

Peter Colmore
Applicant

**ACCIDENT COMPENSATION
CORPORATION**
Respondent

Before: D J Plunkett

Counsel for the Applicant: P Schmidt

Counsel for the Respondent: D Tui

Date of Decision: 7 November 2014

DECISION

INTRODUCTION

[1] This is an application by Peter Colmore for leave to appeal to the High Court against the decision of the Authority of 12 December 2013 (*Colmore v Accident Compensation Corporation* [2013] NZACA 18).

[2] Mr Colmore is a tetraplegic. At the time of the accident, he had been in training as a farm cadet. Following the accident, he worked part-time in office work. The essential question for the Authority is whether his earnings compensation should be calculated on the basis of his pre-accident or post-accident remuneration.

BACKGROUND

[3] As a result of a diving accident on 6 December 1980, Mr Colmore suffers tetraplegia. He was then aged 18 years. The respondent Corporation accepts coverage under accident compensation legislation.

[4] At the time of the accident, Mr Colmore was employed on a dairy farm,

earning \$117 weekly, as well as receiving support by way of board. He was part-way through training as a farm cadet, having already sat the first set of exams, which he learned he had passed after the accident. He had started as a cadet in June 1979.

Post-accident work history

[5] Following eight months of rehabilitation at the spinal unit in Otara, Mr Colmore was employed assembling magnetic door-catches at his parents' home but found this so boring that he gave it up after a couple of months.

[6] The social worker at the spinal unit advised him of a government scheme employing people with disabilities. Accordingly, he started work in November 1981 at the Department of Social Welfare ("Social Welfare"), working six hours daily (plus a one-hour lunch break), for five days per week. He started in the call centre, answering enquiries about National Superannuation and doing general paperwork for about one year before moving to processing mail related to National Superannuation. He was, by then, graded as a clerk. He became a permanent employee at Social Welfare in February 1982.

[7] The manager asked Mr Colmore to trial full-time employment at seven hours 35 minutes daily (plus a one-hour lunch break). He did this for two weeks over March/April 1983, but found it exhausting, so went back to part-time employment of six hours daily for five days per week. In October 1983, he transferred to reception duties. While at Social Welfare, he had received only general wage increases since, as a part-time employee, he could not apply for promotion. However, Mr Colmore was regraded as a senior section clerk in about November 1985, skipping the grade of section clerk. In September 1986, he attained the highest pay grade available for a senior section clerk.

[8] Mr Colmore was finding it increasingly difficult to do the job, due to health issues. He appears to have commenced paid sick leave in February 1987 (see applicant's bundle p35). Once he had used up all of his paid sick leave, he took sick leave without pay.

[9] In September 1987, Mr Colmore reduced the number of days work from five to three, still working six hours daily. This reduction continued until he took one year's paternity leave in March 1990, as his wife (who was also disabled) was having a very difficult pregnancy. Their daughter was born in June 1990.

[10] In March 1991, with the paternity leave about to expire, Mr Colmore decided

to resign from Social Welfare as his wife was unable to manage on her own with the baby. The couple then received the invalid's benefit at the married rate. Mr Colmore became a full-time house-husband and father, as his wife's disability did not allow her to look after the baby. He cared for his daughter and increasingly his wife, the latter dying in September 2008.

Earnings related compensation

[11] Starting some time in 1981, Mr Colmore received make-up earnings related compensation from the Corporation. This was the difference between his entitlement under accident compensation legislation based on his farm cadet earnings and his Social Welfare pay. The documents available to the Authority suggest that due to his low Social Welfare pay, he may have been receiving the invalid's benefit as well as his Social Welfare pay, at least initially. There are a number of Corporation "C62" assessment forms, showing different figures for weekly compensation payable from different dates in 1981.

[12] The Corporation advised him on 26 November 1982 that his entitlement to compensation would cease as he was by then earning in excess of his pre-accident earnings.

[13] In an internal Corporation memorandum of 21 September 1983, the officer noted that Mr Colmore received no compensation as his Social Welfare salary (then \$156.81 weekly) was in excess of what he would have received as a fourth year farm cadet. However, it was noted that he had to pay board and travel expenses of about \$70 per week, which he would not have had to pay as a farm cadet. The officer sought further consideration of Mr Colmore's situation. Other officers considered it on 31 October and 15 December 1983. It was noted that he could not physically cope with 40 hours' work per week, but nor was he able to cope financially on his part-time salary.

