itemised in the context of any claim any actual or anticipated expenses for which he sought reimbursement (aside from those connected with the self-employment grant, to which I will return). It was for Mr Chalecki to identify specific costs in relation to a particular venture and put that to the Corporation in a form which can be said to be a claim.

[112] Mr Chalecki had numerous ideas over the years and sent financial information (forecasts and the like) of varying particularity to the Corporation, but I can identify no specific claim on which he sought a decision, aside from the self-employment grant. Mr Forster confirms no itemised claim was advanced by Mr Chalecki. His counsel counters that the Corporation never asked for one, but that is no answer. It was for Mr Chalecki to submit a specific application for certain costs, with all the supporting documents (including establishing viability). That was not done. Accordingly, such costs are not the subject of the 14 April decision and it cannot be argued that they should have been.

[113] In the documentation I have seen, a claim for the costs of building up the farm as part of his rehabilitation was not made until November 2007 (see appellant's submissions on such costs made to reviewer on 14 July 2011 – review no. 181544). This appears to be a reference to the application for review made on 27 November 2007 and dismissed on 1 April 2009. I note that Mr Chalecki's lawyer at the time had agreed that the claim was then unparticularised. Such a claim (whether properly particularised or not) can have no relevance to a decision made in April 1993.

[114] Section 80(1) on the 1982 Act is also relied on. It allows for recovery of actual and reasonable expenses “necessarily and directly” resulting from the injury. These farm costs do not so arise. They arise from Mr Chalecki's earnest attempt to rehabilitate himself and therefore find alternative income. They are potentially recoverable only under sections 36 and/or 37. This is another obstacle to a section 80(1) claim, in addition to the fact that no such claim had been made by April 1993.

Claim for losses

[115] As for the annual losses on his farming venture, they have never been the subject of a claim made by Mr Chalecki prior to the review decided on 22 October 2013. Nor could they have been. There is no authority for losses of a business being recoverable under sections 36 or 37 as rehabilitation costs, even if such a claim had been made.

[116] Counsel for Mr Chalecki also relies on section 80(1) where “proved losses” are recoverable, but no such claim was made before the review of 22 October. Nor has Mr Chalecki established that the losses resulted “necessarily and directly” from his injury.

[117] This claim for losses is akin to the common law proceedings brought by Mr Chalecki which failed in 2001. Similar proceedings were also on foot in 2004, but I do not know what happened to the 2004 action. It is a late emerging claim without a statutory basis.

Claim for self-employment grant

[118] This brings me to the self-employment grant, the only specific claim made by Mr Chalecki in connection with rehabilitation on the table at 14 April 1993.

[119] It will be recalled that such a grant, up to \$5,000, had been expressly the subject of discussions and correspondence between Mr Chalecki and the rehabilitation officer from not later than June 1988 until after April 1993 (according to the documentation made available to me). Moreover, it is the express subject-matter of the decision made on 14 April. I do not know whether the Corporation had a specific form for such a grant and have seen no completed application from Mr Chalecki. It appears to have arisen as the Corporation treated the reference on the 17 December 1987 form, to farm work as alternate work, as being a claim for a self-employment grant.

[120] The letter of 14 April does not say why the grant was declined, but referred back to an earlier verbal decline on 3 July 1992. The rehabilitation officer’s file note of that telephone discussion recorded that Mr Chalecki was informed the self-employment proposal was too much money to pay out with no foreseeable reduction in ERC. In other words, the Corporation believed the grant would not lead to independence or at least reduced dependence on it.

[121] It is apparent from the Corporation’s file and the submissions to me from

Mr Hunt that the Corporation was concerned at the time about the multiple different self-employment proposals from Mr Chalecki and their financial viability. The Corporation did not regard any of them as viable. Hence, it believed none of them would reduce his dependence on the Corporation for ERC

[122] However, for reasons which are not explained, the Corporation overlooked Mr Gunn's financial analysis of 6 March 1992. I do not conclude it was deliberately ignored, but it appears that the document 'fell into a black hole'. Mr Chalecki was never sent it at the time. Reference to it does not surface in the Corporation's documents seen by me, until early 1994.

