IN THE DISTRICT COURT
AT WELLINGTON

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

[2021] NZACC 30 **ACR 124/17**

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

Hearing: 23 November 2020
Heard at: Dunedin/Otepoti

Appearances: Mr P Sara for the appellant
Mr C Light for the respondent

Judgment: 5 February 2021

RESERVED JUDGMENT OF JUDGE C J McGUIRE
[Weekly Compensation cl 43 sched 1 Accident Compensation Act 2001]

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[1] The issue for determination is the correctness of the Corporation's decision dated 27 January 2016. In this decision, the Corporation advised Mr Knox that he was not entitled to weekly compensation because he was not considered to be an earner at the date of the accident on 24 December 2015.

Background

[2] The appellant suffered a right shoulder sprain/upper arm injury on 12 September 2015 when he was lifting a box of fish at work. Mr Knox was employed as an observer on fishing vessels on fixed-term contracts from the Ministry

of Primary Industries (MPI) on an as required basis. Cover was granted for this injury and weekly compensation was paid from 12 September 2015 to 11 December 2015. Entitlements were suspended from that date as it was determined Mr Knox's ongoing symptoms were not the result of his covered injury.

[3] Mr Knox underwent rotator cuff repair surgery on 15 December 2015. He developed post surgical septic arthritis. He underwent further surgery on 25 December 2015. The Corporation granted cover for a post-operative infection secondary to right rotator cuff repair surgery, with a deemed accident date of 24 December 2015 (the date when Mr Knox presented to Dunedin Hospital for treatment for the septic arthritis).

[4] Mr Knox sought weekly compensation from 25 December 2015 for 42 days, as recorded in the injury claim form dated 18 January 2016.

[5] The Corporation investigated whether Mr Knox was entitled to weekly compensation.

[6] On 19 January 2016, MPI replied to the Corporation's questions as to Mr Knox's work patterns, stating that:

- Mr Knox's last contract ended on Monday 27 September 2015.
- The work was not seasonal, but he was employed as and when required.
- He was not due any holiday pay at the end of his contract because this was paid within the contract period.
- He had not accrued sick leave or annual leave to be paid out.

[7] MPI stated that it would have re-employed Mr Knox in the future when work was next available, but the date was unknown due to the nature of the business.

[8] In an undated note, Mr Knox recorded that he had worked for MPI and its predecessors since July 1992. This had been his primary source of income. He said that before he boarded a fishing vessel, he signed a fixed-term seagoing contract.

The sea trips varied in duration depending on the fishing catch rates, the target fishery and the type of fishing vessel. His personal records indicated that he had completed 93 sea trips ranging from six to 109 days with the overall average of 42 days per trip. After returning to port, a debriefing was conducted, normally in Wellington. Observers were asked when they would be available for further work and their names were written up on a whiteboard. He normally opted for two to three weeks rest and recreation, but this varied according to the duration and intensity of the trip. He said that since the end of his trip on 28 September 2015, he had received a number of calls from MPI offering him work but he turned these down because he was awaiting shoulder surgery.

[9] Mr Knox's employment agreement with MPI, dated 10 August 2015, recorded that the agreement was for a fixed-term between 10 August 2015 and terminated after debriefing, on or about 20 September 2015. Clause 7 recorded that nothing in the agreement should be interpreted as giving either party an expectation of employment or further service after the expiry date.

[10] In a review decision, dated 4 April 2017, the Reviewer found that Mr Knox's employment history did not establish that he was a seasonal employee and, therefore, his application was dismissed.

[11] The Corporation further determined that he was not entitled to extension of employee status under cl 43 of sched 1 of the Accident Compensation Act 2001 (the Act). The Corporation's reasoning was that Mr Knox did not work within 28 days of his treatment injury accident and the weekly compensation was not considered earnings for the purposes of "having worked within 28 days".