[14] Consideration was given in the Corporation's memoranda to the possibility of a 50% uplift to his earnings compensation under section 63(5) of the Accident Compensation Act 1982 ("the 1982 Act"). The Authority observes that section 63 (which is set out later in this decision) provides for people who were in training at the time of their accident to be paid earnings compensation at a rate which reflects increases in pay that completing the training would have allowed them had they not been injured. This is known as a Loss of Potential Earnings ("LOPE") payment. The prescribed rate of compensation payable to a person entitled to LOPE can be increased even further by up to 50% under section 63(5). It appears

nothing came of the Corporation's consideration of an uplift in Mr Colmore's compensation at that time.

[15] As an order in council had increased Mr Colmore's "relevant earnings" (his entitlement under accident compensation legislation to compensation based on his pre-accident earnings) to \$162.39, which was then higher than his Social Welfare salary of \$156.81, he was advised by the Corporation on 9 January 1984 that he was entitled to \$3.56 weekly payable from 15 December 1982 (to make up the difference between them, allowing for certain statutory adjustments).

[16] The Authority finds the subsequent paper trail difficult to follow but it is apparent that Mr Colmore continued to receive make-up compensation. Consideration was given on 3 February 1986 to compensation being paid under section 63 of the 1982 Act, but not to the possibility of a 50% uplift. If the Authority has understood the memorandum of 3 February correctly, section 63 was not considered applicable as he was earning too much from Social Welfare.

[17] Then on 14 October 1986, the Corporation advised Mr Colmore that his gross weekly Social Welfare earnings of \$333.63 since November 1985 were greater than his relevant earnings assessed by the Corporation, so his make-up compensation would cease. While such compensation had mistakenly continued until 22 July 1986, the Corporation would not seek recovery as it was its own fault the compensation had continued.

[18] On 9 July 1987, Social Welfare advised the Corporation that Mr Colmore had reapplied for an invalid's benefit.

[19] The Corporation advised Social Welfare on 14 August 1987 that payments to Mr Colmore had ceased on 22 July 1986, at which time he had been receiving \$5.22 gross weekly.

[20] There is then a gap of 20 or more years in the compensation documentation sent to the Authority, but it is understood Mr Colmore was on an invalid's benefit and did not receive earnings related compensation from the Corporation.

[21] In about 2009, Mr Colmore sought reinstatement of compensation, including for LOPE.

[22] The Corporation wrote to Mr Colmore on 3 March 2011, agreeing to reinstate LOPE payments from 27 March 1990 (which is when he had ceased working for Social Welfare). The letter advised Mr Colmore that the Corporation

would write to him in the near future as to when the payments would start and as to the rate, which would be that most favourable to him. The Corporation would contact WINZ to arrange the transition from the invalid's benefit to LOPE payments.

[23] The Corporation wrote to Mr Colmore on 12 May 2011 advising that it had calculated the backdated compensation to be \$384,785.02, but with the deduction of the WINZ benefit he had received, the Corporation owed \$179,568.80 (before tax), which would be paid to him shortly.

[24] On 13 March 2012, Mr Colmore sought a review of the Corporation's decision of 3 March 2011.

[25] The Corporation advised Mr Colmore on 6 July 2012 that it did not consider there were grounds for it to accept the late application for review. According to the Corporation's letter, the actual LOPE assessment had been made in 1981, with the letter of 3 March 2011 merely being advice that LOPE would be reinstated. The delay in seeking review was therefore either one year or in excess of 31 years. The Corporation noted that the actual assessment had been made in 1981 and seemed to have been accepted as correct at the time. At the time of the reinstatement in 2011, the Corporation had consulted the representatives for Mr Colmore, who could provide no additional information to justify changing the rate, with Mr Colmore's then lawyer concluding that there was no point in pursuing the matter.

[26] As for the strength of Mr Colmore's case, the letter of 6 July stated that no information had been made available to support a change in the assessment. The Corporation had made enquiries with the Department of Labour as to the relevant award rates at the time, but no additional information had been submitted by Mr Colmore or his advocates.

