**IN THE DISTRICT COURT**
**AT WELLINGTON**

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

| | **[2023] NZACC 128** | **ACR 33/22**<br>**ACR 34/22**<br>**ACR 35/22** |
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| UNDER | THE ACCIDENT COMPENSATION ACT 2001 |
| IN THE MATTER OF | AN APPLICATION FOR LEAVE TO APPEAL TO THE HIGH COURT PURSUANT TO SECTION 162 OF THE ACCIDENT COMPENSATION ACT |
| BETWEEN | HURRICANES INVESTMENT LIMITED PARTNERSHIP (ACR 33/22)<br>First Applicant |
| BETWEEN | CRUSADERS RUGBY CLUB LIMITED PARTNERSHIP (ACR 34/22)<br>Second Applicant |
| BETWEEN | CHIEFS RUGBY CLUB LIMITED PARTNERSHIP (ACR 35/22)<br>Third Applicant |
| AND | ACCIDENT COMPENSATION CORPORATION<br>Respondent |

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| Hearing: | On the papers |
| Appearances: | Ms M Urquhart for the Applicants<br>Mr P McBride for the Respondent |
| Judgment: | 2 August 2023 |

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**RESERVED JUDGMENT OF JUDGE C J MCGUIRE**
**[Leave to Appeal to the High Court**
**Section 162(1) Accident Compensation Act 2001]**

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[1] The applicants seek leave to appeal to the High Court against the decision of the District Court in these matters delivered by Judge P R Spiller on 28 November 2022.[1]

[2] Leave to appeal is sought pursuant to s 162 of the Accident Compensation Act 2001 in that the decision of the District Court is wrong in law and upon the further grounds appearing in the submissions of Counsel for the applicants.

[3] Ms Urquhart sets out the grounds as follows:

(a) Judge Spiller did not analyse closely enough the actual activities of its employees. The learned judge was wrong in fact and in law in failing to recognise that many of the staff that provide on and off field player support are not employees of the applicants, but are contractors who pay their own ACC levies.

(b) Section 170(1) of the Act provides that the Corporation must classify an employer in an industry or risk class that most accurately describes their activity. A fundamental premise that underlies this statutory provision is that ACC undertakes an actuarial assessment of the claims and therefore the risk level for each class, which leads to setting the levy classification. It is established in law in *Accident Compensation Corporation v Southern Lakes Building Limited*[2], that a low risk activity should not be placed in a high class for high risk activities. Judge Spiller did not reflect this in his assessment of the correct risk class for the applicants.

(c) Judge Spiller proceeded on the presumption that the CU Code defined for super rugby should apply simply on the definition in the CU Code for professional rugby. He did not consider the core requirement of the Act that the scheme must operate in a manner that brings fairness and reflects the risk category of the applicants' employees.

[4] Judge Cadenhead listed the applicable principles to the exercise of granting leave to appeal in *O'Neill v ACC*[3]:

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1 *Hurricanes/Crusaders/Chiefs v Accident Compensation Corporation* [2022] NZACC 219.
2 *Accident Compensation Corporation v Southern Lakes Building Limited* [2022] NZHC 1288 at [3].
3 *O'Neill v Accident Compensation Corporation* [2008] NZACC 250.

> [24] The Courts have emphasised that for leave to be granted:
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> (i) The issue must arise squarely from "the decision" challenged: eg. *Jackson v ACC* unreported, HC Auckland, Priestly J, 14 February 2002, AP 404/96/01; *Kenyon v ACC* [2002] NZAR 385. Leave cannot for instance properly be granted in respect of obiter comment in a judgment: *Albert v ARCIC* unreported, France J, HC Wellington, AP 287/01, 15 October 2002;
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> (ii) The contended point of law must be "capable of bona fide and serious argument" to qualify for the grant of leave: eg. *Impact Manufacturing* unreported, Doogue J, HC Wellington, AP 266/00, 6 July 2001;
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> (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed: eg. *Northland Co-operative Dairy Co Limited v Rapana* [1999] 1 ERNZ 361, 363 (CA);
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> (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law: *CIR v Walker* [1963] NZLR 339, 354;
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> (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, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision: *Edwards v Bairstow* [1995] 3 All ER 48, 57;
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> (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law: *Commissioner of Inland Revenue v Walker* [1963] NZLR 339, 353-354 (CA); *Edwards v Bairstow* [1995] 3 All ER 48, 57.
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> [25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contested point of law: eg. *Jackson* and *Kenyon* above.

