IN THE DISTRICT COURT
AT WELLINGTON

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

[2021] NZACC 146 ACR 213/18

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 162 OF THE ACT
BETWEEN	MICHAEL BUIS Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the Papers

Judgment: 28 September 2021

JUDGMENT OF JUDGE D CLARK
[Leave to Appeal: s 162 Accident Compensation Act 2001]

Introduction

[1] Mr Buis applies for leave to appeal to the High Court under s 162 of the Accident Compensation Act 2001 ("the 2001 Act") on a question of law against a decision of Judge AA Sinclair dated 18 May 2020.[1]

Background

[2] In July 1976 Mr Buis suffered an epidural infection which resulted in T9 paraplegia. At the time Mr Buis was employed by the Royal New Zealand Navy (RNZN). Mr Buis applied for cover which was declined by the respondent on the basis that the injury was not caused by an accident.

[1] *Buis v Accident Compensation Corporation* [2020] NZACC 46.

[3] In a review hearing dated 29 January 1980, Mr Buis was granted cover on the basis his condition was as a result of a medical misadventure.

[4] As Judge Sinclair records in her judgment[2] the grant of cover at this point did not stop a protracted period of engagement between Mr Buis and the respondent. Between 1980 and 2019 the parties continued to be at odds over the quantum which should be paid to Mr Buis in terms of compensation/weekly compensation (ERC), how the ERC should be calculated in terms of what was to be included, the correct dates as to when that compensation should be calculated from, what arrears should be paid, what interest on the arrears should be paid, and from what date(s) interest should be paid. This involved the parties in further review applications and hearings, including decision in this Court.[3]

[5] The current issue arises regarding a dispute between the parties over the payment of interest on a further ERC payment paid to Mr Buis in 2004.

[6] In the High Court decision of *Accident Rehabilitation and Compensation Insurance Corporation v Lewis*[4] Barker J determined that assessible income for the purposes of calculating ERC should include non-taxable allowances. In March 2004 Mr Buis requested the respondent to reassess his ERC in line with the authority of *Lewis* and once his allowances with the RNZN were taken into account, the respondent agreed to pay a further sum of $124,956.72 in December 2006.

[7] In addition to the $124,956.72 paid, the respondent calculated that arrears interest in the sum of $109,042.15 should also be paid to Mr Buis. Following further communication between the respondent and Mr Buis, the respondent then agreed that the interest should be recalculated, and this increased the interest payment to a total of $118,620.27. Notification of this decision was made to Mr Buis on 19 February 2007. This sum was paid in two instalments; $109,042.15 on 18 January 2007 when the first interest payment was determined and $9,578.12 on 26 February 2007 following the further discussions.

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[2] See paras [5]-[18].
[3] *Buis v Accident Compensation Corporation* [2003] NZACC 246.
[4] *Accident Rehabilitation and Compensation Insurance Corporation v Lewis* HC 149/93 13 April 1994.

[8] The respondent originally calculated the interest payment by determining that it was obliged to pay interest from the date it received "all information necessary"[5] which in Mr Buis' case was the date of the High Court decision in *Lewis*[6] being 13 April 1994. The respondents subsequently agreed with Mr Buis that the "all information necessary" date should be the date of the Accident Compensation Appeal Authority's review decision in *Lewis*[7] which moved the date to 13 July 1992.

[9] On 28 April 2017 Mr Buis wrote to the respondent requesting that it reconsider his entitlement to interest on the arrears ERC that had been paid to him in December 2006. His position was that interest on the payment should be calculated under the original s 72 ("the original s 72") of the Accident Rehabilitation and Compensation Insurance Act 1992 ("the 1992 Act") and not s 371 of the 2001 Act which together with the transitional provisions had modified the original s 72 to the effect that interest on any arrears ERC payments was only payable from 1 July 1992 ("the modified s 72").[8] The original s 72 had first introduced the requirement to pay interest on arrears ERC payments.

[10] The effect of this would mean that further interest was payable to Mr Buis for all arrears ERC payments prior to 13 July 1992.

[11] In response the respondent wrote to Mr Buis on 29 May 2017 advising him that it had fully considered all matters which had previously been raised and was satisfied with its decision of February 2007. The respondent advised that it would not be entering into any further correspondence on the matter unless *"you are able to provide new information that has not previously been provided to us"*.

