

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 86 ACR 187/22

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

Hearing: 21 March 2023

Heard at: Auckland/Tamaki Makaurau

Appearances: Mr D Tuiqereqere and Ms E Manga for the Appellant
 Mr B Marten for the Respondent

Judgment: 24 May 2023

**RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Weekly Compensation, s 100(1)(a); s 103(2); CI 32 Schedule 1
Accident Compensation Act 2001]**

[1] This is an appeal against a decision of the respondent dated 9 August 2022 determining the appellant's entitlement to weekly compensation.

[2] The respondent has determined that the appellant was self-employed at the time of his accident and entitled to the minimum weekly compensation payable.

[3] The appellant succeeded at review in having the respondent's decision quashed. However, the reviewer determined that he could not decide the appellant's employment status. It was the reviewer's decision that only the Inland Revenue Department had competency to decide this matter.

[4] Counsel have helpfully filed an agreed statement of facts and issues as follows.

Agreed Facts

[5] Mr Foketi is from Tonga. English is his second language. He came to New Zealand in December 2019.

[6] Mr Foketi was working as a labourer for JNP Construction Limited from 27 July 2021. His employment was interrupted by a Covid lockdown on 17 August 2021. He did not resume work until Monday, 27 September 2021.

[7] On 29 September 2021, Mr Foketi suffered multiple serious injuries at work when a 1,000 kilogram concrete wall fell, crushing him. The injuries included multiple fractures to his thoracic spine and lumbar spine, as well as fractures to his right shoulder and right foot. He was hospitalised from 29 September to 27 October 2021, undergoing surgery to his right foot.

[8] Mr Foketi and his partner had communications by phone and email with ACC three times in October 2021 and again in February 2022 and May 2022 in respect of Mr Foketi's entitlement to weekly compensation. They were advised by ACC that Mr Foketi was not eligible to weekly compensation unless he had an IRD number. He did not have an IRD number.

[9] During this period, Mr Foketi continued to receive medical treatment, physiotherapy and specialist assessment. He had been required to wear a moonboot when mobilising. Medical certificates were issued on 24 January and 14 February 2022 certifying ongoing incapacity. The latter medical certificate noted that Mr Foketi "has significant back/foot injuries and can't return to work".

[10] On 16 May 2022, an ARTP was prepared, seeking funding for surgery to remove the metalware in Mr Foketi's right foot. ACC approved the application.

[11] In May 2022, ACC organised a referral to Able 2 Limited for a social rehabilitation assessment. This was completed on 20 May 2022 by Ms Unshaw. She noted in her report, dated 22 May 2022, that Mr Foketi was then "wearing a moonboot, full WB using bilateral

elbow crutches for mobility”. In addition to the right foot disability, Ms Unshaw noted several other problems, including lost sensation and movement in both hands, a fall due to his legs having given way, and numbness in his lower limbs. Ms Unshaw assessed that Mr Foketi then had no social rehabilitation needs, a decision was issued by ACC to this effect. A later assessment concluded that he needed one hour home help for 30 weeks post accident and one hour 45 minutes per week for attendant care.

[12] On 13 June 2022, ACC issued a formal decision declining weekly compensation. ACC advised that as Mr Foketi had no IRD number, ACC was unable to confirm his taxable income before the accident and that this was needed in order for ACC to assess his weekly compensation.

[13] Mr Foketi instructed Mr Tuiqereqere on or about 12 July 2022 to assist with his claim. Mr Tuiqereqere contacted ACC to supply information regarding Mr Foketi’s employment circumstances to support his claim for weekly compensation. Details of Mr Foketi’s employer were supplied to ACC on 18 July 2022.

[14] A review was lodged for Mr Foketi on 22 July 2022 from the weekly compensation decision of 12 June.

[15] A statutory declaration was filed by Mr Foketi on 26 July 2022 wherein he explained the circumstances of his employment, provided details of his earnings and supplied copies of bank statements to support the fact of payments received from his employment. These bank statements could have been supplied to ACC in October 2021 if ACC had properly investigated his entitlement to weekly compensation at that time.

