

**Michael Adams**  
Applicant

**Accident Compensation  
Corporation**  
Respondent

**Before:** D J Plunkett

**Counsel for the Applicant:** Self-represented

**Counsel for the Respondent:** P A McBride

**Date of Decision:**

---

## **DECISION**

---

### **INTRODUCTION**

[1] This is an application by Michael Adams for leave to appeal out of time to the Authority against the decision of a reviewer given on 5 May 1980.

[2] The respondent Corporation accepts Mr Adams is covered by the applicable accident compensation legislation. He is challenging the decision of the reviewer concerning his earnings related compensation (ERC). More than 33 years after that decision, he has appealed to the Authority. In the interim, the parties had conducted themselves as if the decision was correct. The essential issue for me is whether, having regard to the extremely lengthy delay and the limited merits of the appeal, the interests of justice favour an extension of time.

### **BACKGROUND**

[3] The following narrative has been compiled from the documents made available to me by the parties. Some of the documents sent are incomplete. I do

not have the Corporation's complete historical files (which may no longer exist). However, I have sufficient evidence to determine this application.

### *Accident*

[4] On 26 February 1979, Mr Adams suffered facial fractures when a tree fell on him while he was working as a self-employed forestry contractor. The limited medical evidence I have seen shows that there were psychological consequences, including post concussional syndrome and a reactive depression of moderate degree (Dr Hibbs, psychiatrist, 22 January 1985). Dr Hibbs later described it as a severe obsessional illness with paranoid features and a lack of insight verging on the psychotic (23 April 1986).

### *Claim to Corporation for coverage and ERC*

[5] The Corporation accepted coverage and he was initially paid ERC, but at some point the Corporation ceased paying. There were periods after the accident when he had work and the Corporation also had difficulty establishing his earnings prior to the accident, in order to calculate the appropriate level of ERC.

[6] The solicitor for Mr Adams wrote a letter to the Corporation on 28 June 1979 recording that no weekly compensation had been paid since 13 May and acknowledging that the Corporation had requested certain financial information.

[7] The solicitor advised the Corporation that Mr Adams had earned \$10,900 in the year ending 31 March 1978 working for Murupara Motors. In the year ending 31 March 1979, being the year of the accident, Mr Adams had not earned wages from April 1978 until mid-January 1979. Instead, he had worked on fencing and repairs to his own property of five acres, while living on savings and irregular earnings from opossum skins, venison, farm meat and produce. His earnings were \$3,374.20. Then from mid-January 1979 until the accident on 26 February, he was a forestry contractor earning approximately \$1,700.

[8] The solicitor stated in the letter that Mr Adams suggested his "relevant earnings" under the legislation should be his remuneration as a forestry contractor. If this was not accepted, his relevant earnings were \$5,074.20 (\$3,374.20 + \$1,700), together with some allowance for the period when he worked on his property (say, \$5,000 to \$10,000). Alternatively, it was reasonable to assess his loss on the basis of the \$9,000 per annum he would have received after 19 March 1979.

*Corporation decision on ERC*

[9] On 7 August 1979, the Corporation advised the applicant's solicitor that it had to establish as his "relevant earnings", pursuant to the statutory scheme, a figure which fairly and reasonably represented his normal average weekly earnings. However, due to his employment history over the 12 months prior to the accident, it was unable to clearly identify his net income, so it had made an interim determination. It assessed his relevant earnings at \$90 weekly, which gave him ERC of \$72 weekly (80% of \$90). This was backdated to 5 March 1979 and would continue to be paid provided supporting medical certificates were received.

*Review decision on ERC*

[10] Mr Adams duly sought review of the Corporation's decision of 7 August 1979 and appeared with his solicitor before a reviewer on 18 March 1980, with a decision given on 5 May 1980.

