IN THE DISTRICT COURT
AT WELLINGTON

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

[2021] NZACC 15 ACR 27/18

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	OWEN JOHNSTONE Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 25 November 2020
Heard at: Wellington/Te Whanganui-a-Tara

Appearances: Mr P Sara for the appellant
Mr I Hunt for the respondent

Judgment: 14 January 2021

RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Earnings Related Compensation – s 53
Accident Compensation Corporation Act 1982]

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[1] This appeal relates to a decision of the Corporation dated 4 November 2016 which calculated backdated weekly compensation for the appellant based on his relevant earnings figure of $698.60 per week.

[2] However, as Mr Sara, Counsel for the appellant submits, the more refined focus in this appeal is whether the appellant was a seasonal worker or not at the time of his accident, as his status as a seasonal worker or full time employee would ultimately determine the amount of backdated weekly compensation payable to him.

Background

[3] The appellant was employed by the Alliance Group Limited (AGL) at the Lorneville plant, in Southland at all material times.

[4] The appellant had an accident on 19 September 2012 when he tripped on a cord at home and wrenched his left knee. It became clear that the appellant was suffering from a pre-existing condition as at the date of the accident and the primary cause of that pre-existing condition was the aftermath of surgery which he had on his knee in 1988. Cover was accepted by the Corporation for left knee osteoarthritis as a consequential injury with the deemed date of injury of 9 June 1988.

[5] There was then an assessment of the weekly compensation to be paid to the appellant and in this regard the review decision sets out various internal memoranda of the Corporation addressing the question of relevant earnings. This ultimately led to the decision at issue on this appeal namely that the relevant earnings figure was $698.60 per week.

[6] An application for review of that decision was then lodged and correspondence was entered into between Counsel for the appellant, AGL, the New Zealand Meat Workers and Related Trades Union.

[7] The review hearing commenced in April 2017 and various steps were taken before it concluded on 28 November 2017. In the intervening period the Corporation's position was reviewed. As a result, in submissions dated 18 July 2017, the Corporation provided a revised assessment of relevant earnings, taking into account the appropriate hourly rate, hourly bonus, daily clean and holiday pay. This resulted in a calculated relevant earnings figure of $847.83 per week.

[8] The Corporation's position at review therefore was that the relevant earnings figure should appropriately be divided by 52 weeks, representing the application of s 53(2)(c) of the 1982 Act. Taking that approach, and as noted in the table at page 10 of the review decision, this led to a calculation of relevant earnings of $456.53.

[9] However, because that figure was less than relevant earnings which had been established in 1988 with respect to a different claim, the Corporation's position was that, exercising its discretion, it would assess the appellant's entitlement based on a relevant earnings figure of $698.60 per week.

[10] Ultimately, the appellant's stance is that his weekly compensation entitlement should be based on the figure of $847.83 per week, which takes into account his wages, allowances, bonuses and holiday pay.

[11] The Corporation's position is that the figure of $847.83 per week was the assessment of relevant *in season* earnings. The Corporation's position is that the figure of $847.83 per week was not the Corporation's assessment of *normal average weekly earnings* in terms of s 53.

[12] It is an agreed fact that as at the date of incapacity, 9 June 1988, the appellant held the position of Sub Branch Vice President of the Meat Workers Union for the Lorneville plant. He was appointed to that position on 12 February 1988.

[13] It is agreed that the appellant had commenced work at the freezing works at Lorneville on 1 December 1987 and worked until 9 June 1988 (the deemed date of incapacity) being a period of 27 weeks and 2 days.

[14] However, the matter is also affected by the fact that at the time of his injury in 1988 Mr Johnstone was union vice president.

[15] It appears to be common ground that by reason of the appellant's position as a union official he would have been offered off season work. This was explained in a letter from Mr Carran, president of the Meat Workers Union dated 2 August 2017.