[16] Subsequent to lodging the review:

- (a) ACC received internal comment from its technical specialist, Simon Bates, who responded on 25 July 2022 stating that he had advised ACC’s review specialist that the “client not having an IRD number is not sufficient grounds for ACC not to pay WC” and that Mr Foketi “was clearly an earner at DOA as (he) was injured at work” and that the issue to consider was Mr Foketi’s employment status, as self-employed or employee.

- (b) ACC received advice from its internal accounting advisory unit on 1 August 2022 confirming Mr Foketi was an earner at the time of the accident. The advisor opined that Mr Foketi was self-employed and, thus, entitled to the minimum weekly compensation payable under clause 42 of schedule 1.
- (c) Alternative dispute resolution was conducted between the parties on 8 August 2022. An agreement was signed at the conclusion. One of the terms of the agreement being that ACC would calculate the backdated weekly compensation payable (at the minimum rate) and endeavour to pay the same within a week. The review was withdrawn.

[17] On 9 August 2022, ACC issued a new decision revoking the 13 June decision. ACC accepted that Mr Foketi was entitled to weekly compensation and advised that it would assess the same on the basis that he was self-employed.

[18] Mr Foketi was advised by ACC to obtain a medical certificate for certain periods of incapacity. He saw his GP on 10 August and obtained medical certificates certifying incapacity for backdated periods, as well as the period up to 31 October 2022.

[19] On 12 August 2022, a review was lodged from the decision of 9 August on the basis that Mr Foketi was an employee and not self-employed.

[20] A statutory declaration was executed by Mr Foketi on 25 August 2022 and supplied to ACC the following day. Mr Foketi addressed ACC's decision that he was self-employed, stating that he was, in fact, an employee and explains his reasons for this.

[21] On 26 August 2022, Mr Foketi had surgery to remove metalware in his foot. A new moonboot was provided for Mr Foketi following the surgery.

[22] In the meantime, with respect to Mr Foketi's payment of weekly compensation, ACC sought advice from its medical advisor, Dr Warren Happy, who responded on 26 August 2022 that he required more medical information, namely the hospital and GP notes, before he could comment on whether Mr Foketi had been incapacitated for the entire period since the accident.

[23] ACC requested that Mr Foketi complete an ACC6300 consent form, so that ACC could obtain the medical information. Mr Foketi signed the form on 31 August 2022.

[24] On 7 September 2022, a review was lodged for Mr Foketi under s 134(1)(b) on the basis that there had been an unreasonable delay calculating and making payment of weekly compensation for the period from 29 September 2021.

[25] An initial payment of weekly compensation was finally made to Mr Foketi on 12 September 2022, almost a year after he suffered his injuries. However, these payments pertained only to the period from 15 August 2022 onwards.

[26] The hearing for review number 7822684 (against ACC's decision of 9 August 2022, which assessed a weekly compensation on the basis that the appellant was self-employed) was conducted on 22 September 2022.

[27] The reviewer issued a decision on 14 October 2022 allowing the review and quashing ACC's decision. However, rather than determining Mr Foketi's employment status, the reviewer directed Mr Foketi to approach IRD to determine the same and directed ACC to subsequently issue a new decision relying on IRD's determination. The reviewer was not satisfied that ACC, a reviewer, or a court had competency to make this determination under the ACC legislation.

[28] A notice of appeal was filed on 17 October 2022.

[29] Issues for determination:

- (a) Does this court have jurisdiction to determine Mr Foketi's employment/earnings status at the time his incapacity commenced on 29 September 2021?
- (b) If the court does have jurisdiction, was Mr Foketi an employee or self-employed at the time his incapacity commenced on 29 September 2021?
- (c) If Mr Foketi was an employee, was he in permanent employment and thus entitled to calculation of his weekly compensation under clause 34 of Schedule 1 of the Accident Compensation Act 2001.

Appellant's Submissions

[30] Mr Tuiqereqere referred to the appellant's statutory declaration dated July 2022. It records that he came to New Zealand in December 2019 on a visitor's visa. His visa was extended on account of Covid, but later expired. This was the position when he worked for JNP Construction Limited. However, in July 2022, he was granted a s 61 work visa on the grounds of worker exploitation.

