

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 207 ACR 80/23

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

Hearing: 12 December 2023

Held at: Auckland/Tāmaki Makaurau

Appearances: The Appellant is self-represented
H Evans for the Accident Compensation Corporation (“the
Corporation”)

Judgment: 14 December 2023

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for weekly compensation - s 15,
Accident Compensation Act 2001 (“the Act”)]**

Introduction

[1] This is an appeal from the decision of a Reviewer dated 18 April 2023. The Reviewer dismissed an application for review of the Corporation’s decision dated 23 August 2022 declining Mr Drever’s claim for weekly compensation.

Background

[2] On 15 July 2021, Mr Drever was involved in an accident in which he sprained and ruptured his right bicep tendon. The Corporation granted him cover.

[3] At the time of his accident, Mr Drever was the sole director and shareholder-employee of an electricity generation company called Quantum Fiziks Limited (the company). In terms of a Salary Agreement with the company, Mr Drever agreed that:

The Senior Director will not make any drawings or seek any loans against the company to service this remuneration package and drawings (weekly) will only be allowable at a time when the company has entered in a retail/revenue phase of the primary remuneration remunerative activity.

[4] Mr Drever later claimed weekly compensation due to incapacity as a result of his accident. As part of its investigation, the Corporation obtained information from IRD as to Mr Drever's earnings in the tax year immediately preceding the accident (in this case the year ending 31 March 2022).

[5] The Corporation's investigation disclosed that Mr Drever did not receive any taxable income from the company. However, he provided the Corporation with an employment agreement which indicated that he was entitled to be paid \$200,000 earnings plus expenses of \$80,000 for that tax year.

[6] The Corporation obtained advice from a technical accounting advisor, Mr Jatesh Kanji, who could find no evidence of any income actually being paid to Mr Drever. Further information was requested from Mr Drever.

[7] On 15 August 2022, Mr Drever responded in an email:

Can you please explain to me why you are seeking information in regards to the company's financial position profit/loss statements etc. This is possibly a bit intrusive looking for information about the company's financial performance when an employee which is a separate entity is the affected party seeking compensation.

Exactly what do you need to establish, from my understanding it is the pay rate and the current hours worked, you may also require confirmation of employment at the time of the injury.

This company is not a shareholder employee situation (IR4S) simply an employer (IR4) and employee (IR3). As explained my salary is just a flat rate and the medical certificates have been issued for the periods I am simply working less than 20% (as required to maintain administrative duties of the company). The company has not replaced me and has started to turn away physical construction jobs until further notice (the doctor's advice after surgery).

The financial information about the company is a bit intrusive. I could possibly have a declaration issued but profit/loss of an independent company entity is a bit intrusive.

[8] On 15 August 2022, Mr Drever confirmed that he was a “company director performing administration, construction and planning activities”. He confirmed that “[m]y current work hours are as required (on average from 20-25 hours per week)”.

[9] Also on 15 August 2022, Mr Nicolas Silva, Customer Service Officer IRD, noted that Mr Drever had clarified as follows:

The company will not pay the director any remuneration currently, because it's not in a position to do so. The director is comfortable continuing to work without remuneration, on the condition that, in the future, when the remuneration payments are made, they will include interest.

[10] On 16 August 2022, Mr Drever advised the Corporation (set out *verbatim*):

As discussed the company is a new startup, and I've not drawn a salary from the company. The company owes me salary and I am entitled to salary for the periods, I can confirm I was working for the company at the time the injury occurred, this is confirmed by the declaration of directors certificate filed on the 6th of November 2020, held at the independent companies office. In New Zealand is as illegal for companies not to pay at least the minimum wage to employees, I would refer you to the Statement of Position issued by the Labour Inspectorate please see attached, it states if there is an economic gain made to the business from the work performed by the worker then the party is required to be identified as a employee and therefore entitled to minimum wages as well as all other Employment Act entitlements. ...

Simply put a company cannot operate without paid employees, all employees of a company are deemed to be paid employees according to the inspectorate.

[11] On 23 August 2022, Mr Lance Joe, Accounting Specialist, noted that Mr Drever's company was incorporated on 6 November 2020. In the 2021 tax year, the salary and wages that were filed were solely from MSD and were \$13,632.99; and, in the 2022 year, the salary and wages (again from the MSD) were \$11,464.53. Mr Joe advised further (set out *verbatim*):

I have reviewed the information provided and the client has not provided any shareholding-employee financial information for Quantum Fiziks Limited requested earlier. The client has provided a copy of an agreement for employment with this company showing with an annual fixed salary remuneration of \$200,000 plus an \$80,000 expense entitlement.

