PURSUANT TO S 160(1)(b) ACCIDENT COMPENSATION ACT 2001 THERE IS A SUPPRESSION ORDER FORBIDDING PUBLICATION OF THE APPLICANT'S NAME AND ANY DETAILS THAT MIGHT IDENTIFY THE APPLICANT

IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 178 ACR 233/22

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION FOR LEAVE TO APPEAL UNDER SECTION 162(1) OF THE ACT
BETWEEN	BI Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Submissions: The Applicant is self-represented
P McBride for the Corporation

Hearing: On the papers

Judgment: 30 October 2023

JUDGMENT OF JUDGE P R SPILLER
[Leave to appeal to the High Court
Section 162(1) Accident Compensation Act 2001]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour, Judge McGuire, delivered on 1 August 2023.[1] At issue in the appeal was the quantum of weekly compensation arising from a 2004 covered event. The Court dismissed the appeal, for the reasons outlined below.

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1 *BI v Accident Compensation Corporation* [2023] NZACC 126.

Background

[2] On 6 February 2004, the applicant suffered an indecent assault at his place of work. He was rendered unconscious and later regained consciousness to find himself in the shower at his workplace. The applicant ceased working from 15 November 2004 and received a social welfare benefit from the Ministry of Social Development (MSD).

[3] On 23 December 2020, the applicant had his first treatment for his injury. On 24 December 2020, the applicant claimed for cover, which was granted.

[4] Initially, 23 December 2020 was accepted by the Corporation as the deemed date of injury. After the receipt of the new information, the date of injury was revised to 10 February 2004. The Corporation obtained relevant documents from both the Inland Revenue Department and MSD.

[5] On 19 July 2022, the Corporation approved the applicant's weekly compensation for the period 15 November 2004 to 12 June 2022. The Corporation repaid MSD the money that the applicant had received and made a net additional payment to the applicant. The applicant lodged a review against the Corporation's decision.

[6] On 17 November 2022, review proceedings were held. The applicant submitted that there had been an unreasonable delay in the Corporation issuing a decision on the applicant's back-dated weekly compensation payments; the Corporation did not correctly calculate his weekly compensation entitlement; and he was entitled to lodge 12-monthly medical certificates. The applicant submitted that the Corporation should have looked at his earnings in his "best months"; and he did not consent to the Corporation deducting his MSD payments from his compensation from the Corporation.

[7] On 9 December 2022, the Reviewer dismissed the applicant's review. The Reviewer found that there had not been an unreasonable delay in the Corporation issuing a decision on the applicant's back-dated weekly compensation payments; the

Corporation had correctly calculated his weekly compensation entitlement; and the issue of whether he was entitled to lodge 12-monthly medical certificates was not a reviewable issue as the Corporation had not issued a decision on this. The applicant then filed an appeal to the District Court.

[8] At the District Court hearing on 15 June 2023, the applicant told the Court of a long and painful dispute with the Corporation over his sensitive claims. He claimed that the decision to deduct MSD benefit payments from his entitlement was reprehensible, as his circumstances were exceptional. He submitted that the tax levied on his compensation was unjust. He contended that the Corporation should use, as the basis of calculation, his best-performing month of his regular earnings only and not take account of times when less money was earned.

The Court's judgment of 1 August 2023

[9] Judge McGuire recorded the Court's admiration for the hard work that the appellant (the applicant in this leave application) had done to rehabilitate himself and get his life back to something reasonably normal after the shocking injury that he sustained, an injury that had to wait some 16 years before it could be addressed through the ACC system. His Honour noted that the reason for the 16-year delay was not the fault of the Corporation, as the applicant only brought the injury to the Corporation's attention when he first felt able to do so.

[10] Judge McGuire noted that the Corporation, having accepted that, at the time of the injury, the applicant was in permanent employment for the purpose of Clause 33 of Schedule 1 of the Act, applied the detailed formula in Clause 34.

[11] Judge McGuire acknowledged that in the High Court decision in *Murray*,[2] Kos J said that the statutory regime is clear and crystalline. Judge McGuire observed that Parliament had decided, in enacting the Accident Compensation Act 2001, that all permanent employees are to have their weekly compensation calculated using the same formula. His Honour noted that that formula is set out in Clause 34 of

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2 *Murray v Accident Compensation Corporation* [2013] NZHC 2967.

Schedule 1, and the Corporation's payments assessor, Mr Turner, in his email of 3 November 2022, set out the rationale for the calculations he did.