[123] No doubt following discussions with Mr Chalecki, the proposal at that time as set out by Mr Gunn, is quite specific. It was to be primarily a poultry farm, commencing with 1,600 birds, building to 2,000. Mr Chalecki would breed pigs for additional income. He sought a grant of \$5,000, the maximum amount he had been told he could get. It would be used to build a chick-rearing shed (\$2,000 pre-cut kit and \$3,000 labour). Mr Gunn regarded the proposal as feasible and viable (in its second year), with a projected net profit before depreciation in the second and subsequent years of about \$25,000.

[124] It is not apparent whether the officer who made the decision on 14 April 1993, who was not the officer who spoke to him on 3 July 1992, ever saw this document. The rehabilitation officer who spoke to him on 3 July may have seen it (see her file note of 11 March 1992), but she overlooks it on 3 July. If those officers had considered the report, with its conclusion as to feasibility, it would be expected they would have referred to it. It is my finding they probably did not consider it. There has been a failure to take into account a relevant and indeed critical factor.

[125] I note also that Mr Gunn's report was overlooked by the manager who conducted the administrative review on 5 May 1993.

[126] As an addition to his proposed expanded poultry venture at that time, Mr Chalecki intended to maintain a sideline in pigs (as per Mr Gunn's report). He was breeding pigs at the time and had been doing so for some years. By 27 April 1993, the date of his review application, Mr Chalecki was asking for money for "a small milking shed and plant". This was not for a full scale dairy venture and was not an example of what the Corporation regarded as Mr Chalecki's uncertainty as to his proposed venture during 1992 and 1993. It was, in fact, merely to provide feed for the pigs.

[127] Furthermore, it is apparent from the review application that it was the Corporation which suggested he apply for the cost of a new shed. No doubt, this came about as a result of discussions with him, with the milking shed being an item on his wish list, as part of the sideline in pigs. From Mr Chalecki's point of view, as is obvious from the review application and supporting documentation, he was seeking any contribution to the capital outlay on the larger farm, by way of a self-employment grant which he had been led to believe was available. He was indifferent to whether it was for a larger chicken shed (at March 1992) or a milking shed (April 1993) or chicken cages and attachments (June 1993). They are all part of the same proposed venture, primarily egg production with a sideline in pigs, which Mr Gunn found to be feasible.

[128] While Mr Chalecki appears to have abandoned the poultry business by March 1994, I am concerned with his statutory entitlements in the July 1992 to April 1993 period at the time the relevant decisions were made.

Post-decision agreement

[129] Counsel for the Corporation took me through the documentation showing an agreement in May and June 1993 between Mr Chalecki and the Corporation, after the review application had been filed. Pursuant to the agreement, Mr Chalecki accepted the Corporation's decline of the grant on the basis that the latter would only reduce his ERC as his actual earnings rose from self-employment. It agreed not to enforce percentage reductions pre-determined in advance (see particularly Corporation letter of 3 June countersigned by Mr Chalecki).

[130] I do not regard this agreement as material to the question of his then statutory entitlements to rehabilitation:

1. Mr Chalecki did not then know that the grant had been found to be viable and had been recommended by Mr Gunn.
2. The Corporation was not entitled to reduce his ERC according to pre-determined percentages in any event. His ERC could only have been lawfully reduced, as his actual self-employment income rose.
3. The Corporation itself never regarded the agreement as an abandonment by Mr Chalecki of his right to seek review of the decision to decline the grant (see manager's file note 27 January 1994).

Conclusion regarding self-employment grant

[131] Mr Chalecki sought a self-employment grant to build a shed to expand his poultry production. This was a specific proposal, backed with detailed accounts. Mr Gunn found his venture to be feasible and viable. This critical report, not disclosed to Mr Chalecki at the time, is not mentioned in the letter of 14 April. Nor is it acknowledged in the file note of the telephone conversation of 3 July 1992, to which the 14 April letter refers. There has therefore been a failure to take into account a relevant and highly material factor, which renders the decision wrong.

[132] There is no evidence the two officers involved in the 14 April and earlier 3 July communications took it into consideration. Had they considered it properly, they would have had to explain why the Corporation did not accept the accountant's conclusion as to viability. The Corporation's decline of a grant was because of their long-standing perception as to the viability of Mr Chalecki's various proposed ventures but this specific venture had been found to be viable.