[12] On 26 April 2017, Mr Sara, Counsel for Mr Knox, wrote to Justin Clement, the team manager of Observer Services MPI, amongst other things, saying:

> You will recall corresponding with me last year concerning Alan Knox and his ACC claim. In the course of discussing his case recently, Alan informed me that, to a large degree, the fishing business falls within identifiable seasons. For instance, there is a squid fishing season, which runs from a certain part of the year and then there is another season for Hoki etc. Can you confirm that this is so, and if so, how are the seasons identified?

[13] Mr Clement responded by email on 9 May 2017, stating:

> There are a number of fisheries which have reasonably routine seasonal activity. The attached spreadsheet will give you an idea of which species is targeted each month. Species codes which are bold and underlined indicated increased seasonal targeting.

[14] Additional evidence has since been filed on behalf of Mr Knox.

[15] A letter from Dan Bulger, Deputy Director General of Fisheries, dated 1 July 2019, states:

> **Long Service Award**
>
> Congratulations on completing 20 years of service with the Ministry of Primary Industries and its predecessor organisations.
>
> This is a significant milestone and I am pleased to have this opportunity to acknowledge the contribution that you have made since your first appointment to the Ministry of Fisheries in 1992. The foundation of our success is built upon the commitment of employees such as yourself to the work we do every day on behalf of New Zealand's primary sector and the New Zealand public.
>
> You are receiving this certificate in recognition of your 20 years' service. You undertook your first trip as an observer in 1992. You have undertaken both solo trips and trips paired with another observer, some of which have been as a trainer, mentoring new observers. You have achieved over 4,200 days at sea as an observer.
>
> …

[16] There is also a collective agreement, dated 25 November 2019, between MPI and the New Zealand Public Service Association. This agreement obviously post-dates Mr Knox's date of commencement of incapacity.

[17] The collective agreement describes how observers are employed. Clause 4.1 refers to observers working intermittently, often linked to a specific season of fisheries. The further subclauses provide that the assignments can range from one day to around 180 days. Each observer receives a letter of assignment advising of the expected start date and the expected end date.

[18] There is reference to employment that may be linked to a specific season of fisheries, this is qualified by the words that introduce this, namely that "observers work intermittently".

[19] There is also a letter from Rebecca Blowes, Director of Fisheries Science and Information, dated 20 February 2020, in response to Mr Sara's letter to Mr Clement, dated 27 January 2020. Mr Sara raised the issue of whether the true nature of the work which Mr Knox and other fisheries inspectors did was fairly described as "ad hoc". Ms Blowes wrote:

> …
>
> Mr Knox is employed by Fisheries New Zealand, a business unit of the Ministry of Primary Industries, as a fisheries observer. Fisheries observers are science technicians who work at sea aboard commercial fishing vessels. They collect biological samples, record data and perform other types of verification services. Fisheries observers are deployed in accordance with section 223(1) of the Fisheries Act 1996 to provide services that enable Fisheries New Zealand to meet its fisheries management priorities, ministerial directions, and international obligations. The Ministry of Primary Industries considers that fisheries observers are permanent employees on intermittent assignments. Fisheries observers are engaged on fixed term employment agreements on a per trip basis, and on multiple trips per year. Their deployment is unpredictable and depends on vessel sailings, fish migratory behaviour, and weather patterns. Postings vary across fishing fleets and a fisheries observer can be deployed to a vessel operating anywhere in New Zealand or international waters, which is necessary to minimise the risk of becoming captive to industry. Fisheries observers can be away from home for up to three months at a time.
>
> Fisheries New Zealand recognises it has an ongoing employment relationship with each fisheries observer, regardless of the nature of their deployments. As of September 2019 approximately 40% of fisheries observers had worked for Fisheries New Zealand for more than four years. Mr Knox has an ongoing employment relationship with Fisheries New Zealand, and its predecessors, which spans over 30 years. Last year Mr Knox was presented with a long service award in commemoration of his passion and dedication for the observer programme. We have data relating to Mr Knox's observer engagements from 1992 and can share this with you if required.
>
> Fisheries New Zealand has recently examined the employment status of fisheries observers in detail, as part of a collective bargaining process, which resulted in a collective agreement for fisheries observers. The collective agreement was executed on 24 December 2019.
>
> Under the terms of the new collective agreement, fisheries observers are now entitled to the same employment benefits as other Fisheries New Zealand permanent employees. This includes long service leave, and well being and eye care benefits, which are tied to continuous service. This reflects the understanding that although fisheries observers are deployed on discrete assignments, the relationship is one of an employee.
>
> For the sake of clarification, the collective agreement (section 1.7) defines a break of more than 12 months between assignments to be a break in service. A break of less than four months between assignments is treated as continuous service. A break of between 4 and 12 months is treated as interrupted service, unless otherwise agreed. Periods of interrupted service are added together to