[11] In the decision, the reviewer noted that, while Mr Adams' normal occupation was as a motor mechanic, he was a self-employed forestry contractor at the time of the accident. He was then earning approximately \$280 per week gross, but he did not claim that this amount fairly and reasonably represented his normal average weekly earnings. The reviewer found that in the financial year ending 31 March 1978, Mr Adams had earned \$10,900, according to the Inland Revenue Department. The reviewer said that he would ignore the period from 1 April 1978 to 15 January 1979, during which Mr Adams was neither an employee nor in business. Furthermore, the reviewer rejected the brief period prior to the accident, when Mr Adams was earning a very high weekly income. The review officer considered that a fair and reasonable figure for his relevant earnings was \$10,900.

[12] Mr Adams did not at the time exercise his right of appeal to the Authority.

*Further discussions and correspondence on ERC*

[13] There followed further discussions and correspondence between Mr Adams and the Corporation concerning earnings related compensation and his lump sum entitlement. The two have had a long, acrimonious relationship.

[14] On 2 July 1984, the Corporation advised Mr Adams that statutory awards had increased his pre-accident relevant earnings from \$209.62 weekly (\$10,900 annually) to \$420.22 weekly. The accident had resulted in 15% loss or impairment of bodily function. He was entitled to 80% of the relevant earnings, less tax, being

\$253.74 weekly, effective 6 June 1984. He was advised that the amount could not be reduced by reason of any subsequent increase in his earning capacity.

#### *Commutation of ERC*

[15] Mr Adams sought commutation of his weekly payments in March 1985. The Corporation declined to commute his ERC on 9 April 1985. A review was dismissed on 23 January 1986. He had been represented by counsel at the review.

[16] An appeal to the Authority (Decision No. 179/86) was allowed by Judge Middleton on 11 December 1986 (with addenda to the decision on 26 January and 5 February 1987). Mr Adams was represented by counsel. It was noted that an earlier review had fixed his relevant earnings at \$209.62. Commutation of 30% of his entitlement was ordered by the Authority, so the applicant could re-establish himself in a home free of mortgage. This would give him and his family greater security. He would continue to receive a regular weekly income from the Corporation (as to the balance of 70% of his ERC entitlement), augmented by earnings from his jet boat operation.

[17] There was a meeting on 8 July 1987 between Mr Adams (and his solicitor) and the Corporation concerning commutation of ERC. A heads of agreement was reached concerning a net payment to him of \$255,920.70. This represented 100% commutation and would enable Mr Adams to sever his relationship with the Corporation as much as possible. He was advised this was an alternative to regular weekly payments until the age of 65. The payment was made on 9 July 1987. The Corporation's letter of that date advised the applicant that the final weekly payment to him would be for the week 13 to 17 July.

#### *Second accident*

[18] On 5 December 1989, Mr Adams suffered chest and abdomen injuries arising from a second accident when operating a jet boat. The Corporation accepted cover for this accident but there remains a dispute concerning his ERC entitlement arising from that accident, which is also before the Authority in a separate appeal.

#### *Settlement concerning tax liability*

[19] Further discussions concerning commutation of ERC from the first accident led to Mr Adams entering into a deed of settlement with the Corporation on about

29 June 1992. The file copy sent to the Authority bears that date, though it is unsigned. Counsel for the Corporation says an executed copy of the deed cannot now be located. The settlement largely concerned the tax liability of Mr Adams, with the Corporation agreeing to meet such liability arising out of payments by it. It was expressed to be in full settlement of a specified claim (the details of which are unknown to me). It was also expressed to be in full and final settlement of all claims he might have against the Corporation (whether concerning tax liability or otherwise), with such settlement to be final and binding. I observe here that the Corporation accepts that this deed does not of itself bar the current appeal.

[20] An accountant providing independent advice to Mr Adams (at the expense of the Corporation) wrote to his then counsel on 24 July 1992 setting out a consensus reached with another accountant as to the Corporation's tax liability. The accountant confirmed that the commuted earnings had been correctly returned as income. The assessable income and tax liabilities for the years to March 1987, 1988 and 1991 are set out. In the opinion of the accountant, the payment by the Corporation of \$118,760.06 would discharge all its taxation obligations in respect of commutation. Attached to the letter is the unsigned deed of 29 June 1992.

[21] The Corporation duly discharged this tax liability.