[27] The Corporation's letter noted that it had been argued on Mr Colmore's behalf that section 53(9) of the 1982 Act gave the Corporation the discretion to use pre-incapacity rather than pre-accident earnings, with the incapacity said to arise in March 1990 when he left Social Welfare employment. According to the letter, this had been investigated but would not result in a more favourable rate being paid to him. Social Welfare had advised the Corporation that the highest rate at which he was paid was \$333.63 weekly, effective from 10 November 1985. If this rate was applied from the period of further incapacity beginning 27 March 1990, it would be less favourable than the LOPE rate assessed by the Corporation. That

base rate of \$333.63 (in March 1990) would give a rate (current at the date of the letter) of \$447.16, increased using orders in council (allowing for inflation). This was less than the then weekly compensation rate of \$500 gross being paid to him.

[28] Furthermore, according to the Corporation's letter of 6 July, at the time of the accident, it had been Mr Colmore's intention to continue work as a farm manager, not as a clerical worker, and all investigations of potential rates as a manager had failed to justify an increase above the prescribed amount.

[29] The Corporation therefore declined to accept the review, so it went to a hearing before an independent reviewer.

[30] The hearing was on 15 August 2012, with the reviewer's decision given on 7 December 2012. The reviewer declined jurisdiction, because the application for review had been filed outside the timeframe of one month for such applications.

[31] In terms of the merits of the substantive application, the reviewer considered the various options for compensation and found that the Corporation had acted reasonably in assessing Mr Colmore's LOPE entitlement and in determining that his weekly compensation be reinstated at the previously assessed LOPE rate. It was noted that his advocates had agreed with the Corporation's position. The reviewer was not persuaded that the Corporation had incorrectly assessed Mr Colmore's compensation in 1981, or was incorrect in reinstating his weekly compensation in March 2011 at the previously assessed LOPE rate.

[32] Mr Colmore then appealed to the Authority against the reviewer's decision of 7 December 2012.

[33] There was a hearing on 6 December 2013 and the Authority (Judge Beattie) issued a decision on 12 December 2013. It found that Mr Colmore had remained continuously incapacitated from full-time employment as a consequence of the personal injury suffered in 1980. He had been employed at Social Welfare only on a part-time basis. His entitlement to ongoing LOPE was to be determined on the basis of the assessment of income that he might have been able to achieve if he had been able to continue with his pre-injury employment.

[34] The Authority further found that Mr Colmore's income upon which LOPE was to be assessed could not be any income received in periods subsequent to the commencement of his incapacity. Accordingly, any income received in the late 1980s from Social Welfare could not be taken as the basis for the assessment of

his LOPE entitlement. The provisions of sections “53(5)” (this should be section 53(9)) and 63(5) of the 1982 Act did not permit payment of a sum not related to his pre-injury employment income. The Corporation’s determination of the amount of Mr Colmore’s entitlement to ongoing weekly compensation from 1990 was found to be correct.

[35] It is from this decision that Mr Colmore seeks leave to appeal to the High Court.

CASE ON APPEAL

[36] There are submissions from Mr Schmidt, for Mr Colmore, of 15 August and 5 October 2014, as well as those set out in the application made to the Authority on 20 December 2013. The submissions are supported by a casebook. It is contended that the Authority’s decision raises three questions of law, which are considered later in detail.

[37] The submissions from Mr Tui, for the Corporation, are dated 12 September 2014. The Corporation opposes leave to appeal, on the basis that the proposed questions of law concern the facts rather than the law, are new (not having been raised earlier in the appeal) or are of no merit.

THE LAW

[38] By virtue of section 391(1) of the Accident Compensation Act 2001, the Authority has jurisdiction to hear this application. It is to be determined pursuant to section 111 of the 1982 Act:

Appeal to High Court

- (1) Where any party is dissatisfied with any order or decision of the Accident Compensation Appeal Authority, that party may, with the leave of the Authority, appeal to the High Court against that order or decision:

Provided that, if the Appeal Authority refuses to grant leave to appeal, the High Court may grant special leave to appeal.

- (2) The Appeal Authority or the High Court, as the case may be, may grant leave accordingly on a question of law or if in its opinion the question involved in the appeal is one which by reason of its general or public importance or for any other reason ought to be submitted to the High Court for decision.