> determine continuous service, for example, it may take 18 months to complete one year's service.
>
> It is the Ministry of Primary Industries' organisational policy to apply the terms of a collective agreement to all staff within that respective work force. This means even if a fisheries observer is not a union member, the changes introduced by the collective agreement still apply.
>
> …

The Appellant's Submissions

[20] Mr Sara went through the sequence of events:

- On 12 September 2015, while at sea as a fishing observer, Mr Knox injured his right shoulder.
- An ACC claim was lodged and accepted. He was entitled to receipt of weekly compensation which commenced from 12 September 2015.
- On 11 December 2015, WellNZ issued a decision suspending Mr Knox's entitlement.
- On 15 December, he underwent a right shoulder surgical repair performed by an orthopaedic surgeon.
- On 24 December 2015, Mr Knox was referred to Dunedin Public Hospital by his GP and was diagnosed with a post operative infection.
- The appellant underwent acute surgery on 25 December 2015 for right shoulder post surgical septic arthritis and he was discharged on 5 January 2016.
- A treatment injury claim for post operative rotator cuff repair – right shoulder infection was lodged with ACC on 31 December 2015 with incapacity being certified initially for 14 days from 29 December 2015.
- A further medical certificate was issued on 5 January 2016 indicating that Mr Knox was unfit for work as from 14 December 2015 until his next review on 18 January 2016.

- ACC determined that Mr Knox was not an earner under s 100 of the Act at the date of his treatment injury on 24 December 2015 as he did not work within 28 days of his treatment injury accident and the weekly compensation was not considered earnings for the purposes of "having worked within 28 days".

[21] Mr Sara notes that the terms "seasonal employment" and "season" are not themselves defined in the Act.

[22] Mr Sara submits that Mr Knox's employment is not seasonal in the same way that fruit picking or meat works operations are seasonal, but the employment is seasonal in the sense that the term "season" is derived by its ordinary meaning:

> Proper time, favourable opportunity, time at which something is plentiful or in vogue or active.

[23] He submits that fishing trips are often for different fishing companies for different nations fishing different species in international waters. As a result, each fishing trip, is a discrete season, with a defined beginning and end.

[24] Mr Sara says there is nothing in the Act to read down "seasonal" to mean something that only applies to the freezing works season or a fruit picking season.

[25] In a supplementary submission, Mr Sara says:

> It seems that the appellant's employment represents a somewhat novel employment arrangement, whereby the overarching relationship is that of permanent employment, but at the material time in this case, his deployment as a fisheries observer was governed by fixed term contracts. So while his employment relationship with MPI continued, the intermittent deployments as a fisheries observer from time to time were governed by discrete fixed term contracts. Only the fixed term contracts had a beginning and an end: the employment relationship continued.

[26] Mr Sara submits that Parliament's intention was to recognise that employees who worked according to a pattern were entitled to be treated differently from those whose employment was truly unpredictable. The idea was that those employees who had established a working pattern could reasonably be expected to work again in the future at the next season.

The Respondent's Submissions

[27] Mr Light submits that, given Mr Knox was on a series of fixed-term contracts, the clear implication is that his employment ended when the contract ended.