#### *Possible challenge to ERC review decision*

[22] The first reference seen by the Authority to any possible challenge to the reviewer's assessment (dated 5 May 1980) of Mr Adams' ERC arising from the 1979 accident is an internal Corporation memorandum of 13 December 2007. This stated that Mr Adams was questioning the calculation of his 1979 ERC claim, as compared with that of 1989. The details of the assessment of ERC for the 1979 claim were unknown to the author. The memorandum recorded that the author had been unsuccessful locating the file.

#### *Complaint to Ombudsman*

[23] It is apparent that Mr Adams made a complaint to the Ombudsman concerning the management of his claim. A senior officer of the Corporation wrote a letter of apology to Mr Adams on 3 March 2010, following a meeting with the Ombudsman on 21 December 2009. It was expressed to be a comprehensive apology. It recorded the significant stress in achieving a 100% commutation of his weekly compensation. A payment of \$8,000 had been made to compensate him

to some degree. The letter dealt with other matters not material to the issue before me.

[24] The Authority has been given an appendix to a letter from the Chief Ombudsman presumably to Mr Adams. I do not know the date of that letter, which is no longer available.

[25] It is apparent from the appendix that the Chief Ombudsman accepted that “immense stress” had been caused to Mr Adams as a result of his dealings with the Corporation from 1979 to 1986. The Ombudsman considered that if Mr Adams was to contest the calculation of his ERC, determined at the review hearing in 1980, he would have to lodge an appeal out of time. It was suggested that he seek legal advice concerning this.

[26] I note that the Ombudsman also recorded, in relation to the 1979 ERC claim, that the commutation of Mr Adams’ ERC had been settled in 1992 by way of a deed. The Corporation had paid 100% commutation, funded a High Court appeal about tax liability for commutation payments, fully paid his tax liability and paid compensation for his legal and other costs. Importantly, said the Ombudsman, \$8,000 was paid by way of damages for distress, as part of the settlement.

[27] According to the Ombudsman, the only outstanding issue from “that era” had been the absence of a formal apology from the Corporation, which had since been put right.

[28] In respect of the 1989 ERC claim, the Ombudsman did not consider that she had jurisdiction as Mr Adams had the right to lodge a late review. She recorded that the Corporation had agreed not to contest the lateness of any review application from him on this issue.

[29] There is an internal Corporation memorandum of 26 July 2010 recording that Mr Adams had requested the Corporation to reconsider the review decision of 5 May 1980. His main area of concern was that the review officer had ignored the most recent income information, which would have increased the weekly compensation by approximately 20%. The author set out some background information.

[30] An internal Corporation memorandum of 19 August 2010 noted that Mr Adams had asked the Corporation to reconsider the review decision of 5 May 1980. The author concluded that he had not provided any new information and

that the Corporation did not, in any event, have the power to revisit a review officer's decision.

[31] There is an email dated 5 November 2010 from an officer of the Ombudsman to the ACC. In relation to the 1979 ERC claim, it was noted that Mr Adams had taken it on review and he would next need to consider an appeal out of time from that review decision, which it was understood he could do. The officer regarded the draft letter sent (presumably that to Mr Adams of the same date) as consistent with what the Ombudsman had sent to Mr Adams.

[32] A letter from the Corporation to Mr Adams on 5 November 2010 summarised the action taken as a result of outcomes agreed at the meeting with the Chief Ombudsman on 21 December 2009. In respect of the 1979 claim, it was noted that a review decision in 1980 had increased the weekly compensation to better reflect the average income earned before the accident. That review claim had come with appeal rights, but his solicitor had written to the Corporation accepting the review decision. In respect of the 1989 ERC claim, the Corporation offered to waive its objection to any out-of-time review.

[33] It is apparent that Mr Adams returned to the Ombudsman, as the latter wrote to him on 13 March 2013. Mr Adams has given the Authority a partial copy of the letter. His complaint concerned ERC arising from both his 1979 and 1989 claims. It referred to the Ombudsman's earlier letter of 2 November 2010 (not sent to the Authority). I record an "Important Note" in the letter stating that the Corporation had "destroyed all the files on the 1979 claim". The letter further stated that the information gathered in relation to the 1979 claim was therefore much less detailed, although key documents had been retrieved.