[12] Judge McGuire found that he was satisfied that Mr Turner correctly applied the relevant provision. Mr Turner took into account that there was a period of incapacity of 10.57 weeks between 17 February 2004 and 30 April 2004, so he reduced the divisor that he used from 52 weeks to 41.43 weeks and used that divisor to conclude a weekly rate of $812.73. Mr Turner added:

> We reduce the divisor, and remove earnings during periods of incapacity, to not disadvantage the client from having lower earnings during periods of incapacity. If we just divided the client's total earnings over 52 weeks, it would give a lower rate ($35,331.81/52 equals $679.46).

[13] Judge McGuire noted that there was no provision in the legislation that would allow the Corporation to apply what the applicant described as his best performing month, namely, the two weeks in November 2004 when his gross monthly earnings amounted to $5,951.60. Judge McGuire also accepted that the Corporation had no ability to mitigate the tax liability on backdated weekly compensation in terms of the Income Tax Act and cases including *Pryce*.[3]

[14] Judge McGuire concluded that, because the applicant had been unable to establish that the Corporation had failed to follow the provisions of the Act for assessment of weekly compensation, his appeal was dismissed.

The applicant's submissions

[15] The applicant submitted that his wage calculation excluded his best performing month; the repayment of MSD benefit was "reprehensible"; there were issues about the tax rate on the lump sum of backdated weekly compensation; some documents were excluded or not included for consideration by the Court; and the behaviour of the Corporation since 2000 had given him severe clinical depression and psychological dysfunction.

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3 *Pryce v Accident Compensation Corporation* [2018] NZACC 154.

Discussion

[16] This Court notes that the applicant's submissions as to his earnings being assessed on his best-performing month, and the legitimacy of the repayment of the MSD benefit, were raised by him before both the Reviewer and Judge McGuire. Both made it clear that the Corporation's assessment and calculation of the applicant's compensation were in accordance with the Accident Compensation Act 2001, and there was no basis to the applicant's submissions. The Corporation was obliged to apply the provisions of Clause 34 of Schedule 1 of the Act, governing the calculations of weekly earnings where an earner had earnings as an employee in permanent employment immediately before incapacity commenced. Section 252(4) of the Act requires the Corporation to refund the excess benefit payment to the department responsible for the administration of the Social Security Act 2018 if the Corporation knows that this section applies.

[17] In relation to the applicant's submission as to the tax rate applied to his compensation, this Court agrees with Judge McGuire that the Corporation had no ability to mitigate the tax liability on backdated weekly compensation in terms of the relevant Income Tax Act. As was stated in *Pryce*,[4] "logic provides that the body responsible for [tax issues] is the Inland Revenue Department who are determinative of this issue and the body responsible to the quantum required".

[18] In relation to the applicant's claim of some documents being excluded or not included for consideration by Judge McGuire, this Court finds that this ground of appeal has not been established. The applicant has not satisfactorily shown that relevant documents were excluded for consideration or that any exclusion or non-consideration thereof had an adverse impact on his appeal. The applicant had full opportunity to provide documents that he considered relevant to his appeal, but Judge McGuire was required to take into account and address only evidence that was relevant to the applicant's appeal.

[19] Finally, in relation to the applicant's claim that the behaviour of the Corporation since 2000 has been objectionable, Judge McGuire's jurisdiction was

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[4] See *Pryce* n3 above, at [91].

confined to the issues raised on appeal from a specific decision of a Reviewer (in terms of section 149(1)(a) of the Act). Judge McGuire's powers on appeal were limited to dismissing the appeal or modifying or quashing the specific decision of the Reviewer (section 161(1) of the Act). Judge McGuire did not have jurisdiction to conduct and decide upon a wide-ranging inquiry as to the Corporation's behaviour since 2000 and its effects on the applicant. Nevertheless, Judge McGuire recorded the Court's admiration for the hard work that the applicant had done to rehabilitate himself after his shocking injury (in 2004), while noting that the reason for the 16-year delay after the injury was not the fault of the Corporation, as the applicant only brought the injury to the Corporation's attention when he first felt able to do so.

The Decision

[20] In light of the above considerations, the Court finds that the applicant has not established sufficient grounds, as a matter of law, to sustain his application for leave to appeal, which is accordingly dismissed. The applicant has not established that Judge McGuire made an error of law capable of *bona fide* and serious argument. Even if the qualifying criteria had been made out, this Court would not have exercised its discretion to grant leave, so as to ensure the proper use of scarce judicial resources and the finality of litigation. This Court is not satisfied as to the wider importance of any contended point of law.

[21] Costs are reserved.

Judge P R Spiller,
District Court Judge