[31] The declaration goes on to say:

- (5) Covid made things hard for me. My visitors visa expired and I needed to earn money to live.
- (6) I worked different jobs from 2020. I cleaned cars, painted houses and did labouring work on construction sites. Sometimes after I did the work, my employer refused to pay me. Sometimes they paid me less than they promised to pay me.
- (7) In May 2021, I got a job painting I worked a lot of hours and worked there until the end of July 2021. I received the following payments for this work ...
- (8) The payments were made into my partner's bank account because I did not have a bank account. I also did not have an IRD number. Some payments I received in cash. I gave these payments to my partner and she banked them. My partner's bank statements showing these payments are attached.
- (9) On 27 July 2021, I started working as a labourer for JNP Construction Limited. ... They didn't give me an employment contract. I worked at a construction site at AUT Tower in Auckland City.
- (10) The main contractor at the site was MacGroup Limited. JNP Construction was a sub-contractor. MacGroup controlled the site. I was supervised by a supervisor from MacGroup.
- (11) I reported to the MacGroup site office when I started the day and when I finished the day. I recorded my starting time and finishing time in the timesheet book which was kept in the office.
- (12) The work I did on site was picking up rubbish and demolition work. We knocked down walls and ceilings. I used a jack hammer.
- (13) When I started ... told me that I would work at the AUT Tower until the job finished. He said that the job will finish in February or March 2022. He told me that he had other jobs and that when the AUT job was finished, I would keep working for him on the other jobs.
- (14) I worked full time. I started at about 8 am and worked until at least 5.30 pm. I usually worked into the night. I worked Monday to Friday. I also worked Saturday when they asked me. JNP Construction agreed to pay me \$21 an hour.

(15) The first day I stated work was Tuesday, 27 July. I was paid on the Thursday of the following week. I worked from 27 July to 17 August 2021. On 17 August, Auckland went into level 4 lockdown for Covid. I wasn't allowed to work when this happened.

...

(17) Auckland went into level 3 lockdown on 22 September 2021. I went back to work on Monday 27 September 2021.

(18) On Wednesday 29 September 2021, a concrete wall fell on me while I was working at the AUT Tower site. The wall was about 1,000 kg. It made me black out. I suffered a lot of injuries all over my body. I had fractures to the discs in my back. I suffered fractures to my right leg. The ambulance took me to Auckland Hospital.

(19) I had surgery to my right leg. A metal plate was put in my foot. I had more surgery to remove the plate. I was transferred to Middlemore Hospital and then to the Super Clinic, and then back to Middlemore Hospital. I was in hospital from 29 September to 27 October 2021.

(20) When I was working for JNP Construction, I received the following payments for this work:

5 August 2021	\$873.60
14 August 2021	\$920.00 (cash payment)
19 August 2021	\$670.00
26 August 2021	\$430.00
6 October 2021	\$600.00

(21) My partner's bank statements showing these payments are attached.

...

(23) I thought that JNP Construction was taxing me, because the payments I received were less than what I should have got for the hours that I was working. JNP Construction never gave me payslips, so I don't know how my pay was calculated or if tax was taken out.

(24) I was a good worker. I worked hard. MacGroup liked my work. They said I should work for them when the AUT job was finished.

...

(27) I have now been granted a work visa on the grounds that I was an exploited worker. I will be applying for residency.

[32] Mr Tuiqereqere refers to the ACC claim form completed on the date of his accident, 29 September 2021. The injury claim form gives his occupation as "building or related worker". It lists his earner status as "employed" in paid employment. It also records the accident as a work accident.

[33] In light of this, Mr Tuiqereqere submits that ACC was aware that the appellant was an earner and therefore there would be a need for a weekly compensation.

[34] Mr Tuiqereqere refers to contact made with the appellant by ACC on 12 October 2021. The file note records:

Has only arrived in NZ one year ago, and has no IRD number. Advised we can only initiate weekly compensation once we have an IRD number, as we need to confirm earnings with IRD.

[35] Mr Tuiqereqere notes that the appellant “put them off for a while”, that is, ACC.