[5] An error of law will also arise where a decision is wrong in principle, or where a decision maker has failed to take into account relevant matter, or has taken into account an irrelevant matter: *Legal Services Agency v Fainu.*[4]

[6] An error of law will also arise where the Court has reached a conclusion that is irrational, or not supported by reasons: *Lewis v Wilson & Horton Ltd*[5] and *Thompson v Accident Compensation Corporation.*[6]

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[4] *Legal Services Agency v Fainu* (2002) 17 PRNZ 433 at [27].

[5] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA)

[6] *Thompson v Accident Compensation Corporation* [2015] NZHC 1640, [2015] NZAR 1163.

## Applicant's Submissions

[7] Applicants' Counsel submits that Judge Spiller did not analyse closely enough the actual activities of its employees. She submits the learned judge was wrong in fact and in law in failing to recognise that many of the staff that provided on and off field player support are not employees of the applicants, but are contractors who pay their own ACC levies.

[8] She further submits that s 170(1) of the Act provides that the Corporation must classify an employer in an industry or risk class that most accurately describes their activity. A fundamental premise that underlies this statutory provision is that ACC undertakes an actuarial assessment of the claims and therefore the risk level for each class, which leads to setting the levy classification. It is established law in *ACC v Southern Lakes Building Limited*[7] that a low risk activity should not be placed in a high risk class for high risk activities. Judge Spiller did not reflect this in his assessment of the correct risk class for the applicants.

[9] She further submits that Judge Spiller proceeded on the presumption that the CU Code defined for super rugby should apply simply on the definition of the CU Code for professional rugby. He did not consider the core requirement of the Act that the scheme must operate in a manner that brings fairness and reflects the risk category of the applicants' employees.

## Respondent's Submissions

[10] Respondent's counsel submits that the allegation that the Court did not analyse closely enough the actual activities of particular employees is squarely a question of fact and not one of law; and secondly, it is the predominant activity of the employer and not of the employee that is relevant.

[11] As to the proposition that the judge was wrong to fail to recognise the contractual status of the number of those engaged by the applicants, the respondent submits that there is and was no evidence properly before the Court in that regard. Secondly, in any event, this does not amount to any error of law on behalf of the judge.

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7 *Accident Compensation Corporation v Southern Lakes* see n2 above.

[12] Thirdly, the respondent submits that the contractual status of a number of those engaged by the applicants is irrelevant to the proper factual categorisation of the applicant's business activity.

[13] As to the applicants' contention that it is established law that those in the position of the applicants should not be placed in a risk class for higher risk activities, the respondent submits that there is no such established principle of law and that the overall statutory regime is one in which risk classes are defined, and the actuarial assessment undertaken as to the class, rather than of the specific employer within that class. It is a matter of fact as to which of the risk classes a particular employee most accurately fits within.

[14] The respondent further submits that, as revenue provisions, any perceived "unfair" results are only properly ones to be addressed by the legislature.

[15] In so responding, the respondent acknowledges that the applicants are dissatisfied with the outcome.

**Reply Submissions**

[16] In reply submission, Counsel for the applicants refers to the decision in *Bryson v Three Foot Six Limited*[8] and submits that the Court has overlooked relevant matters, being:

(a) The evidence of Colin Mansbridge about the reality of what the applicants are able to do in contrast to the licence agreement.

(b) That the activities described also fell under CU Code 78693, which is a code for administrative services (not elsewhere classified), including administrative services for sport.

(c) Judge Beatie's definition of the administration of rugby in *Auckland Rugby Football Union.*[9]

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8 *Bryson v Three Foot Six Ltd* [2005] NZSC 34.

9 *Auckland Rugby Football Union v Accident Compensation Corporation* [2003] NZACC 34.

## Discussion

[17] As to the incorrect assessment of the applicants' activities, the applicants allege that Judge Spiller did not consider the evidence of Colin Mansbridge about the reality of what the applicants were able to do in contrast to the licence agreement. Neither did he consider that many of the activities described also fell under CU Code 78693, which is a code for administrative services (not elsewhere classified) including administrative services for sport.

[18] In response Mr McBride, on behalf of the respondent, submits that this is squarely a question of fact and not one of law and secondly that it is the predominant activity of the employer and not the employee which is relevant.