Leave to appeal - principles

[39] The principles and factors applicable in considering leave to appeal on the

ground of a question of law were all conveniently listed by the District Court, following a number of High Court authorities, in *O'Neill v Accident Compensation Corporation* DC Wellington Decision No 250/2008, 8 October 2008 at [24], as follows:

- (i) the issue must arise squarely from the decision challenged and not from *obiter* comments;
- (ii) the contended point of law must be capable of *bona fide* and serious argument;
- (iii) care must be taken to avoid allowing issues of fact to be dressed up as questions of law;
- (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 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.

[40] It is not necessary to show that the decision-maker was wrong, only that there is a *bona fide* arguable question of law, a "modest test"; *Bondarenko v Accident Compensation Corporation* HC Wellington CIV 2006-485-555, 23 February 2007 at [3] & [23] (while a case concerning special leave, the same threshold applies to leave applications).

[41] The Authority's jurisdiction is not merely confined to questions of law, since leave can be granted where, "for any ... reason", there is a question which ought to be submitted to the High Court, including by reason of its general or public importance.

[42] In exercising its discretion, the Authority is mindful of the proper use of the scarce resources of the High Court. Leave is not given as a matter of course; *O'Neill* at [25].

[43] Such an applicant seeks an indulgence, so the onus rests on him or her to

satisfy the Authority that, in all the circumstances, the interests of justice require that leave be given; *Kenyon v Accident Compensation Corporation* [2002] NZAR 385 at [15].

ASSESSMENT

Applicable law

[44] While it is the dispute resolution provisions of the 1982 Act that are applicable to the appeal and this leave application, the accident occurred and coverage was accepted by the Corporation during the currency of the Accident Compensation Act 1972. Accordingly, there is a question as to which Act sets out the substantive law applicable. The reviewer used both Acts. In submissions to the Authority, the applicant's lawyer uses the 1982 Act and the respondent's lawyer uses both Acts.

[45] As Judge Beattie dealt with this matter under the substantive provisions of the 1982 Act, the present Authority will do the same. It is observed that there is no difference material to this application between the comparable provisions of the two Acts, being sections 53 and 63 of the 1982 Act and sections 104 and 118 of the earlier 1972 Act. Neither party makes a point about which Act is applicable.

[46] Mr Colmore has been paid earnings related compensation backdated to March 1990 and, so far as the Authority is aware, continues to be paid such compensation. The Corporation has calculated it based on his pre-accident (farming) income. The issue here is whether that compensation should be based on his pre-accident or post-accident (Social Welfare) income.

[47] Such compensation (known as "relevant earnings") is usually based on the injured person's pre-accident income (80% of such income). There are various periods pre-accident that can be used to calculate what fairly and reasonably represents the person's normal average weekly earnings at the date of the accident, pursuant to section 53 of the 1982 Act. For a person receiving compensation long-term, there are regular increases by order in council reflecting inflation (section 53(6)).

[48] For a person whose incapacity for work occurs, or recurs, subsequent to the accident, usually with a period of work in between, the income on which the earnings related compensation is based can be that at the time of the later incapacity, rather than at the time of the accident (section 53(9)). The later income will often be higher.

53. Relevant earnings-- (1) Subject to this Act, for the purpose of determining the amount of any earnings related compensation payable to an earner, or payable at any time to any dependant of such an earner, the amount of his relevant earnings shall be such amount as, in the opinion of the Corporation, would, at the time of the accident, fairly and reasonably represent his normal average weekly earnings, having regard to such information as the Corporation may obtain regarding his earnings before the time of the accident and his earnings at the time of the accident, and the period of his residence in New Zealand before the time of the accident and his work history, and such other relevant factors as the Corporation thinks fit.

...