[36] On 17 May 2022, there was again contact from ACC. The file noted recorded this as follows:

Client advised that he didn't have a tax number and he had explained this previously. He is aware that because he doesn't have a tax number, ACC is not able to be paid. He advises he will speak to his lawyer about this matter and I have encouraged Mosese to do so and if he obtained a tax number etc to please let us know and we can re-look at this again at that time.

[37] On 13 June 2022, ACC advised that they were unable to provide weekly compensation. The letter said:

It appears that you don't currently have an IRD tax number and as such we have not been able to confirm your taxable income immediately prior to your accident. We would need to do this in order to assess weekly compensation.

[38] Counsel emailed ACC on 12 July 2022. His letter included the following:

There appears to be a question mark over whether the company properly paid the PAYE to IRD for Mosese's earnings, but that of course is not Mosese's concern in terms of his entitlement to weekly compensation ...

In the meantime, it would be helpful if ACC could commence payment of the minimum weekly compensation payable to Mosese ...

[39] The appellant completed the statutory declaration referred to above and ACC had this by 27 July 2022, along with supporting bank statements.

[40] Mr Tuiqereqere notes that ACC had details of the appellant's employer, but they did not contact him.

[41] On 9 August 2022, ACC wrote to Mr Foketi as follows:

As you know, ACC has been reconsidering its decision regarding your weekly compensation.

ACC wrote to you on 13 June 2022 to decline your weekly compensation because you did not have an IRD number.

ACC has looked carefully at all the information now available and has decided that this decision was incorrect at the time.

As a result, ACC is now issuing a new decision confirming that ACC will assess your weekly compensation as a self-employed earner, now that you have provided an IRD number earnings information.

[42] On 12 August, a review application was lodged on behalf of the appellant.

[43] The appellant made a further statutory declaration dated 25 August 2022 which included the following:

- (3) I was not self-employed. I was working for JNP Construction Limited from 27 July 2021 up to the time of the accident. I was an employee.
- (4) I understand what it means to be an employee and self-employed. An employee works for somebody. A self-employed person owns his own business, this person is the boss. I was not the boss. I worked for JNP Construction.
- (5) ... never told me that I was self-employed. He did not say that I was a contractor. He told me I would work for him. He did not tell me that I had to give him invoices for the work I did. He did not tell me that I should pay my own tax. He told me I would get \$21 an hour.
- (6) He told me to go to the AUT Tower site and that I would be doing labouring work, picking up rubbish. When I got to the site, I was told by MacGroup that I would be picking up rubbish, but also be doing demolition work.
- (7) When I got to the site each morning, I recorded the time I started in the timesheet book held in the MacGroup site office. Each morning there would be a meeting with the workers and two supervisors. The same two supervisors would tell the workers what work to do and where on the site ...
- (8) We had breaks at about 10 am and 1 pm each day. The supervisors would walk around and tell us to have a break.
- (9) At the end of the day, sometimes the supervisors would ask us if we wanted to keep working.
- (10) I was told the time to start work and the time to finish. I was not the boss. Everything I did was because a supervisor from MacGroup told me what to do, where to do it and when to do it.

- (11) At the end of each day that I worked, I recorded the time I finished work in the timesheet book. I did not keep these times myself. They were kept in the timesheet book held by MacGroup.
- (11) JNP Construction paid me the following week for the work I did each week. They did not give me payslips. The money they paid me was less than the hours I did, so I thought JNP Construction was taking off tax.
- (13) I understood that JNP Construction would keep me on after the AUT Tower job finished and that I would keep working as their employee. I was not told that I would finish working for JNP Construction after the AUT Tower job or the job after that. I understood that I would just keep working for JNP Construction on different sites.

[44] Accordingly, Mr Tuiqereqere submits that it is very clear from his client's evidence that his client was an employee. Whereas, it appeared that for ACC, the issue was determined against an employee's status if no PAYE was paid.

[45] Mr Tuiqereqere submits that the court has jurisdiction to make a finding as to the appellant's employment status.

[46] He also submits that ACC has the power to make the same decision, as in fact it did in its decision of 9 August 2022.