[133] Mr Chalecki was, at the time, endeavouring to implement the venture discussed by Mr Gunn. He had already gone into egg production, post-injury, at his own expense. He was expanding the poultry operation at his own cost, though I do not know whether he ever built the shed Mr Gunn had in mind or reached the level of chickens ultimately envisaged by the accountant (2,000 hens). However, it is not material whether the shed was ever built, as it is clear Mr Chalecki sank far more than \$5,000 into his farming venture post-accident.

[134] While I do not have the "guideline" policy document concerning these grants, there is an extract from it in the letter of 14 April. As any such grant was available only for "establishment costs for self-employment purposes", a grant to Mr Chalecki would satisfy the criteria set out there. The Corporation does not contend it falls into one of the prohibited categories identified in the letter.

[135] According to the reviewer (22 October 2013), Mr Chalecki's circumstances since 1993 had changed (he no longer lived on the farm) such that a request for a self-employment grant was no longer relevant. He considered a grant now would be contrary to the 1982 Act.

[136] The reviewer has misunderstood Mr Chalecki's rights under the Act. It is not relevant whether, today, Mr Chalecki is going to use the grant to build a chicken or milking shed. It is a question as to his entitlement in 1992 or 1993 under the 1982 Act. Had he been given the grant in 1992 or 1993, the evidence

before me is that he would have used it for the venture described by Mr Gunn, but whether it would have been spent at that time on a chicken shed or a small milking shed or chicken cages is not material.

[137] Mr Forster submits that there is no statutory maximum for such a grant. He is correct. What the documentation refers to as a self-employment grant is not expressly referred to at all in the 1982 Act. It appears to have been a practical policy response of the Corporation to its rehabilitation objectives under sections 36 and 37.

[138] The Corporation, like any entity with a statutory discretion, is entitled to adopt policies (rules) as to how it will exercise its statutory discretions, provided it is mindful of the need to allow exceptions to the policy criteria in appropriate cases. In respect of self-employment grants, the criteria was set out in the "guideline" referred to in the 14 April letter. That letter records what appear to be extracts from the guideline, but the full guideline is no longer extant. The Corporation has been unable to locate a copy. I have been referred to an extract from a claims manual which deals with financial assistance for those newly self-employed (with a maximum grant of \$5,000, except in exceptional circumstances), but both counsel agree this is not the relevant "guideline". The date of this document is unknown. I decline to rely on it.

[139] Despite the absence of the guideline, the documentation shows clearly that in 1992/1993 there was a policy limit of \$5,000 (and probably an ability to obtain more than that in accordance with some sort of exceptional circumstances test). I can see no reason related to Mr Chalecki not to accept what was the policy limit of \$5,000 at that time. It must be remembered that the principle developed by the Authority's decisions was that any such grant should be a reasonable contribution to the self-employment venture. It was not intended to fully fund the injured person's proposed business.

[140] There is nothing exceptional about Mr Chalecki's back injury or the consequences of it or his farming venture or his other circumstances such that he should receive a grant in excess of what was then the policy limit. Mr Forster has not drawn my attention to any matter which shows the normal policy criteria at the time should not apply to Mr Chalecki. I do not accept that his treatment by the Corporation justifies a larger grant.

[141] Finally, I accept Mr Forster's submission that it would be speculative to determine now what effect a grant made in 1993, as should have occurred, would

have had on Mr Chalecki's earnings related compensation from then. It may, or may not, have reduced his dependency on the Corporation, partially or wholly. In other words, it cannot be said that Mr Chalecki has in effect been compensated for the lack of a grant by the continuance of ERC thereafter at what I understand to be the full rate. His receipt of ERC from 1993 onwards poses no obstacle to a back-dated grant being made now.

OUTCOME

[142] Having found the Corporation decision of 14 April 1993, and therefore that of the reviewer of 22 October 2013, to be wrong, there are a number of options open to me as to the outcome. I have decided to reverse the decision, rather than refer the matter back to the Corporation, for two reasons:

- (1) the only reasonable decision under section 36(2)(b), based on the evidence I have seen, would be to make the grant, given Mr Gunn's unequivocal report; and
- (2) without attributing fault to any party, a decision is well overdue. It is time this matter was finalised.

[143] It follows that I find that Mr Chalecki was entitled in April 1993 to a self-employment grant of \$5,000, pursuant to section 36(2)(b) of the 1982 Act. The value of that, in today's money, can be determined by those with the expertise to do so.

[144] Costs are reserved. The appellant can provide submissions within 21 days, with the respondent having 21 days thereafter to reply.