(9) Where any period of an earner's incapacity for work does not commence on the date of the accident, and the Corporation is of the opinion that relevant earnings ascertained in accordance with the foregoing provisions of this section do not fairly and reasonably represent the earner's normal average weekly earnings at the time of the commencement of the period of incapacity for work, the Corporation may, notwithstanding the foregoing provisions of this section, determine an amount which, in its opinion, would fairly and reasonably represent his normal average weekly earnings at the time of the commencement of the period of incapacity for work, having regard to such information as it may obtain regarding his earnings before the time of the commencement of the period of incapacity for work and his earnings at the time of the commencement of that period, and the period of his residence in New Zealand before the time of the period of incapacity for work and his work history, and such other relevant factors as the Corporation thinks fit; and any amount so determined shall be treated as if it was his relevant earnings for the purpose of assessing earnings related compensation during the particular period of incapacity for work:

Provided that any determination made under this subsection shall not bind or prejudice the Corporation or limit or restrict its discretions or powers with regard to any assessment or determination of that person's relevant earnings or loss of earning capacity during any other period of his incapacity for work to which the determination does not relate.

[49] As Mr Colmore had commenced training as a farm cadet at the time of his accident, he is entitled to have taken into account his loss of potential earnings (LOPE) reflecting the fact his wages would have increased while on the training scheme and then on qualifying, had he not been injured (pursuant to section 63 of the 1982 Act). This is an exception to the usual basis of using pre-accident earnings for calculating all earnings related compensation.

[50] The relevant earnings of such a person are deemed to be \$190 weekly (at the commencement of the 1982 Act on 1 April 1983), with orders in council providing regular increases to this prescribed rate (section 63(5)). According to the first proviso in subsection (5), this can be periodically uplifted by up to 50% for an individual as that person's post-accident earnings would have been expected to increase, if he or she had advanced while in training, but not been injured.

[51] However, the second proviso provides that if the relevant earnings payable based on actual earnings at the time of the accident are higher than the LOPE

amount calculated pursuant to section 63, then that higher amount will apply. Accordingly, the injured person is always entitled to the higher of (a) relevant earnings based on pre-accident earnings, plus indexed increases (section 53), and (b) LOPE, plus indexed increases (section 63).

63. Compensation for loss of potential earning capacity in certain cases –

(1) Where, as a result of incapacity due to personal injury by accident, a person suffers any loss of potential earning capacity, compensation shall be payable in accordance with and subject to this section, if-

...

(c) At the date of the accident, the person –

...

(iii) Was actively studying or training for an occupation, career, or profession which he intended to take up on completing his study or training, and satisfies the Corporation to this effect;

...

(2) Where compensation for loss of potential earning capacity is so payable under this section, an assessment of the amount payable shall, subject to subsections (3) and (4) of this section, be made in accordance with section 59 or section 60 of this Act as if the injured person were an earner whose relevant earnings were the amount determined under subsection (5) of this section.

...

(5) Subject to subsection (7) of this section, in any case to which this section applies, the relevant earnings of the injured person shall be deemed to be \$190 or such other amount as may from time to time be prescribed for the purposes of this section by the Governor-General by Order in Council:

Provided that the Corporation may from time to time fix the relevant earnings of the injured person at such greater amount, being not more than 50 percent in excess of the amount prescribed, as it thinks fit, in any case where the injured person is a person to whom any of the subparagraphs of subsection (1) (c) of this section applies:

Provided also that, in any case where the injured person is an earner whose relevant earnings ascertained in accordance with section 53 of this Act would be more than the amount so prescribed for the purposes of this section, the Corporation may fix the relevant earnings at such greater amount as it thinks fit (not exceeding the amount so ascertained) if it is satisfied that, were it not for the injury, the person had the capacity to continue to earn throughout a normal working life at a rate not less than that greater amount.

...

[52] Mr Colmore primarily contends that his earnings related compensation (whether under sections 53 or 63) should be based on his post-accident earnings at Social Welfare, since his incapacity arose in March 1990 when he ceased working there, not in December 1980 at the time of the accident. By March 1990,

he was earning considerably in excess of that which he was earning as a second year farm cadet in December 1980.

[53] The Authority (Judge Beattie) found that Mr Colmore's post-accident earnings were irrelevant, as he had been continuously incapacitated from December 1980.

[54] This brings the present Authority to the questions of law which Mr Schmidt, on behalf of Mr Colmore, submits arise from Judge Beattie's decision.

Question 1 – Is the Corporation's reliance on the occupation of farm worker flawed?