[47] Mr Tuiqereqere submits that the Accident Compensation Act 2001 provides a comprehensive regime for ACC to manage the ACC scheme. He refers to part 3 of the Act, which sets out the claims process, including the responsibility on the Corporation to make reasonable decisions in a timely manner. He submits that there is nothing in the Act that takes that power away from ACC.

[48] He further submits part 5 provides that all decisions made by ACC in relation to any claim are then the subject of review and appeal and that accordingly, the court has the competence to decide the appellant's employment status.

[49] Mr Tuiqereqere submits that on every measurement, the appellant is an employee, when in particular what is contained in the appellant's statutory declarations are considered.

[50] He refers to the definition of "employee" in section 6 as meaning:

A natural person who receives, or is entitled to receive –

- (a) Any amount that is treated as income from employment as defined in paragraph (a) of the definition of “Income from employment” in section YA1 of the Income Tax Act 2007; or
- (b) Any salary, wages or other income to which section RD3B or RD3C of the Income Tax Act 2007 applies.

[51] Mr Tuiqereqere contrasts the appellant’s position with that of Mr Drage in *ACC v Drage*¹, where the respondent in that case had described himself as a person with nine years experience as a self-employed stunt man.

[52] Mr Tuiqereqere acknowledges that s 9 of the Accident Compensation Act 2001 describes earnings as an employee as:

In relation to any person in any tax year, means all PAYE income payments of that person for the tax year.

[53] However, Mr Tuiqereqere notes that the Act does not say that PAYE payments must be deducted.

[54] He says that if ACC is correct and that only PAYE deducted payments fulfil the definition of earnings as an employee, then it would be unfair to employees whose employers fail to meet their obligations to deduct and pay PAYE to the Inland Revenue.

[55] Mr Tuiqereqere also refers to the Supreme court decision of *Bryson v Three Foot Six Limited*² where the Court, in referring to s 6 said:

[31] ...That section defines an employee as a person of any age employed by employer to do any work for hire or reward under a contract of service – a definition that reflects the common law. ... The section then requires the court or authority, in deciding whether a person is employed under a contract of service, to determine “the real nature of the relationship between them”. In doing so, the court or authority is directed that it must consider “all relevant matters”, including any matters that indicate the intention of the persons ...

[56] Mr Tuiqereqere refers to the definition of “employee” under s YA1 of the Income Tax Act 2007 and submits that on every measurement of each of the Acts, the appellant is an employee.

[57] Mr Tuiqereqere submits that the IRD has no role or authority under the ACC Act.

¹ *Accident Compensation Corporation v Drage* decision [2010] NZACC 9.

[58] Mr Tuiqereqere refers to *Andrews*³ and submits that it has no similarity with the facts of this case. In that case, Mr Andrews held himself out as being self-employed and the court found, at paragraph 16, that it cannot alter his tax status.

[59] Accordingly, he says that that decision does not assist ACC's position in this case.

[60] Mr Tuiqereqere refers to *Leech*⁴ and says that decision is more factually similar to the appellant's position. The appellant's permanent employment status is what effects ACC's calculations for weekly compensation. The question of whether the appellant would have worked for 12 months is answered in paragraph 13 of the appellant's statutory declaration, namely that JNP Construction Limited was intending to continue to employ the appellant after this particular job.

Respondent's Submission

[61] Mr Marten poses the question: Who is the gatekeeper for weekly compensation calculations, is it ACC or is it the Inland Revenue Department (initially)?

[62] He submits that ACC needs an answer to this question from this court.

[63] Speaking of ACC's current policy, he says that ACC's initial position is to look at the records of the person and if there has been no PAYE payments, then the person is treated as a self-employed person. This then allows ACC to make payments of weekly compensation. He submits that such approach leaves the claimant in a better position because they receive a weekly compensation sooner.

[64] In this case, ACC decided that Mr Foketi was self-employed on the basis that there were no PAYE tax payments made by an employer, or other formalities normally associated with employment, such as an employment agreement. So this is in effect a default finding because he did not meet the Act's criteria for "employee" status.

[65] He says that ACC accepts that there is no evidence before the court that Mr Foketi regarded himself as having entered into an oral agreement with JNP to provide his services

² *Bryson v Three Foot Six Limited* [2005] NZSC 34 at [31]

³ *Andrews v Accident Compensation Corporation* [2004] NZACC 84.