However, ACC cannot use these earnings as they have not be[en] lodged with Inland Revenue as required under clause 31 of Schedule 1 of the Act.

[12] On 23 August 2022, the Corporation wrote to Mr Drever, advising that he was not entitled to weekly compensation. This was on the basis that there was no evidence of any earnings immediately prior to his incapacity on 5 August 2021, and so there were no earnings for which he might be compensated for by payment of weekly compensation.

[13] On 24 August 2022, Mr Drever advised the Corporation that his company could confirm that no remuneration had been released for the relevant periods in accordance with provisions of the salary agreement.

[14] On 24 March 2023, review proceedings were held. On 18 April 2023, the Reviewer dismissed the review, on the basis that Mr Drever could not show that he had shareholder-employee earnings in the relevant tax year.

[15] On 29 April 2023, a Notice of Appeal was lodged.

Relevant law

[16] Section 6(1) of the Accident Compensation Act 2001 (the Act) defines “earner” as a natural person who engages in employment, whether or not as an employee; and “employee” as a natural person who receives or is entitled to receive any amount that is treated as income from employment.

[17] Section 103 of the Act provides:

- (1) The Corporation must determine under this section the incapacity of—
 - (a) a claimant who was an earner at the time he or she suffered the personal injury

...

- (2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.

[18] Clause 32 of Schedule 1 of the Act provides:

- (1) The Corporation is liable to pay weekly compensation for loss of earnings to a claimant who—
- (a) has an incapacity resulting from a personal injury for which he or she has cover; and
 - (b) was an earner immediately before his or her incapacity commenced.

[19] Section 15 provides:

15 Earnings as a shareholder-employee

- (1) Earnings as a shareholder-employee, in relation to a person who is a shareholder-employee and any tax year, means-
- (a) the amount described in subsection (2) (the subsection (2) amount); or
 - (b) the amount described in subsection (3) (the subsection (3) amount), if the Corporation decides that the subsection (2) amount is not a reasonable representation of the person's earnings as a shareholder-employee in the tax year.
- (2) The subsection (2) amount is-
- (a) all PAYE income payments of the person for the tax year derived from a company of which the person is a shareholder-employee; and
 - (b) all income of the person that is deemed to be income derived otherwise than from PAYE income payments under section RD 3B or RD 3C of the Income Tax Act 2007.
- (3) The subsection (3) amount is an amount determined by the Corporation in the following way:
- (a) first, determine each of the following amounts:
 - (i) an amount that represents reasonable remuneration for the services that the person provides to the company as an employee of the company in the tax year; and
 - (ii) an amount that represents reasonable remuneration for the services that the person provides as a director of the company in the tax year; and

- (b) second, add the amounts described in paragraph (a)(i) and (ii), and the result is the subsection (3) amount.
- (4) The earnings as an employee of the person as an employee of the company are the amount described in subsection (3)(a)(i).
- (5) The director's fees of the person as a director of the company are the amount described in subsection (3)(a)(ii).
- (6) The dividend of the person as a shareholder of the company is determined by the Corporation in the following way:
 - (a) first, determine the total amount the company pays or provides to the person in any capacity in the tax year; and
 - (b) second, deduct the subsection (3) amount from that total amount, and the result is the dividend of the person as a shareholder of the company and is not earnings of the person.
- (7) For the purposes of this section, earnings as a shareholder-employee do not include a benefit arising under section CE 2(2) or (4) of the Income Tax Act 2007 in relation to which an employer has made an election under section RD 7B to withhold an amount of tax.

[20] Clause 30 of Schedule 1 of the Act confirms that the relevant year means:

- (1) ... the most recent tax year (as defined in section YA 1 of the Income Tax Act 2007) last ended before the commencement of the period of incapacity.
- (2) However, in the case of a self-employed person or a shareholder-employee, the relevant year is the most recent year ending with the balance date (whether 31 March or another date) of the self-employed person or shareholder-employee before the commencement of the period of incapacity."

[21] Clause 31 provides:

31 Use of income tax returns in determining earnings

If the Corporation is determining earnings under this Part in relation to a self-employed person or a shareholder-employee, it must take an income tax return into account, if-

- (a) the claimant has given the return to the Commissioner; and
- (b) the Corporation considers that the return, and any related accounts, have not been unreasonably influenced by-
 - (i) the fact of the claimant's incapacity; or
 - (ii) the effects or likely effects of the incapacity on the claimant's income or business activities.