[28] Mr Light refers to cl 32 of sched 1 of the Act, which declares that the Corporation is liable to pay weekly compensation for loss of earnings to a claimant who was an earner immediately before his incapacity commenced.

[29] Clause 32 is modified by cl 43, which state the circumstances where people are deemed to have been employed and had employment earnings under the schedule even when they were unemployed immediately before their incapacity. Mr Light refers specifically to cl 43(3)(b), which provides that the claimant is deemed to continue to be in employment and have earnings from that employment for a period of 12 months if:

> (i) the claimant was employed in seasonal employment with the same employer as he or she had been employed in the 2 seasons before the complainant's incapacity commenced; and
>
> (ii) the employer confirms that the claimant could reasonably have expected to be re-employed in the season after the claimant's incapacity commenced.

[30] Mr Light refers to decision in *Accident Compensation Corporation v Algie*.[1] At paragraph 14, the Court said that in accordance with s 5 of the Interpretation Act 1999, the meaning of a statutory provision must be ascertained from the text and in light of its purpose. Even if the meaning of the text may appear plain in isolation of the purpose, that meaning must be cross checked against the purpose in order to achieve the requirements of s 5.

[31] Mr Light also refers to the Supreme Court's judgment in *Commerce Commission v Fonterra Co-operative Group Ltd* where Tipping J said:[2]

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1 *Accident Compensation Corporation v Algie* [2016] NZCA 120, [2016] 3 NZLR 59.

2 *Commerce Commission v Fonterra Co-operative Group Limited* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

> In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[32] Mr Light noted that until the provisions were introduced in cl 43 of the Act, a seasonal employee who was incapacitated after a season had ended was not entitled to weekly compensation.

[33] Mr Light refers to the dictionary definition of "seasonal" and submits that, ultimately, it is discontinuous employment, work that is only available for part of the year. He also submits that seasonal employment always occurs during a definite period of the year, even though the dates do not have to be exact and can be approximate. He submits that Mr Knox is unable to bring himself within the provisions of cl 43(3)(b)(i). He submits that Parliament did not intend to extend this provision to persons such as Mr Knox, who were also engaged on fixed-term agreements, but did not work during definite seasons and "instead on an as required basis or on some other irregular basis".

[34] He said it appears that Mr Knox took on contracts when these were offered to him after he had had a sufficient period of shore rest. He submits that this is not seasonal employment but instead working on an as required basis when he chose to be employed.

[35] He submits that the letter from Ms Blowes, with its description of persons such as Mr Knox being permanent employees on intermittent assignment, is not consistent with seasonal employment provided for by cl 43(3)(b) of sched 1.

The Appellant's Submissions in Reply

[36] Mr Sara submits that Mr Knox can be reasonably brought within the compass of a seasonal worker who does work, which he submits is never identical but for which there is a regular pattern. He submits that is what cl 43 is about.

Decision

[37] Mr Knox has worked as a fish observer on a continuous basis since 1992 on a series of fixed-term contracts with MPI that were for the duration of the particular fishing voyage.

[38] While at sea as a fishing observer on 15 September 2015, he injured his right shoulder.

[39] An ACC claim was lodged and accepted, and he was paid weekly compensation, which commenced from 12 September 2015. On 11 December 2015, WellNZ issued a decision suspending those entitlements. Following his injury on 12 September, Mr Knox returned to shore on 28 September 2015, which is the operative date that his then fixed-term employment agreement ended. The particular agreement appears to have been no different in substance from the other fixed-term employment agreements between himself and MPI under which he had operated since 1992.

[40] On 15 December 2015, he underwent right shoulder surgical repair.

[41] On 24 December 2015, he was referred to Dunedin Public Hospital diagnosed with a post operative infection. He underwent acute surgery on 25 December for right shoulder post surgical septic arthritis and was discharged on 5 January 2016.

[42] A treatment injury claim for post operative rotator cuff repair was lodged with ACC on 31 December 2015 and accepted.