⁴ *Leech v Accident Compensation Corporation* [2004] NZACC 110.

and make his own tax arrangements, as one might normally expect in the case of a self-employed contractor.

[66] Despite this, ACC's decision was reached on the understanding that in the absence of any contrary information from IRD pointing to "employee" status, the Corporation was nevertheless empowered to determine whether a person has an "income" as a result of their "exertions" for the purposes of the Act.

[67] Mr Marten refers to clauses 33 and 34 of the First Schedule and says that ACC is reliant on tax payments in order for it to be able to do its calculations of weekly compensation.

[68] He says that ACC's decision was reached on the understanding that, in the absence of any contrary information from IRD pointing to "employee" status, the Corporation is empowered to determine whether a person has earned "income" (as that term is defined in s YA1 of the Income Tax Act 2007) as a result of their exertions for the purposes of the Act.

[69] Furthermore, he submits that the decision was reached on the understanding that this is a conclusion open to the Corporation regardless of whether a person might be determined to be "self-employed" as an "employee" for employment law purposes.

[70] He notes that under s 161 of the Employment Relationship Act 2000, the Employment Relations Authority has exclusive jurisdiction over "matters about whether a person is an employee".

[71] He submits that ACC cannot determine from an employment law perspective whether Mr Foketi's position was properly classified as that of an employee or a contractor under the Employment Relations Act.

[72] He notes that the Employment Relations Act has its own separate definitions of employment concepts that govern decisions in this area and the Corporation must therefore exercise caution in drawing on employment law concepts and jurisprudence in its decision making.

[73] The question remains unanswered, namely, how does ACC make a weekly compensation payment calculation if there are no PAYE payments.

[74] Mr Marten also refers to s 131(2) of the Act anticipates a situation like ours, where if:

(2)(a) Details of earnings of any person are not available, and their unavailability is not due to the fault of that person

...

[75] Then, s 131(4) provides:

If weekly compensation is paid in advance under this section, the maximum amount that may be paid as weekly compensation is the amount that would have been payable if the person on whose earnings the compensation is to be based had weekly earnings as determined under clause 42(3) of Schedule 1.

[76] Clause 42(3) of Schedule provides a formula for assessing minimum weekly earnings based on s 4 of the Minimum Wage Act 1983 or \$125 of the rate of a single person over the age of 18 ... under the Social Security Act 1964.

[77] Mr Marten concluded his submissions by helpfully acknowledging that on the evidence before it, ACC accepted that the appellant was a permanent employee.

[78] He also says, however, that this case does raise issues as to what should happen where, as here, there is no compliance with the Tax Administration Act 1984.

[79] Mr Marten also says that there are broader considerations here about what to do in similar cases and that what has occurred here cannot be allowed to go unchecked.

Decision

[80] Issues for determination by the court on this appeal have been listed by Counsel as:

Does this court have jurisdiction to determine Mr Foketi's employment/earnings status at the time his incapacity commenced on 29 September 2021?

[81] I find the answer to that question is a very clear "yes".

[82] First, ACC made the two decisions. The first being on 13 June 2022 in which it said that it had been unable to confirm the appellant's taxable income immediately prior to this

accident and that it would need to do this in order to assess weekly compensation. The letter also specifically stated that ACC was unable to provide weekly compensation for the above reason.

[83] ACC made a second decision on 9 August 2022 and decided that the decision of 13 June 2022 was incorrect. It then said that:

... ACC is now issuing a new decision confirming that ACC will assess your weekly compensation as a self-employed earner now that you have provided an IRD number earnings information.

[84] Section 134 empowers claimants to apply to review any of ACC's decisions on the claim. For the sake of completeness, s 149 allows for appeals to the District Court against review decisions.

[85] On the plain wording of the Act, the right to review and to appeal is unfettered.

[86] The Act itself is very prescriptive, as it needs to be, when providing for access to entitlements, including weekly compensation.

[87] As an example, s 6 provides a series of definitions relating to who is an earner; who is an employee; who is an employer; and what is employment.