[16] Amongst other things the letter said:

> In reply to your question, during the era of the 1970s and 1980s it was more common than not, off season work was normally offered to senior delegates and officials as maintenance workers throughout the Lorneville plant, undertaking end of year season major clean-ups, dismantling of equipment for cleaning and maintenance, which involved employment throughout the off season.

> In your department, as the largest in the plant at the time, I can recall up to 30 slaughter board meat workers undertaking this work for the complete duration of the off season, until the new killing season commenced. I would be confident to say to you, as the senior labourers' delegate, and also holding the position of vice president, would have been entitled to this work in the off season as many other departmental delegates were offered off season work also. This practice suited the company as this allowed the company to have access to union representatives for discussion and negotiations during the off season period.

Appellant's Submissions

[17] Mr Sara says at the time of the accident the appellant was not a seasonal worker and therefore the Corporation was required to determine his relevant earnings using a 52 week divisor.

[18] He submits that the decision in *Davies v ACC*[1] is wrong in fact and law. He also submits that in any event decisions of the Accident Compensation Corporation Appeal Authority of which *Davies* is one does not bind this Court.

[19] Mr Sara refers to *Davies*[2], which states:

> [40] It is well settled that in making the determination regard is not had for future earnings and accordingly the suggestion that the appellant would have worked a continuous period of 13 months to the end of the 1989 season but for the accident, is not material and should be disregarded.

[20] Mr Sara submits that the Appeal Authority has conflated the notion of future earnings with the appellant's status at the date of injury.

[21] Mr Sara refers *Davies*[3] where the Authority said:

> [47] … The Authority accepts that the appellant enjoyed status in terms of a ranked seniority which probably gave him an assurance of continued employment just short of guaranteed employment. However, in the Authority's view that measure of permanence does not automatically translate to employment for a full period of 12 months during each and every year of the appellant's employment at the freezing works. …

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1 *Davies v Accident Compensation Corporation* Wellington Decision No 18/2001, 15 October 2001 (Accident Compensation Appeal Authority).
2 At [40].
3 At [47].

[22] Mr Sara submits that it is not and never had been necessary for the appellant to prove guaranteed employment. He submits that what is actually required is an examination of the appellant's status at the time of the accident. The proper question to be asked is whether at the date of the accident the appellant was then a seasonal worker subject to seasonal lay off which would entail a period of non earnings or perhaps earnings from an alternative source.

[23] Mr Sara submits that by the time of his accident the appellant had ceased to be a seasonal worker liable to seasonal lay off and was, on account of his seniority and by virtue of his senior union official position, to be employed during the off season. He submits that while future earnings cannot be taken into account in a direct sense, it is nevertheless appropriate for the fact that his employment would most likely continue during the off season to be a factor to be taken into account by the Corporation.

[24] He submits that his client's appointment as vice president changed him from being a seasonal worker, in the sense of someone subject to a seasonal lay off, to someone who had the privilege of continuing employment during the off season. In practical terms this amounted to year round employment.

[25] Mr Sara says that the law does not compel the Corporation to apply a 52 week divisor. In fact, he submits, s 53(2)(c) specifically allows and in fact directs the Corporation to have regard to some shorter period so that the objective of determining what the appellant's relevant earnings should be reflecting normal average weekly earnings on a fair and reasonable basis. He submits that the divisor to be used in this case should be 27 weeks and 2 days.

The Respondent's Submissions

[26] After setting out the relevant provisions of s 52 and s 53 of the 1982 Act Mr Hunt submits that in essence s 53(1) requires the Corporation to make an assessment of an earner's relevant earnings so as to determine the amount that would fairly and reasonably represent his or her normal average weekly earnings, at the time of the accident.