[43] The Corporation determined that Mr Knox was not an earner under s 100 of the Act as at the date of his treatment injury, namely 24 December 2015.

[44] ACC further determined that the appellant was not entitled to the extension of employee status under cl 43 of Schedule 1 of the Act.

[45] The focus of this appeal has been on whether the appellant comes within the provisions of cl 43(3)(b).

[46] That clause provides:

> (2) The claimant is deemed to continue to be in employment and have earnings from that employment for the purposes of this Schedule for the longer of –
>
> (a) 28 days from the date he or she ceased to be in employment, if he or she–
>
> (i) had been in employment within 28 days before his or her incapacity commenced; and
> (ii) would have been an employee within the period specified in subclause (3) after the date on which his or her incapacity commenced, but for the incapacity;
>
> …
>
> (3) For the purposes of subclause (2)(a)(ii), the period is, –
>
> …
>
> (b) 12 months if–
>
> (i) the claimant was employed in seasonal employment with the same employer as he or she had been employed in the 2 seasons before the claimant's incapacity commenced; and
> (ii) the employer confirms that the claimant could reasonably have expected to be re-employed in the season after the claimant's incapacity commenced.

[47] However, the letter from Rebecca Blowes, dated 20 February 2020, provides a full description of the employment arrangement of the appellant. She says:

> The Ministry of Primary Industries considers that fisheries observers are permanent employees on intermittent assignments. Fisheries observers are engaged on fixed term employment agreements on a per trip basis, on multiple trips per year. Their employment is unpredictable and depends on vessel sailings, fish migratory behaviour and weather patterns.
>
> …
>
> Fisheries New Zealand recognises it has an ongoing employment relationship with each fisheries observer, regardless of the nature of their deployments.

[48] She goes on to say that under the terms of the new collective agreement, fisheries observers are now entitled to the same employment benefits as other Fisheries New Zealand permanent employees. This includes long service leave, and wellness and eye care benefits, which are tied to continuous service. This reflects the understanding that, although fisheries observers are deployed on discrete assignments, the relationship is one of an employee-employer.

[49] The collective agreement is dated 25 November 2019, some four years after Mr Knox's treatment injury.

[50] Given Ms Blowes' comment that fisheries observers are employees, the question arises as to whether, as a matter of law, anything significantly has changed over those four years that would render the appellant an employee during the collective agreement but not at the time of his treatment injury. There is nothing before me to suggest there has been any such significant change.

[51] Section 103(1)(a) requires the Corporation to determine the incapacity of a claimant who was an earner at the time he or she suffered the personal injury.

[52] Section 6 of the Act defines earner this way:

> [a] means a natural person who engages in employment, whether or not as an employee; and
>
> [b] includes a person to whom clause 43, 44, or 44A of Schedule 1 applies

[53] Ms Blowes describes the role of fisheries observers as employees and Fisheries New Zealand recognises it has an ongoing employment relationship with each observer. As a result, I conclude that Mr Knox is an earner as defined in s 6 and, for the purposes of s 103(1)(a), he was such when he suffered his treatment injury.

[54] That being so, it is not necessary to reach any final conclusion as to whether Mr Knox was employed in seasonal employment for the purposes of cl 43 of sched 1.

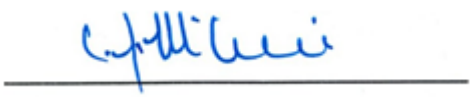
[55] What is clear, however, that the relationship that fisheries observers have with the MPI is a significantly closer one than other seasonal workers have with their employers.

[56] Given the employment relationship enjoyed by Mr Knox since 1992, I find that as at the time of the treatment injury on 15 December 2015, he was an earner and entitled to earnings related compensation for the period in question. The period is

from 11 December 2015 until he was fit to return to work, which I understand to have been in late January 2016.

[57] Accordingly, the appeal is allowed and the respondent's decision of 27 January 2016 is reversed. The effect is that Mr Knox is entitled to weekly compensation for the period in question.

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



Judge C J McGuire
District Court Judge

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