[12] Mr Buis wrote again to the respondent in November 2017 maintaining that there had been errors and miscalculations of ERC in line with the *Lewis* decision, and that "all information necessary" was information that had always been available to the respondent from the RNZN.

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[5] In accordance with s 371 Accident Compensation Act 2001.
[6] Supra at n4.
[7] *Lewis v Accident Rehabilitation and Compensation Insurance Corporation* No 236/92.
[8] Judge Sinclair has referred to s 72 as the 'original s 72' and 'modified s 72' and I do likewise in this judgment.

[13] The respondent again considered the matter and on 14 November 2017 advised that a further interest payment of $276.35 would be paid to Mr Buis. It advised:

> The amount of interest we're paying covers the period from 1 July 1992, the earliest date that ACC can calculate the interest from, to 18 December 2006, the date we paid your backdated worker compensation for 17 January 1997 to 20 June 2006. $276.35 is the difference between the recalculated interest total of $118,896.60 and the interest amounts already paid on 18 January 2007 of $109,042.15 and 26 February 2007 of $9,578.12.

[14] Mr Buis filed an application to review the respondent's decision which was dismissed on 10 April 2018. He then appealed that decision to the District Court.

District Court Decision

[15] For the purposes of this application Mr Buis has repeated many of the arguments that he raised in the hearing. It is convenient then to repeat Judge Sinclair's summary of those arguments:[9]

> [a] The Board of the Corporation had a duty imposed by legislation to ensure that the C3 Form requested all the financial information from employers that was required under the relevant statutory provisions to ascertain an employee's earnings and enable the Corporation to be able to calculate the correct ERC to be paid to the injured person as required by legislation.
>
> [b] In breach of its duties and obligations, the Board unreasonably and unlawfully limited its policy and requisite earnings information in the C3 Form by specifying that only pre-accident taxable earnings, benefits and allowances were to be included; specifically excluding non-taxable items; and not providing a means of identifying any additional items as part of the employee's earnings.
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> [c] The Corporation had 10 opportunities prior to 22 June 2006 to calculate Mr Buis' compensation according to the law but on each occasion, the Corporation deliberately chose to apply a process that it knew would result in an under payment.
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> [d] The Corporation correctly calculated Mr Buis' ERC on 22 June 2006 only because Mr Buis had found out about the Lewis decision and obtained the necessary information from the RNZN. The Corporation admitted by making the arrears payment to Mr Buis on 11 December 2006 that its policy was wrong. Despite putting the Corporation on notice that it should correct other claimants' compensation to comply with the Lewis decision, the Corporation has not taken any steps to do so and has not changed its forms ascertaining a person's earnings as an employee.
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> [e] Despite accepting that the final 2006 weekly compensation arrears payment was a revision of an earlier decision, the Corporation contends that the resulting interest decision must be treated as an original first decision under the 2001 Act and s 371

[9] At para [23].

therefore applies. The High Court decisions relied upon by the Corporation in *Robinson v Accident Compensation Corporation and McLean v Accident Compensation Corporation* are both cases where the appellant's first claim for interest was made under the 2001 Act so s 371 clearly applied.

[f] The interest calculations were initiated under s 72 and each subsequent adjustment to the calculation has been due to the Corporation's errors. In these circumstances, Mr Buis' right to have the matter completed under the 1992 Act is preserved under s 18 of the Interpretation Act 1999.

[g] The decision in *Accident Compensation Corporation v Kearney* makes it clear that the Corporation should not profit from its own failure to obtain information. The Court's observations at paragraph 32 of that decision are not limited to interest claims that fall within the ambit of s 371, but interest claims generally including the present case where the first originating claim was made under the 1992 Act within the ambit of s 72 by way of s 390 of the 2001 Act.

[h] In *King v Accident Compensation Corporation* the High Court took a dim view of the Corporation's attempts to deliberately delay a claim for permanent incapacity assessment under the 1982 Act until repealed by the new Act. In the present case, the Corporation has deliberately failed to carry out its statutory duty in *Lewis* and is now attempting to take advantage of the interest limiting provision that took effect from 1 July 1999.

[i] The limiting provisions (ss 458 and 371) only apply in cases where there is compensation due for periods prior to 1 July 1999 but the interest application was made on or after that date. In this case Judge Hole in *Buis v Accident Compensation Corporation* has already found on the facts that the original s 72 applies.