[88] Part 2 of Schedule 1 of the Act then provides a comprehensive regime as to how weekly compensation is assessed and how it is payable in respect of all those in the workforce, whether as employees, shareholder employees, employees not in permanent employment; self-employed claimants. It also provides for adjustments for low earners; claimants no longer employees; employees on unpaid parental leave; weekly compensation to potential earners; and it also provides for claimants who are recuperating organ donors and employees have consecutive periods of unpaid parental leave.

[89] There are numerous cross references with the various tax statutes administered by the Inland Revenue.

[90] In this regard, the Accident Compensation Act is no different from the many other statutes that are cross referenced with other statutes.

[91] This means that the jurisprudence that derives from the case law affecting those statutory provisions at large in this case, may come from taxation cases, ACC cases and also from other commercial cases where interpretation of provisions in the Income Tax Act and related statutes crops up.

[92] Accordingly, I find no basis for finding that this court does not have jurisdiction to determine Mr Foketi's employment/earning status at the time his incapacity commenced on 29 September 2021.

[93] The next issue is whether or not Mr Foketi was an employee or self-employed at the time his incapacity commenced on 29 September 2021.

[94] In deciding this issue, in *Bryson v Three Foot Six Limited*, referring to s 6 of the Employment Relations Act 2000, the Supreme court said:⁵

[31] That section defines an employee as a person of any age employed by an employer to do any work for hire or reward under a contract of service – a definition that reflects the common law ... The section then requires the court or the authority, in deciding whether a person is employed under a contract of service to determine “the real nature of the relationship between them”. In doing so, the court or authority is directed that it must consider “all relevant matters”, including any matters that indicate the intention of the persons ...

32. “All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the court or the authority should consider the way in which the two parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” equally clearly requires a court or the authority to have regard to their features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants in the relationship at common law.

...

40. ... The majority judgment in the court of Appeal actually said that the way in which Mr Bryson's engagement by the appellant worked out in practice “smacks very much of employment”. They also said on a day to day basis he did what he was told and was “fully integrated” into the appellant's infrastructure. He was not able to delegate his work. His work was effectively full time. On the evidence, the Employment court could take the view that Mr Bryson was not in business on his own account, taking the

⁵ See *Bryson* n2. At [31], [32] and [40].

profits and running the risks of a sole trader, despite being required by Three Foot Six to issue invoices to them and comply with taxation requirements on that basis

[95] The features of the appellant's work with JNP Construction Limited are set out in his two statutory declarations. There has been no counter-evidence.

[96] In his statutory declaration of July 2022, the appellant says:

- (9) On 27 July 2021, I started working as a labourer for JNP Construction Limited. ... They didn't give me an employment contract. I worked at a construction site at AUT Tower in Auckland City.
- (10) The main contractor at the site was MacGroup Limited. JNP Construction was a sub-contractor. MacGroup controlled the site. I was supervised by a supervisor from MacGroup.
- (11) I reported to the MacGroup site office when I started the day and when I finished the day. I recorded my starting time and finishing time in the timesheet book which was kept in the office.
- (12) The work I did on site was picking up rubbish and demolition work. We knocked down walls and ceilings. I used a jack hammer.
- (13) When I started ... told me that I would work at the AUT Tower until the job finished. He said that the job will finish in February or March 2022. He told me that he had other jobs and that when the AUT job was finished, I would keep working for him on the other jobs.
- (14) I worked full time. I started at about 8 am and worked until at least 5.30 pm. I usually worked into the night. I worked Monday to Friday. I also worked Saturday when they asked me. JNP Construction agreed to pay me \$21 an hour.

[97] In his further statutory declaration of 25 August 2022, the appellant says:

- (5) ... never told me that I was self-employed. He did not say that I was a contractor. He told me I would work for him. He did not tell me that I had to give him invoices for the work I did. He did not tell me that I should pay my own tax. He told me I would get \$21 an hour.
- (6) He told me to go to the AUT Tower site and that I would be doing labouring work, picking up rubbish. When I got to the site, I was told by MacGroup that I would be picking up rubbish, but also be doing demolition work.
- (7) When I got to the site each morning, I recorded the time I started in the timesheet book held in the MacGroup site office. Each morning there would be a meeting with the workers and two supervisors. The same two supervisors would tell the workers what work to do and where on the site. We cleaned the site and demolished the building. When we finished cleaning an area or demolishing an area, the supervisor would tell us the next area to go and work on.