[27] Mr Hunt notes that s 53(2) gives the Corporation discretion, where the earner was an employee at the date of the accident, to fix relevant earnings in descending order by, in the first place, having regard to the amount of weekly earnings at or about the time of the accident, but also provides that if this did not properly represent the earner's normal average weekly earnings at the time of the accident then the Corporation may have regard to the amount of the average weekly earnings during the period 28 days immediately preceding the date of the accident, or such part or parts of that period as the Corporation may consider is appropriate. Failing this representing the earner's normal average weekly earnings, the Corporation may have regard to the average weekly earnings during the period of 12 months immediately preceding the date of the accident or such part or parts of that period as the Corporation may select for the purpose.

[28] Mr Hunt refers to the decision of Mahon J in *Dragicevich v ACC*[4] where His Honour said:

> The purpose of the elaborate provisions contained in s 104 (the equivalent of s 53 of the 1982 Act) is to give the Commission a wide discretion in assessing a sum that will fairly and reasonably represent the claimant's normal average weekly earnings.

[29] Mr Hunt also refers to *Blundell v ACC*[5], where speaking of s 52(2), Justice Heron said:

> I pause there simply to observe that the words "fairly", "reasonably" and "normal" necessarily involve judgmental assessments required by the Corporation of any figures which may be provided by reference to s 52.

[30] Mr Hunt also refers to *Ellis v ACC*[6] where the Authority said that in assessing relevant earnings the Corporation should be neither generous nor mean but fair and reasonable.[7]

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4 *Dragicevich v Accident Compensation Commission* (1980) 4 NZTC 61,568, [1980] 2 NZAR 549 at 9.

5 *Blundell v Accident Compensation Corporation* [1994] NZAR 1 at [3].

6 *Ellis v Accident Compensation Corporation* Hamilton Decision No 12/2004, 23 December 2004 (Accident Compensation Appeal Authority).

7 At [41].

[31] In *Ellis*[8] the Authority said:

> [54] "Fair and reasonable" should be an objective standard of equity, measured against the facts of the case. It should address any prejudice either to the Corporation or to the appellant.

[32] Mr Hunt refers to *Davies v ACC*[9] where the Authority said:

> [40] It is well settled that in making the determination regard is not had for future earnings and accordingly the suggestion that the appellant would have worked a continuous period of 13 months to the end of the 1989 season but for the accident, is not material and should be disregarded.
>
> [41] The appellant having seemingly been satisfied over a period of some 10 years (late 1989 to late 1999) with the respondent's revised calculation based on 12 months earnings divided by 52, now contends that the calculation should be on the basis of the earnings derived in the actual period worked, divided by the number of weeks worked.
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> …
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> [43] In the Authority's view this method of calculation has the effect of treating the appellant as if he was at all times fully employed and thus is entirely contrary to his work history. That calculation would give rise to a result which does not reflect his earnings and thus does not reflect his loss, which the Act intends to cushion by providing for earnings related compensation equivalent to 80% of lost earnings.

[33] Mr Sara submits that in the appellant's case being employed during the off season is a reference to future employment if not future earnings. He submits that it is not within the matrix of relevant information the Corporation is required to consider in determining normal average weekly earnings at the time of the accident.

[34] Mr Hunt submits that there has been no error in the approach taken by the respondent in this case and that the appeal should be dismissed.

Decision

[35] Section 53 of the Accident Compensation Corporation 1982 relevantly provides as follows:

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8 At [54].
9 ibid n1, at [40]-[41] and [43].

Section 53(1)

> … for the purpose of determining the amount of any earnings related compensation payable to an earner, the amount … shall be such amount as … would, at the time of the accident, *fairly and reasonably represent his normal average weekly earnings* …
>
> [Emphasis added]

[36] Section 53(2) is then engaged:

> (a) The Corporation may have regard in the first place to the amount of his weekly earnings as an employee at or about the time of the accident …
>
> Or
>
> (b) If the amount ascertained under paragraph (a) would not at the time of the accident *properly represent his normal average weekly earnings* …
>
> Or
>
> (c) If … the amount ascertained under paragraph (b) would not at the time of the accident properly represent his *normal average weekly earnings* the Corporation may then have regard to his average weekly earnings during the period of 12 months immediately preceding the date of the accident.
>
> [Emphasis added]

[37] So, the legislation squarely places the focus on what a claimant's normal average weekly earnings were.