[34] The Ombudsman recorded that at the time of the accident Mr Adams was earning \$280 gross weekly, as a forestry contractor. He had been doing this work from January 1979 until the accident. However, he had a job offer as a mechanic for \$9,360 annually, due to start on 19 March 1979.

*Appeal to the Authority on 1979 ERC claim*

[35] On 15 November 2013, Mr Adams appealed to the Authority against the review decision of 5 May 1980. At the same time, he sought leave to appeal out of time.

## **CASE ON APPEAL**

[36] A memorandum of submissions (12 November 2013) setting out Mr Adams' case was filed by his previous counsel. It is supported by an affidavit from Mr Adams sworn on 12 November 2013. Another memorandum (14 March 2014) was subsequently filed by his former counsel.

[37] Mr Adams has himself filed numerous lengthy documents, including a bound, paginated volume and letters (4 & 17 January 2015) written by his daughter, Ms Hasson, to the Corporation, the Authority and others. There are also submissions from Mr Adams (8 December 2014 & 20 February 2015), as well as a lever arch file of additional supporting documents.

[38] The Corporation's submissions are contained in a memorandum of preliminary submissions of 14 February 2014, with supporting documents. A memorandum of 19 March 2014 was also filed. There was a further memorandum filed on 13 February 2015, with additional documents.

### *Procedure on leave to appeal application*

[39] The former counsel for Mr Adams sought an oral hearing for this leave to appeal application (memorandum 12 November 2013, para 8). It would be unusual for the Authority to hold an oral hearing in order to determine whether an extension of time should be granted. Counsel said that further evidence would be filed, including a report from a psychologist.

[40] Considerable further evidence was filed by Mr Adams (and taken into account by the Authority), but no report from a psychologist was provided. The Authority has sufficient evidence upon which to make a decision. I do not consider an oral hearing would be of any assistance and decline to grant one, nor would I be assisted by evidence from a psychologist.

[41] I record that the Authority wrote to the parties on 5 February 2015. Mr Adams was invited to provide final submissions on the leave application, together with any further documents. The Corporation was requested to provide additional documents and submissions on a particular issue. As noted above, both parties responded to this invitation by the provision of submissions and documents.



## **THE LAW**

[42] At the time of the accident, the Accident Compensation Act 1972 (“the 1972 Act”) was applicable. The 1972 Act also applied to the Corporation’s ERC decision of 7 August 1979 and the review decision of 5 May 1980. An appeal then lay to this Authority (section 162 of the 1972 Act).

[43] Notwithstanding the repeal of the 1972 Act and the subsequent Accident Compensation Act 1982 Act (“the 1982 Act”), the Authority continues to have jurisdiction over certain claims arising from personal injury by accident occurring on or before 30 June 1992 (section 391(1), Accident Compensation Act 2001 - “the 2001 Act”). By virtue of section 391(1)(a) of the 2001 Act, Part 9 of the 1982 Act applies to the appeal process.

[44] An appeal is by way of a rehearing (section 109(1) of the 1982 Act). The Authority can confirm, modify or reverse a decision, or refer the matter back to the Corporation (section 109(7) & (8) of the 1982 Act).

## **ASSESSMENT**

[45] Mr Adams seeks an extension of time to bring an appeal against the decision of a review officer on 5 May 1980 settling his ERC arising out of the first accident on 26 February 1979.

[46] There was a right of appeal from that decision under section 162 of the 1972 Act. It had to be lodged within 21 days after the date the decision was notified, or “within such further time as the Authority may allow on application made either before or after the expiration of those 21 days” (section 163(1)). It is conceivable that the 1982 Act appeal time limit and/or discretion to extend time applies to this late application, pursuant to section 391(1)(a) of the 2001 Act. If so, section 108(1) of the 1982 Act provides for an appeal to be lodged within one month or such further time as the Authority may allow.