[55] According to Mr Schmidt, the Corporation's calculation of weekly LOPE compensation was based on information it received from the Department of Labour regarding pay rates for dairy farm workers. No research was done on establishing the earnings of employees in more senior farm positions, such as contract sharemilker or farm manager, even though that is the normal career path in farming. Yet, it is submitted, section 63(5) permits the LOPE calculation to be done from "time to time".

[56] Mr Tui contends this is a new issue, as it was not argued before Judge Beattie. Furthermore, it is not a question of law, but one arising out of the facts on which the Corporation's calculation was based.

[57] The Authority agrees with Mr Tui on both his objections to this purported question of law.

[58] The matter was not raised before Judge Beattie (see Mr Schmidt's submissions of October 2013) and is not dealt with by him for that reason. Of course, that is because Mr Colmore sought a recalculation based on his higher Social Welfare pay. Mr Schmidt says he intended to raise it later if he prevailed on his primary argument as to the interpretation of sections 53 and 63. However, it remains that it was not argued before Judge Beattie and cannot now be raised. It is not a question arising out of Judge Beattie's decision.

[59] Nor is it a question of law. It is primarily a factual enquiry as to the fair and reasonable increases available to cadets in training and then on completion of the cadetship. To the extent it is a mixed question of fact and law, with the legal component being whether qualified farm manager salaries are relevant to the inquiry, the subsidiary question of law is neither capable of serious argument (for

the reason set out immediately below) nor is it one which should be resolved by the High Court.

[60] Mr Tui says that the rates used by the Corporation did incorporate those for dairy farm managers, who were not paid well then. He says the 50% uplift was not applied, because the dairy worker annual rates at the time were below the LOPE prescribed maximum amount. To Mr Tui's first point about incorporating manager's rates, Mr Schmidt contends the rates used in the calculation were not those of fully qualified farm managers.

[61] The Authority has not done the mathematics to check what rates were used, since it rejects the first question of law on the basis that it is new and factually based. Nor is the Authority persuaded that the rates of fully qualified farm managers are even relevant to the section 63 assessment, since Mr Colmore was on a farm cadet training scheme at the time of the accident. The LOPE assessment entitles him to the deemed prescribed rate, or such higher amount (up to 50% more) reflecting the applicable pay increases he would have received as he progressed through the cadet training scheme (if he had not been injured). There is no evidence before the Authority that the scheme leads to the position of contract sharemilker or fully qualified farm manager immediately at the end of the cadetship.

Question 2 – Are Mr Colmore's earnings at Social Welfare relevant to a LOPE increase?

[62] This is really the nub of the appeal and this application for leave to appeal. It is certainly a question of law, but the issue for the Authority is whether it is capable of *bona fide* argument.

[63] Mr Schmidt submits that a fresh incapacity arose when Mr Colmore left Social Welfare in March 1990, since he had been working there since November 1981. His earnings related accident compensation should therefore be based on his higher Social Welfare pay at that time, as if he had been working full-time.

[64] Mr Tui contends that Mr Colmore has been continuously incapacitated since December 1980 and that there was no fresh incapacity in March 1990 when he left Social Welfare. He points out that there is evidence Mr Colmore's previous representative accepted there was continuous incapacity (see his representative's email of 22 November 2010).

[65] Judge Beattie agreed with Mr Tui. He found that Mr Colmore had been

continuously incapacitated from full-time employment since the accident, as a consequence of the injury sustained then. He had only ever held part-time employment at Social Welfare.

[66] This is an argument based on the relationship between section 53(9) and 63(5).

[67] It will be recalled that section 53(9) provides for earnings compensation to be based on post-accident wages, where there is delayed incapacity, as a rare exception to compensation usually being based on pre-accident earnings.

[68] However, there is no delayed incapacity here. The present Authority respectfully agrees with Judge Beattie. Mr Colmore never regained full-time employment following the accident. While he was employed at Social Welfare from November 1981 to March 1990 (when he ceased working), he was only ever part-time (albeit near full-time until September 1987).

[69] It is clear from the trial period in 1983 that he could not achieve full-time employment. He spent a good deal of 1987 on sick leave (and was back on an invalid's benefit for a period) and from September of that year, reduced his hours even further. Mr Colmore remained continuously "incapacitated" from December 1980, in terms of the statutory definition (section 2(1) of the 1982 Act):

"Incapacitated" means suffering from total or partial incapacity; and "incapacity" has a corresponding meaning.