[22] In *Nicholas*,¹ Beattie DCJ stated:

[25] As was noted by Ms Scott in her submissions, the appellant has neither paid tax on the income which he now seeks to have considered for the purposes of Clause 39, nor has he paid the ACC levy which would be calculated on that income. I find it inconceivable that the legislation would allow for some arbitrary figure to be put up for consideration as being earnings, when those earnings have not been returned for income tax purposes, or had ACC levies paid which are commensurate with those earnings.

Discussion

[23] The issue in this case is whether the Corporation's decision of 23 August 2002, to decline Mr Drever weekly compensation, was correct.

[24] In summary, Mr Drever submits as follows. By virtue of section 6(1) of the Accident Compensation Act, he is entitled to receive weekly compensation on the basis that he is an employee who is entitled to receive earnings. He provided the Corporation with an employment agreement with a company which indicated that he was entitled to be paid \$200,000 earnings plus expenses of \$80,000 for that tax year. Further, the Sale of Goods Act and the Consumer Guarantees Act apply to his case, as well as the Employment Relations Act and the Minimum Wage Act. There are also issues of invasion of privacy by the IRD and possibly the Corporation.

[25] This Court acknowledges Mr Drever's submissions. In particular, the Court accepts that Mr Drever has been (at least in potential) an "earner" in the sense of a natural person who engages in employment, and an "employee" who is entitled to receive an amount that is treated as income from employment.

[26] However, the Court points to the following considerations.

[27] First, the Act requires that Mr Drever be an earner at/immediately before the time that he suffered his personal injury on 15 July 2021, for him to be eligible for weekly compensation for loss of earnings.² Because Mr Drever claimed that he was entitled to earnings as the shareholder-employee of a company, the Corporation was entitled to determine (and therefore enquire as to) his earnings in light of tax records

¹ *Nicholas v Accident Compensation Corporation* [2008] NZACC 110.

² Section 103(1)(a) and clause 32(1)(b), Schedule 1.

for the relevant tax year.³ The Corporation discovered that the tax records (PAYE payments) filed for the relevant year showed income for Mr Drever solely from the Ministry of Social Development, and no income derived by him from his company. This Court refers to the reports of Mr Kanji, Accounting Advisor, and Mr Joe, Accounting Specialist. Mr Drever himself confirmed that, though he was entitled to a salary from the company, he had not drawn a salary or received payments from it.

[28] Second, while (as noted above) Mr Drever can be seen as having been an earner/employee in the sense that he had an entitlement to future remuneration, the legislative determination of his entitlement to weekly compensation is clearly based on actual earnings at/immediately before the date of personal injury. Entitlement to weekly compensation is designed to make up for *loss of earnings*,⁴ and the Corporation is directed to refer to PAYE income *payments* of the person for the tax year *derived* from the company of which the person is a shareholder-employee.⁵ It has previously been held that *posited* earnings that have not been returned for income tax purposes, or had ACC levies paid commensurate with those earnings, are not sufficient for the purpose of determining weekly compensation for loss of earnings.⁶

[29] Third, Mr Drever's claim to weekly compensation relating to his covered personal injury must be determined by the provisions of the Accident Compensation Act 2001. Legislation such as the Sale of Goods Act 1908 (now repealed), the Consumer Guarantees Act 1993, the Employment Relations Act 2000 and the Minimum Wage Act 1983 are not relevant to the determination of Mr Drever's claim to weekly compensation.

[30] Fourth, issues of invasion of privacy by the IRD and/or the Corporation are beyond the jurisdiction of this Court in deciding on Mr Drever's appeal, which is confined to the correctness of the Reviewer's decision regarding his claim to weekly compensation.

³ Section 15(2) and clauses 30-31 of Schedule 1.

⁴ Clause 32(1) of Schedule 1.

⁵ Section 15(2)(a).

⁶ *Nicholas*, above note 1, at [25].

Conclusion

[31] In light of the above considerations, the Court finds that the Corporation's decision of 23 August 2002, to decline Mr Drever weekly compensation because there was no evidence of earnings immediately before his incapacity, was correct. The decision of the Reviewer dated 18 April 2023 is therefore upheld. This appeal is dismissed.

[32] I make no order as to costs.

A handwritten signature in black ink, appearing to read 'P R Spiller', written in a cursive style.

P R Spiller
District Court Judge