[38] The (relatively new) normal for the appellant at the time of the accident is that from the time of his union appointment some months before the accident his employment is continuous and no longer seasonal, albeit that his earnings in the "off season" would be somewhat less than they would be during the season.

[39] So far as the decision in *Davies*[10] is concerned, while helpful, I do not regard it as decisive.

[40] In *Davies* case the appellant had worked at the Waingawa Works for 12 years and on average for not less than 9 months for each of those 12 years. It is understandable therefore that the Authority said:[11]

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[10] ibid n1.
[11] Ibid n1, at [47].

> [47] However in the Authority's view that measure of permanence does not automatically translate to employment for a full period of 12 months during each and every year of the appellant's employment at the freezing works. In fact the evidence is quite the contrary, and as is recorded a little earlier in this decision, this was confirmed by Mr Gough-Young in answer to a question from the Authority.

[41] At the time of his accident the appellant in this case had, only months before, been appointed to the position with his union that entitled him to 12 months employability. I conclude that he would plainly have taken advantage of this, it being the first occasion on which it was available to him. I find therefore that but for the injury he would have worked for the whole 12 months of that year. This case therefore is distinguishable from the *Davies* case in that in the *Davies* case the appellant had a track record of not working 12 months of the year even though he was entitled to do so.

[42] Mr Hunt properly refers to the *Dragicevich*[12] and *Blundell*[13] decisions. The wide discretion to assess a sum that will fairly and reasonably represent the claimant's normal average weekly earnings is plainly an important theme in the legislation to ensure that a fair and reasonable figure is arrived at, as was said in *Ellis*:[14]

> [54] It is not always fair and reasonable to use the lowest figure available, nor always fair and reasonable to use the highest. "Fair and reasonable" should be an objective standard of equity, measured against the facts of the case. It should address any prejudice either to the Corporation or to the appellant.

[43] In this regard, I disagree with Mr Sara that a divisor of 27.2 should be used in this case. That would have the effect of deeming that the higher rates of remuneration earned during the freezing works season is extrapolated over the remainder of the year. It is common ground that rates of remuneration in the "off season" are lower. To use a divisor of 27.2 would result in a "windfall" for the appellant not reflected in the real world. The ethos of the Corporation's legislation tells against such an approach.

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[12] Ibid n4.
[13] Ibid n5.
[14] ibid n6, at [54].

[44] In this case therefore I conclude that to ascertain his normal average weekly earnings at the time of the accident the Corporation needs to calculate his seasonal and his (future) non seasonal income for that year at the then applicable pay rates and divide the figure by 52 to obtain the figure that fairly and reasonably represents his normal average weekly earnings.

[45] The evidence is that his "off season" role, that is, his off season employment with the company was "locked in" as it were and so the "normal" average weekly earnings that s 53 speaks of for the appellant at the time of the injury was full time, year round employment albeit at a higher "in season" remuneration rate and a lower "off season" remuneration rate.

[46] I conclude that in terms of s 53(1) to calculate his normal average weekly earnings, this way, the Corporation is doing what the section provides namely "having regard to … such other relevant factors as the Corporation thinks fit".

[47] The net result is that the appeal is allowed with the practical effect that the Corporation calculates the appellant's normal average weekly earnings for the year of his accident to be 27.2 weeks of his in season employment and 24.8 weeks of his then prospective off season weekly remuneration, altogether divided by 52.

[48] Accordingly, the Corporation's decision of 4 November 2016 is quashed.

[49] Should there be any issue as to costs counsel have leave to file memoranda in respect thereof.

Judge C J McGuire
District Court Judge

Solicitors: Peter Sara, Barrister and Solicitor, Dunedin for the appellant
Young Hunter, Christchurch for the respondent