[70] Mr Schmidt submits that under the first proviso to section 63(5), the Corporation can "from time to time" fix the relevant earnings (LOPE) at an amount higher than the prescribed rate, up to a maximum of 50% in excess of the prescribed rate.

[71] However, the ability to periodically reassess the LOPE payment in this way allows the Corporation to take into account what (bar the injury) would otherwise have been the injured person's progression towards completion of the qualification for which he was training *at the time of the accident*, and hence the periodic increases in remuneration based on that progression. Mr Schmidt advances no authority or reasonable argument supporting his proposition that LOPE or other earnings related compensation can be based on actual post-accident employment. It would seem to the Authority that could only occur using section 53(9) but in Mr Colmore's case, he suffered no delayed incapacity, as he was continuously incapacitated from the date of the accident.

[72] Counsel for Mr Colmore relies on the decision of the Authority in *Gallagher v Accident Compensation Corporation* Decision No. 140/97, 9 October 1997. It is not clear what point Mr Schmidt is making relying on *Gallagher*. It seems to be that in *Gallagher*, no objection was taken to a late application for make-up earnings related compensation (including LOPE), since Mr Gallagher had worked part-time after the accident, but the Corporation in Mr Colmore's case is making no such objection. It is paying related LOPE earnings compensation, but calculated by reference to his pre-injury farming occupation and not his later clerical employment. On that point, it is noted that Mr Gallagher had returned to his same pre-injury employment, so *Gallagher* provides no assistance for Mr Schmidt's contention that a different post-injury employment should be used as the basis for calculating earnings related compensation. In *Gallagher*, the Authority did not consider compensation issues arising from delayed incapacity under section 53(9) because by the time he ceased work, Mr Gallagher's earnings had fallen below that which he enjoyed at the date of the accident.

[73] Indeed, the general principles set out in *Gallagher* as to the relationship between sections 53 and 63 are contrary to the case being made out for Mr Colmore (*Gallagher* at pp7-8):

"Mr Edwards referred to the fact that the Corporation may take account of "such other relevant factors as the Corporation thinks fit" – s.53(1) – those words appearing in both s.53(1) and the proviso to s.53(9). Mr Barnett is correct in arguing that these provisions do not permit the Corporation to take account of future earnings, if that is what the appellant is seeking. Mr Barnett is correct in saying that the paramount consideration in assessing relevant earnings is that they fairly and reasonably represent normal average weekly earnings "at the time of the accident" – s.53(1) – or in the case of delayed incapacity "at the time of the commencement of the period of incapacity for work" – s.53(9). Future earnings are not a consideration apart from those exceptional provisions namely 62 and 63.

As was spelt out in the principal submissions made by Mr Barnett at the hearing, s.63 did allow the Corporation to look at the appellant's future earnings, that is to say, the earnings he would be entitled to immediately upon completing his apprenticeship. That calculation was done by the Corporation but produced a result less favourable than that produced by s.53.

Mr Barnett is correct in arguing there is simply no authority when assessing relevant earnings pursuant to s.53 or s.63, to have regard to what the appellant's earnings might have been in the years following completion of his apprenticeship. It is noted that Mr Edwards has apparently been unable to cite any authority for his argument.

Mr Edwards also referred to the second proviso in s.63(5). I agree with Mr Barnett that this provision does not assist the appellant. What it does is permit the Corporation to calculate relevant earnings pursuant to s.53 and if that calculation exceeds the one made pursuant to s.63, then to disregard the s.63 calculation and "fix relevant earnings at such greater amount as it thinks fit (not exceeding the amount so ascertained ...)". The words "not exceeding the amount so ascertained" refer to the amount ascertained pursuant to s.63. That is precisely what the Corporation has done."

[74] It follows that, absent delayed incapacity (which Mr Colmore does not have), his earnings compensation must be assessed on the basis of his wages at the time of the accident as a farm cadet. The future earnings that can be built into this assessment are those he would have enjoyed during the cadetship or earned immediately upon completing the cadetship, not those of a fully qualified farm manager, let alone those as a clerical officer at Social Welfare.

Question 3 – Is Mr Colmore entitled to the greater of either LOPE (assessed under section 63) or loss of earnings (assessed under section 53)?