[j] In *Accident Compensation Corporation v Bartels* the Court upheld the Corporation's argument that in a situation where later information shows that the original decision under an early Act was wrong then it is appropriate to apply s 390 to correct that error. In the present case, the Corporation breached its statutory duty in not obtaining the allowances information when it knew that affected claimants (including himself) would be underpaid. This is an error that must be corrected by way of s 390 as the legislation intended.

[Citations omitted]

[16] Judge Sinclair then identified the principle issue for determination as being:

> …whether the Corporation was required to apply the original s 72 provision or the modified s 72 pursuant to s 371 of the 2001 Act when it considered Mr Buis' entitlement to interest on the 2006 arrears payment of weekly workers compensation in early 2007.[10]

[17] After careful consideration Judge Sinclair rejected all of Mr Buis' arguments. Following the cases of the High Court decision of *McLean v Accident Compensation Corporation*[11] and the Court of Appeal decision of *Robinson v Accident Compensation*

[10] At para [24].
[11] *McLean v Accident Compensation Corporation* [2018] NZHC 615.

Corporation[12] her Honour noted that the issue of whether payment of interest could predate the 1992 Act has previously been dealt with by these two cases.

[18] The starting point was determining when the decision(s) were made regarding the payment of interest on the arrears ERC. Having reached a decision that arrears ERC was payable in December 2006 the respondent was then required to determine the amount of interest that was also payable. Those decisions were made in January and February 2007 which meant the modified s 72 under the 2001 Act applied by virtue of s 371 of the 2001 Act. Both *McLean* and *Robinson* were authority for the proposition that interest was only ever payable from 1 July 1992 notwithstanding that the respondent in both cases had "all information necessary" prior to 1 July 1992.[13]

[19] Furthermore s 18 of the Interpretation Act 1999 did not assist Mr Buis as the application of that section would only be relevant where the enactment in question was silent (in this case) on when interest would be payable from. Section 453(b) of the 1998 Act specifically dealt with this issue by modifying the original s 72 and s 371 of the 1992 Act continued to also preserve s 72 but in its modified form. Accordingly, s 18 of the Interpretation Act 1999 did not apply.

[20] Judge Sinclair also did not accept that the cases of *Accident Compensation Corporation v Kearney*[14] or *King v Accident Compensation Corporation*[15] assisted Mr Buis. In *Kearney* the Court of Appeal held that despite errors being made and that "all necessary information" could or ought to have been held between 1986 and 1991, interest would only run from 1 July 1992.

[21] *King* concerned a judicial review hearing where the Corporation failed to undertake a s 60 assessment of Mr King, prior to that provision getting repealed under the new 1992 Act. The High Court criticised the Corporation in its failure to exercise its statutory duty but Judge Sinclair rejected Mr Buis' argument on the basis that *King* involved different issues including a consideration of the application of provisions in the 1992 Act which were irrelevant in these proceedings.

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[12] *Robinson v Accident Compensation Corporation* [2007] NZAR at 193.
[13] See paras [25] and [27].
[14] *Accident Compensation Corporation v Kearney* [2010] NZCA 327.
[15] *King v Accident Compensation Corporation* [1994] NZAR 159.

[22] Mr Buis could also not rely on the authority of *Accident Compensation Corporation v Bartels.*[16] In that case it was held that if future information confirmed that an error was previously made in making a decision, then it is appropriate to apply s 390 to correct that original decision as at the date the decision occurred. Mr Buis argued that the respondent had breached its statutory duty by failing to collect "all information necessary" and implement the *Lewis* decision.

[23] Judge Sinclair determined that the decisions at issue in this proceeding (the payment of the arrears on the newly assessed ERC and interest on those arrears) were new decisions made by the respondent in late 2006 and 2007, and therefore the 2001 Act applied. The respondent had accepted that the earliest date that it should pay interest from was 1 July 1992 based on the transitional provisions and the modified s 72. Accordingly, s 390 had no relevance.

[24] Finally, Judge Sinclair determined that the letter from Mr Buis dated March 1999 did not preserve his claim for interest in 2006. That letter dealt with interest in respect of different arrears which were paid and had no connection with the decisions made in 2006 and 2007. For the same reasons Mr Buis' reliance on the finding of Judge Hole in *Buis v Accident Compensation Corporation* [17] could not succeed. In that case Judge Hole made a factual finding that interest was payable in respect of arrears claimed prior to 1999, and therefore had no application to the arrears and interest paid in 2006 and 2007.