[19] Section 170(1) of the Accident Compensation Act 2001 requires the Corporation to classify an employer in an industry or risk class that most accurately describes their activity, being in the industry or risk class set out in regulations made under this Act.

[20] Judge Spiller deals with this issue from paragraph [24] through to paragraph [32] of his judgment. Judge Spiller refers to the ACC business industry classification code website, which provides additional guidance and notes that this code applies to rugby administration, coaching or playing, and that there is no other code specifically referring to the administration of professional rugby. He confirms that the code suggested by the applicants, namely CU 78693, does not refer to rugby administration.

[21] He notes that CU code 93180 specifically applies to the activity of the applicants and that therefore s 239 does not apply to their classification, and so the Corporation is not empowered to provide a classification in terms of another code.

[22] Judge Spiller notes that his decision is made with reluctance and only because the Court and Corporation are bound by the existing classification provisions applicable to the applicants. He also said:[10]

> … It appears to this Court to be anomalous and potentially unfair to rugby administrators that their classification should be grouped along with rugby players in the markedly higher levy category of CU 93180 … The Court expresses the hope that serious attention will be given to reassessing the appropriate classification and levy

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[10] *Hurricanes/Crusaders/Chiefs v Accident Compensation Corporation* see n1 at [34].

rates applicable to rugby administrators, to reflect better injury risk in light of actuarial calculations based on claims experience.

[23] In light of Judge Spiller's careful analysis and conclusions, it cannot be contended that in respect of this issue, there is a point of law capable of bona fide and serious argument. Accordingly, leave to appeal on this ground must be refused.

[24] The applicants' Counsel further argues that the underlying premise of levy setting is to allocate costs according to risk profile and that the ACC should turn its mind to the claims history of an employer as part of the assessment of the activity of an employer.

[25] He notes that Judge Spiller acknowledged that rugby administrators were potentially being treated unfairly, given the previously low CU rates they were paying.

[26] Counsel submits that Judge Spiller did not consider the applicants' claim history in his analysis of the correct CU code, despite acknowledging claims history formed part of the CU code levy rate calculation.

[27] Mr McBride responded that there is no established principle of law that those in the position of the applicants should not be placed in a risk class for high risk activities. Mr McBride says the overall statutory regime is one in which risk classes are defined, and the actuarial assessment undertaken as to the class, and not necessarily a specific employer within that class.

[28] He submits that it is then a matter of fact as to which of those risk classes a particular employer most accurately fits within.

[29] He further submits that if a particular classification unit gives rise to an unfair result, it is a matter for the legislature to address.

[30] He further submits that the applicants have failed to identify the existence of any discretionary factors that would give rise to a grant of leave to appeal.

[31] Again, I must conclude on the basis of the detailed analysis of the issues referred to above by Judge Spiller, I am again unable to conclude that in this regard there is a point of law capable of bona fide and serious argument. As mentioned earlier, Judge Spiller has done

a very detailed analysis of the activities of the applicants and has concluded that CU code 93180 is the correct code and that the other code suggested by the applicants, CU 78693, administrative services (not elsewhere classified) does not refer to rugby administration and that therefore CU code 93180 is the correct one.

[32] Again, Judge Spiller has, as mentioned above, pointed out that underlying the classification regime should be an assessment of injury risk and he expressed the hope that serious attention would be given to reassessing the appropriate classification and levy rates applicable to rugby administrators. However, in terms of the current statutory and regulatory regime, the conclusions reached by Judge Spiller were not only open to him, but in view of the statutory and regulatory regime, they were proper conclusions. Again, I must find that the contented point of law here of absence of consideration of risk, is not capable of bona fide and serious argument.

[33] Ms Urquhart complains that Judge Spiller took no action himself to address the unfairness of the classification and levy rates applicable to rugby administrators.

[34] While such a view is understandable from the applicants' perspective, in the passages of the judgment already referred to, Judge Spiller has done as much as he is able by expressing the view that the results for rugby administrators is anomalous and potentially unfair. Once again, however, there is no question of law identified that is capable of bona fide and serious argument, nor is there any error of law arising because there is no evidence that Judge Spiller has mistreated the facts in this case such that it would amount to an error of law.

[35] For the above reasons, the application for leave to appeal must be and is dismissed.

CJ McGuire
District Court Judge

Solicitors: Tompkins Wake, Rotorua for the applicants
McBride Davenport James, Wellington for the respondent