[47] It does not matter which Act stipulates the time limit for this appeal. The 1972 and 1982 Act provisions are essentially identical (the difference between 21 days and one month being immaterial in the context of the lengthy delay in this case).

[48] Mr Adams does not contend that there was late notification of the review decision. Accordingly, I find that it occurred at or immediately after the date it was issued. It follows that his appeal to the Authority, dated 12 November 2013 and

filed on 15 November, is 33 years out of time (irrespective of which of the 1972 or 1982 Acts are applicable).

[49] The High Court set out the factors to take into account in assessing whether time should be extended in *McDougall v Accident Compensation Commission* [1983] 4 NZAR 85 at 87:

- (a) The length of the delay beyond the time allowed
- (b) The reasons for it
- (c) The strength or merits of the applicant's case
- (d) The prejudice to the respondent if the extension is granted.

[50] The most important factor is the strength of the applicant's underlying case (*McDougall* at 88). However, while the above factors are material, the fundamental question is whether it is just to grant an extension (*McDougall* at 87).

[51] A party seeking an extension of time requires an indulgence. The period of 21 days (or one month) to lodge an appeal as of right is an indication that Parliament intended an appellant should proceed promptly after receipt of the original decision (*Morgan v Accident Compensation Corporation* [2012] NZHC 1789 at [29]).

[52] I will consider the *McDougall* factors in order, then turn to the fundamental question of whether it is just to grant an extension. Before doing so, I record that the Corporation has at no time consented to an appeal out of time concerning the 1980 decision. The consent referred to by the Ombudsman ([28] of this decision) relates to ERC arising out of the 1989 injury. Mr Adams seeks to rely on this consent, but it is irrelevant. It was a gesture made in 2009/2010 concerning an injury in 1989 and a Corporation decision I believe was made on 15 January 1990.

*The length of the delay beyond the time allowed*

[53] The time allowed was 21 days (or one month if the 1982 Act is applicable), with the delay beyond that being more than 33 years. That is an extraordinary and inordinate period of delay.

*The reasons for it*

[54] The delay is not satisfactorily explained.

[55] It was not because of any lack of knowledge on Mr Adams' part of his right to appeal. I do not have the covering letter for the 1980 review decision, so I do not know whether he was expressly informed of his right of appeal by the Corporation or reviewer, but he was represented by a solicitor at the time and subsequently.

[56] Mr Adams has a long history of challenges to the decisions of the Corporation and those made on review, so he would have been well aware of his rights. He had come to the Authority at least twice well before this appeal, in 1986 (see [16] above) and in 1990 (see Decision No. 15/91, 30 January 1991). He was represented by a solicitor on both occasions.

[57] Given the legal representation of Mr Adams at the time of the decision and during much of the intervening period, I do not accept that his brain injury (as alleged) or psychological condition are an adequate explanation. Furthermore, he has had a psychologist funded by the Corporation to assist him to deal with legal and medical matters for part of this time. There is no evidence his mental condition materially affected his ability to understand his claim or the process of challenging decisions of the Corporation or of reviewers throughout such a long period. It did not prevent him from contesting other decisions of the Corporation or of reviewers.

[58] In light of his history of legal representation and legal challenges, it is highly unlikely that any new psychological evidence (if it had been adduced in support of this application) would have persuaded me to grant an extension of time.

[59] The former counsel of Mr Adams who filed this appeal refers to the remote location where his client lives and works, there being no cellphone or landline communication. That made obtaining instructions challenging. I do not know how long he has lived there, but do not accept that satisfactorily explains a delay of 33 years. That is particularly so given just how active he has been in contesting other decisions.

*The strength or merits of the applicant's case*

[60] Of course, unless I grant an extension of time and fully hear Mr Adams' case on appeal, I cannot be in a position to conclusively determine the merits. However, on the basis of what has been produced to me by the parties, I find little merit to Mr Adams' substantive case.

[61] He seeks to have his ERC recalculated on the basis of his higher forestry earnings at the time of the accident.