Application Leave to Appeal – Legal Principles

[25] The principles are clear. Section 162(1) of the 2001 Act states:

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

[26] The application for leave will only be granted where there is a question of law capable of bona fide and serious argument. In *Gilmore v Accident Compensation Corporation*[18] Dunningham J stated:[19]

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[16] *Accident Compensation Corporation v Bartels* [2006] NZAR 680.
[17] *Buis v Accident Compensation Corporation* [2003] NZACC 246
[18] *Gilmore v Accident Compensation Corporation* [2016] NZHC 1594.
[19] At para [28]. See also *Bryson v Three Foot Six Ltd* [2005] NZSC 34; [2005] 3 NZLR 721 (SC); *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

> [28] Section 162 makes it clear that an appeal is only allowed on a question of law. A question of law does not arise where the Court has merely applied law, which it has correctly understood, to the facts of an individual case. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is the matter for the fact-finding Court unless clearly unsupportable. Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law. However, issues of fact should not be dressed up as questions of law.
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> [Citations omitted]

The Question of Law Posed

[27] Mr Buis poses the following question of law;

> Did the District Court misconstrue the relevant transitional provisions when determining how s 65 of the [1992] Act applied to the revision of the interest decision.

Analysis and Discussion

[28] Mr Tuaquerequre, Counsel for the respondent accepts in his submissions that the question posed is a question of law. However, he goes on to say that there is no real prospect of Mr Buis succeeding in the High Court.[20] For the reasons below I agree with his submission.

[29] Mr Buis' question focuses on the respondent's ability to correct an error[21] made in respect of the decision. He argues that the respondent made an error when it failed to gather the requisite information to assess and pay his ERC prior to 1992. Correcting that error fell under s 390 and therefore the interest calculation on those arrears, in accordance with the original s 72, was not limited to the 1 July 1992 cut-off date.

[30] The cases of *Kearney*, *Robinson* and *McLean*, all of which are on point and binding on this Court, address the question raised by Mr Buis. As outlined by Chambers J in *Kearney*:[22]

> [9] By the time the issue of interest arose, the Accident Compensation Act 2001 (the 2001 Act) was in force. Section 339(1) had repealed the 1998 Act. In turn, s 417(1) of the 1998 Act had repealed the Accident Rehabilitation and

[20] Para 1.8 of Counsel's submissions.

[21] It is noted that Mr Buis refers to s 65 of the 2001 Act (which deals with revising decisions under the 2001 from 1 April 2002) in his question although in his submissions he frequently refers to s 390 of the 2001 Act (which deals with the revision of decisions made under the previously repealed 1998 and 1992 Acts). I infer from this that he relies on both provisions to advance his argument.

[22] Supra at paras [9] to [12].

Compensation Insurance Act 1992 (the 1992 Act); s 179(1) of the 1992 Act had repealed the 1982 Act. Accordingly, except as provided by transitional provisions to which we will come, the only relevant statute in force was the 2001 Act…

[10] One of the sections in Part 11 is s 371. Because of the importance of that section to this appeal, we set it out in full:

> **371 Interest on late payments of weekly compensation**
>
> (1) Despite section 339, section 72 of the Accident Rehabilitation and Compensation Insurance Act 1992 (as continued by section 458 of the Accident Insurance Act 1998) continues in effect to the extent that it requires payment of interest only in respect of calculations made under that Act for any period commencing on or after 1 July 1992 for which weekly compensation is payable.
>
> (2) Despite section 339, -
>
> (a) section 101 of the Accident Insurance Act 1998 continues in effect as if that section had not been repealed; but
>
> (b) section 101 has effect to require the payment of interest only in respect of calculations made under that Act for the period 1 July 1999 to 1 April 2002.

[11] By way of explanation, s 339 of the 2001 Act is the section which repealed the 1998 Act. By the "despite section 339" device, that Act continued in force for the limited purpose specified in s 371. Section 72 of the 1992 Act was the section empowering and requiring the Corporation to pay interest on late payments of compensation under the 1992 Act. Section 101 of the 1998 Act was the equivalent section applicable for the period that Act was in force, namely 1 July 1999 to 1 April 2002.