[75] The answer to this question is essentially ‘yes’, as the second proviso to section 63(5) provides, though it must be remembered that LOPE is subject to a maximum of 50% above the prescribed rate. However, there is no evidence that Mr Colmore did not get the benefit of that comparison (bearing in mind that both calculations will be based on farm worker wages).

[76] The question seems to relate to what compensation, if any, was paid to Mr Colmore for the period from September 1987 (when he reduced his hours at Social Welfare) to March 1990 (when he stopped working at Social Welfare). The factual position is not clear, but the Authority understands that from July 1986, Mr Colmore was not paid LOPE or indeed any earnings related compensation, because he was earning more at Social Welfare than he would have received from the Corporation for LOPE compensation adjusted by the orders in council (LOPE being based on farm worker wages). Earnings related compensation (LOPE) was resumed many years later, backdated to March 1990.

[77] Judge Beattie observed (at [17]) that it was possible Mr Colmore was entitled to some compensation during the period of reduced hours from 1987 to 1990. That may be so. The facts were not before Judge Beattie, and are not before the Authority now, on which to do that calculation. The Authority does not know whether his earnings at Social Welfare on reduced hours were still higher than any earnings related compensation (LOPE or otherwise) to which he was entitled. That is a factual enquiry which the parties can resolve between themselves. There is no question of law here for the High Court.

[78] According to Mr Schmidt, the Corporation refused to consider the earnings of full-time employees at Social Welfare on the same grade and salary as Mr Colmore. As Mr Schmidt acknowledges, this is an argument based on section 53(9). However, the Authority has rejected the contention that there is any delayed incapacity as contemplated by section 53(9), whether in September 1987

or March 1990. Mr Colmore has been continuously incapacitated (in terms of the statutory definition) since the accident in December 1980.

[79] Mr Schmidt relies on *Wicks v Accident Rehabilitation and Compensation Insurance Corporation* HC Auckland HC50/93, 22 March 1995. However, *Wicks* was a case of a fresh incapacity under section 53(9) (though section 53 was not the issue there). Mr Wicks had returned to full-time employment post-accident. It was found that when subsequently made redundant, his inability to find new employment was a fresh incapacity resulting from the injury years earlier, notwithstanding there having been no loss of capacity in between the accident and redundancy. The calculation of his compensation was not the issue, but presumably it would be based on his remuneration at the later (pre-incapacity) employment, rather than the earlier (pre-accident) employment, using section 53(9).

[80] The intervening full-time employment and therefore period of no incapacity, followed by a later fresh incapacity (when made redundant from his post-accident employment), make Mr Wicks' circumstances under section 53 materially different from those of Mr Colmore.

[81] In summary, Mr Colmore is not entitled during any period to earnings related compensation – whether under sections 53 or 63 – based on his remuneration at Social Welfare. His compensation will be based on the higher of his pre-accident farm worker wages (adjusted by orders in council) and the LOPE prescribed amount based on his anticipated farm cadetship wage increases (adjusted by orders in council and with a possible maximum 50% uplift).

Conclusion

[82] The Authority concludes that no question of law capable of *bona fide* and serious argument arises out of the decision of Judge Beattie of 12 December.

[83] Mr Schmidt submits that the ground of appeal “for any other reason” is relevant here, since the interpretation of sections 53 and 63 contended by him will materially alter the long-term calculation of earnings related compensation for Mr Colmore. It is accepted that his interpretation would do so, but his interpretation is wrong and there is no serious argument in its favour. The scarce resources of the High Court should not be directed to consider the interpretation advanced here.

[84] There is no question which by reason of its general or public importance or for any other reason ought to be submitted to the High Court.

[85] Finally, Mr Schmidt contends that the outcome in this case is at odds with the overriding statutory principle of a fair assessment of lost earnings for a person whose disability is permanent and serious. The general concept of a fair assessment is an oversimplification of the 1982 Act and other accident compensation legislation. The fair assessment is not 'at large', as it must be made in accordance with the relevant legislation.

[86] The interests of justice do not require that leave to appeal be granted.

OUTCOME

[87] The Authority declines Mr Colmore leave to appeal to the High Court from its decision of 12 December 2013.

D J Plunkett