[62] In accordance with section 104 of the 1972 Act, “relevant earnings” for the purpose of calculating ERC for Mr Adams were:

**104 Relevant earnings**

- (1) ..., for the purpose of determining the amount of any earnings related compensation payable during or after the period of short term incapacity ... to an earner who suffers personal injury by accident in respect of which he has cover under this Act, ... the amount of his relevant earnings shall be such amount as, in the opinion of the Commission, would, at the time of the accident, fairly and reasonably represent his normal average weekly earnings, having regard to such information as the Commission may obtain regarding his earnings before the time of the accident and his earnings at the time of the accident, and to his work history and the period of his residence in New Zealand before the time of the accident.
- (2) ...
- (3) If the earner was a self-employed person at the date of the accident (whether or not he was also an employee at the date of the accident) or if the earner had been a self-employed person at any time during the period of 12 months immediately preceding the date of the accident, the Commission, in fixing his relevant earnings under subsection (1) of this section, may have regard to all or any of the following factors, as it thinks appropriate for the purpose:
  - (a) His earnings as a self-employed person during his financial year last ended before the day immediately following the date of the accident, or, if the amount of those earnings is not for the time being readily determinable, such sum as may be estimated by the Commission as fairly and reasonably representing those earnings:
  - (b) His earnings as an employee (if any) during that financial year and his earnings as a self-employed person during that financial year, or, if the amount of those earnings is not for the time being readily determinable, such sum as may be estimated by the Commission as fairly and reasonably representing those earnings:
  - (c) The average amount of his earnings as a self-employed person during any of the periods of 2 or 3 or 4 consecutive financial years last ended before the day immediately following the date of the accident, or, if the Commission, in the exercise of its discretion, so decides, during any one or more of those financial years which it may select as appropriate for the purpose:
  - (d) His earnings as an employee (if any) at or about the time of the accident, or during the period of 12 months immediately preceding the date of the accident, or during such part or parts of that period as the Commission may select as appropriate for the purpose
  - (e) His earnings as a self-employed person (as determined or estimated by the Commission) during the period of 12 months immediately preceding the date of the accident, or during such part or parts of that period as the Commission may select as appropriate for the purpose, if sufficient information, including accounts, is furnished to the Commission to enable it to determine

or estimate the amount of his earnings as a self-employed person during that period or the said part or parts of that period, as the case may be:

Provided that nothing in this subsection shall preclude the Commission from having regard also to such other factors as it may consider relevant for the purpose of subsection (1) of this section.

[63] It can be seen that the Corporation and therefore the review officer had a wide discretion to have regard to Mr Adams' earnings as both a self-employed person and earlier as an employee in order to ascertain the amount which, in the opinion of the Corporation, fairly and reasonably represented his normal average weekly earnings at the date of the accident, 26 February 1979. This includes earnings in the financial year of the accident and the preceding years.

[64] It will be recalled that Mr Adams was a self-employed contractor earning \$280 weekly at the time. However, he had been a contractor only since mid-January 1979. Previously, he had been a mechanic earning \$10,900 in the year ending 31 March 1978. In the period from April 1978 to mid-January 1979, he had earned only \$3,374.20, about \$82 weekly. He had then earned about \$1,700 (\$280 weekly) as a forestry contractor immediately prior to the accident. Accordingly, the total for the year ending 31 March 1979 was only \$5,074.20 (about \$98 weekly). He had been due to start work as a mechanic from 19 March 1979 on an annual pay of \$9,000, though I appreciate this was strictly irrelevant as it was not earnings prior to the accident.

[65] The review officer recorded that Mr Adams did not contend at the hearing that the \$280 remuneration as a forestry contractor fairly and reasonably represented his normal average weekly earnings.

[66] The officer had increased the relevant earnings which the Corporation had found to be \$90 weekly. He determined that \$10,900 (\$209.62 weekly) was the fair and reasonable figure for Mr Adams' annual remuneration at the time. On the basis of the evidence disclosed to me, Mr Adams has not satisfied me that he can mount any serious challenge to the determination of the reviewer. Given that he had worked as a forestry contractor for only about six weeks prior to the accident, I do not accept that his higher remuneration as a contractor reflected his normal average weekly earnings at the time of the accident.