[12] There is a further quirk to s 371(1) which requires explanation. That subsection preserved s 72 of the 1992 Act, but only "to the extent that it requires payment of interest only in respect of calculations made under that Act for any period commencing on or after 1 July 1992". The reason for that qualification is this. An issue had arisen under the 1992 Act as to whether s 72 of that Act permitted or mandated the payment of interest prior to 1 July 1992, the date on which the 1992 Act came into force. The Corporation contended it did not, but this argument did not prevail in at least one District Court case. At the time the 1998 Act was before Parliament as a Bill, another case was making its way to the High Court on the same issue. Parliament made its position clear by specifically providing in s 458(b) of the 1998 Act that s 72 of the 1992 Act, which continued in effect as a transitional provision, required the payment of interest "only in respect of calculations made under [the 1992] Act for the period 1 July 1992 to 1 July 1999".

[citations omitted]

[31] Furthermore, Chalmers J noted the findings in *Robinson* and *McLean*[23] where an argument that interest could be paid prior to 1992 using the original s 72 was expressly rejected.[24]

[32] In *McLean* Stevens J upheld the decision of Judge Barber in the District Court who concluded:

> [49] The Corporation is a creature of statute and must apply the legislation in force at the time it considers and determines a claimant's payment of interest. The relevant legislation in force here was the 2001 Act. Such legislation had expressly modified s 72 of the 1992 Act with the effect that interest is not payable before 1 July 1992. Parliament decided on 1 April 2002 that interest on unpaid compensation could only run from 1 July 1992 and not for any period prior to that.

[33] Earlier Judge Barber noted:

> [30] It seems to me the purpose of the said ss 458 (of the 1998 Act) and 371 (of the 2001 Act) are clearly twofold:
>
> (a) To preserve the payment of interest for periods prior to the enactment of the New Zealand legislation; and
>
> (b) To confine the payment of interest to periods after 1 July 1992.

[34] Later in his judgment Stevens J stated:

> [35] With respect to the argument for the appellant based on the applicability of s 72 of the 1992 Act, I am satisfied that the approach followed by the Judge in the District Court was correct. Such an approach finds support from the dicta in the Court of Appeal in *Robinson* and other authorities cited at [31] above. I agree with the submission of counsel for the Corporation that the application of the relevant legislation at the time that the determination is made by the Corporation regarding payment of compensation (or interest) is consistent and would avoid haphazard results depending upon accidents of timing.
>
> [36] So far as the Corporation is concerned, being a creature of statute, it must apply the legislation in force at the time that it is dealing with any particular claim. It would be entirely artificial to say that the Corporation, dealing with the claims for interest in 2003 or 2006, could reach back and apply s 72 of the 1992 Act when, at the point of determination, that section had been repealed. It is true that the effect of s 72 continued in part at those times, but that was only due to the effect of s 371 of the Act. By its express terms the payment of interest prior to 1 July 1992 was not possible.

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[23] At paras [19] and [24].

[24] Based on the decision of *GPB v Accident Rehabilitation and Compensation Insurance Corporation* HC Wellington AP393/97, 23 November 1998.

[35] At the time that the decisions regarding arrears of ERC and interest were made in late 2006 and early 2007 the Act that was in force was the 2001 Act. The applicable transitional provision for interest to be paid was s 371 which applied the modified s 72, meaning interest could only run from 1 July 1992.

[36] These were new decisions and not the revision of earlier decisions. As such neither s 390 (nor s 65) has any application. Even if these decisions should have been made prior 1992, then on the authority of *Kearney*, *Robinson and McLean* where decisions were made prior to 1992, in each of these cases interest was held to run only from 1 July 1992.

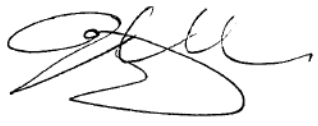
[37] In the circumstances Judge Sinclair interpreted and applied the transitional provisions in accordance with their statutory terms and in accordance with the existing High Court and Court of Appeal authorities. Mr Buis' case falls within the ambit of s 391, meaning that interest can only be payable from 1 July 1992.

[38] Accordingly, whilst there is a question of law, it is not a question of law which is capable of bona fide serious argument.

Result

[39] The application for leave to appeal is dismissed.

[40] There is no issue as to costs.



D Clark
District Court Judge

Solicitors: Medico Law Limited