- (8) We had breaks at about 10 am and 1 pm each day. The supervisors would walk around and tell us to have a break.
- (9) At the end of the day, sometimes the supervisors would ask us if we wanted to keep working.
- (10) I was told the time to start work and the time to finish. I was not the boss. Everything I did was because a supervisor from MacGroup told me what to do, where to do it and when to do it.
- (11) At the end of each day that I worked, I recorded the time I finished work in the timesheet book. I did not keep these times myself. They were kept in the timesheet book held by MacGroup.
- (11) JNP Construction paid me the following week for the work I did each week. They did not give me payslips. The money they paid me was less than the hours I did, so I thought JNP Construction was taking off tax.
- (13) I understood that JNP Construction would keep me on after the AUT Tower job finished and that I would keep working as their employee ...

[98] When these are measured against what the Supreme court decided in *Bryson*, it is plain that the appellant was an employee.

[99] The factual matrix in our case is completely different from that in *Drage*⁶, where the appellant had as a matter of fact been self-employed by his own description and by the way he was treated by IRD for tax purposes, and then later he unsuccessfully attempted to change that status.

[100] Our situation is also different from that of *Andrews*⁷, where Judge Beattie said:

Whilst it is competent for this court to consider certain questions of status such as whether a claimant is in permanent employment, or is a shareholder/employee, I find that it is not competent for the court to alter the taxation status of a person from being that of an employee on wages to that of a self-employed person when that particular status has been determined by the Inland Revenue Department.

[101] Once again, this decision does not assist ACC's position. The appellant's status has not been determined by the Inland Revenue Department.

[102] Accordingly, therefore, I find that the appellant was an employee at all material times, notwithstanding that it would seem his employer, JNP Construction, and indeed the appellant, did not have any interface with the Inland Revenue Department.

⁶ See *Drage* n1.

⁷ *Andrews v ACC* [2004] NZACC 84 [16]

[103] Likewise, I find that the appellant was in permanent employment and thus entitled to a calculation of his weekly compensation under clause 34 of Schedule 1 of the Accident Compensation Act. It has not been seriously argued otherwise, on behalf of the appellant.

[104] There is no evidence to counter what the appellant has said about continuing to work for JNP Construction Limited after the work at AUT finished.

[105] Mr Marten fairly points out in this regard that while there is no evidence available from JNP Constructions Limited, there is no evidence to contradict Mr Foketi's understanding.

[106] Accordingly, I find that he satisfies the criteria as set out in clause 33(3) of Schedule 1, namely that:

For the purposes of this clause and clause 34, the claimant is regarded as having been in permanent employment if, in the opinion of the Corporation, he or she would have continued to have received earnings from that employment for a continuous period of more than 12 months after the date on which his or her incapacity commenced, if he or she had not suffered the personal injury.

[107] This case raises a number of issues beyond the parameters of the questions to be answered by the court. These include the vulnerability of those who work in New Zealand and for whom their visa status has not been settled. It potentially raises the wider issue of whether both workers and "employers" are remaining wilfully ignorant, or worse, of their statutory obligations to pay income tax and ACC levies.

[108] It poses the question as to whether some review and possible overhaul of the existing regimes is indicated. Particularly, as it would appear, that this country has an increasing reliance on overseas visitor workers. That, however, is well beyond the scope of the jurisdiction of this court.

[109] Accordingly, the appeal is allowed. ACC's decision of 9 August 2022 is quashed. Instead, this court rules that ACC is to assess the appellant's weekly compensation as an employee in permanent employment before his incapacity commenced.

[110] Accordingly clause 34 of Schedule 1 of the Act applies.

[111] Costs are reserved. Any memoranda in respect of costs is to be filed within one month.

CJ McGuire

CJ McGuire
District court Judge

Solicitors: Pacifika Law Limited, Westmere for the appellant.
Izard Weston Lawyers, Wellington for the respondent.