[67] I do not accept the argument of Mr Adams' daughter set out in the letter of 4 January 2015 (at page 5) that the Corporation is restricted to relying only on his earnings at the time of the accident or the period of 28 days immediately before it. Section 104 gives the Corporation a wide discretion as to the period of earnings

that regard may be had to in order to arrive at remuneration fairly and reasonably reflecting his normal average weekly earnings. Nor do I accept her contention in the letter of 17 January (page 5) that the Corporation and reviewer cannot look at the earlier occupation of Mr Adams as a mechanic. It was entitled to have regard to his previous earnings as an employee, even though he was self-employed at the time of the accident.

[68] According to counsel for the Corporation, Mr Adams has been paid the maximum ERC allowed at the time, so his claim for more cannot be successful (submissions 14 February 2014, para 22). I have not been given a schedule of statutory maxima, so cannot check this contention. If correct, it would be fatal to the appeal.

*The prejudice to the respondent if the extension is granted*

[69] It is apparent that much of the documentation concerning the 1979 claim is no longer available (see Ombudsman letter 13 March 2013). While there will be some prejudice to the Corporation arising out of such a lengthy delay, it is difficult to assess how real this will be. It is apparent that some, if not much, of the key documents appear to be available, as the Ombudsman recognised. I have been given many key documents.

[70] The Corporation makes a general claim that it is “substantially prejudiced”, but does not point to any specific prejudice (submissions 14 February, para 19.4). It is not clear to me how the payments already made, referred to by counsel, can amount to prejudice, unless some part is more generous than it would otherwise have been. Mr Adams is claiming he was underpaid, so I cannot see how the payments to date (which are not contested by the Corporation) have prejudiced the Corporation.

[71] Additionally, Mr McBride for the Corporation submits that it would be an abuse of process to allow this appeal to proceed. This is not just because of the period of the delay, which he correctly describes as “gross, inordinate and inexcusable”. It is because of the history of Mr Adams’ claims regarding ERC, his active decision not to appeal, the significant alteration of position by the Corporation based on the facts as determined by the reviewer (including commutation) and the extremely belated change of heart.

[72] In terms of the alleged active decision not to appeal, the Corporation relies on a letter of 25 January 1983 from the then solicitor of Mr Adams to the

Corporation, but this concerns another review decision, not that of 5 May 1980. Notwithstanding that, given that Mr Adams was represented at the time of the 1980 review decision and in the immediately following period, I accept that he actively decided not to challenge the decision. I consider it highly unlikely he was not aware of his right to appeal or that he overlooked appealing or that as a result of any brain injury he misunderstood his rights.

[73] I accept that the Corporation acted upon the review decision, particularly in commuting the payment and assuming the tax liability of Mr Adams which involved payment of significant sums to him. Indeed, both Mr Adams and the Corporation have conducted themselves as if the 5 May 1980 decision was correct in the decades following that decision. However, it has not been established that the Corporation altered its position in a way which could be considered adverse or prejudicial if Mr Adams was allowed to challenge the decision.

[74] I decline to find any substantial prejudice to the Corporation if the appeal was to proceed.

### *Conclusion*

[75] While I do not find any serious prejudice to the Corporation, I conclude that the interests of justice do not warrant an extension of time. I decline to grant such an extension. The delay is far too long and is not explained. I accept Mr McBride's description of it as gross, inordinate and inexcusable. The delay is so great as to put the appeal outside what the statute contemplated could be addressed by the appeal procedure (*Air New Zealand v MacIntosh* CA 19/01, 14 February 2002 at [28]). There is a public interest in the finality of litigation. Furthermore, on the evidence adduced to date, assessing the merits at this early leave application stage, I find little merit to the appeal.

### **OUTCOME**

[76] I dismiss this leave to appeal application.

[77] Costs are reserved. Either party may address this issue within 28 days of the decision. If submissions are filed, the other party may reply within 21 days.