IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA 56

[2023] NZACC 56 **ACR 211/22**

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

Hearing: 28 March 2023
Held at: Wellington/Te Whanganui-a-Tara by AVL

Appearances: B Hinchcliff for the Appellant
C Hlavac for the Accident Compensation Corporation

Judgment: 5 April 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for weekly compensation - s 15(3) and clause 31 of Schedule 1, Accident Compensation Act 2001 ("the Act")]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 7 November 2022. The Reviewer dismissed an application for review of the Corporation's decision dated 9 March 2022 advising Mr Brown of his new weekly compensation amount.

Background

[2] Mr Brown (born in 1985) is a shareholder-employee of Oxen Limited and works as an earthmoving and machine operator. Mr Brown is the sole director and shareholder of the company.

[3] On 27 February 2020, Mr Brown suffered a lumbar injury and he received cover and weekly compensation for 95 days until 10 June 2020.

[4] On 27 May 2021, Mr Brown injured his lower back at work while pulling a compactor.

[5] On 17 June 2021, Dr Holman Gao, GP, lodged a claim with the Corporation on Mr Brown's behalf, for a lumbar sprain when he hurt his back on 27 May 2021, and certified that Mr Brown was incapacitated by his injury.

[6] On 17 June 2021, the Corporation accepted Mr Brown's claim and that he was incapacitated by his injury. The date of first incapacity was initially found to be 17 June 2021, but this was later amended to 27 May 2021.

[7] On 8 July 2021, Dr Robert Walton, GP, certified that Mr Brown was fully unfit to work from 17 June to 11 August 2021.

[8] The Corporation calculated Mr Brown's weekly compensation in accordance with clause 39(2)(c) of Schedule 1 of the Act (weekly earnings if the claimant had earnings as shareholder-employee immediately before incapacity commenced).

[9] In terms of clause 31, the Corporation had to take Mr Brown's income tax return into account for the relevant year. In terms of clause 30(2), the relevant year for a shareholder employee 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. The Corporation determined that the relevant year for Mr Brown's weekly compensation was the tax year ending 31 March 2021.

[10] The Corporation had to calculate the weekly compensation on an interim basis because Mr Brown's tax return for the year ending 31 March 2021 was not yet available. To calculate the interim amount, the Corporation had to use the earnings declared in Mr Brown's previous tax year ending 31 March 2020 as a basis for its

calculations ($33,928.59). This is permissible under clause 45 (interim estimation of weekly earnings that cannot be ascertained).

[11] The Corporation also included PAYE earnings of $1,767.70 in its calculations. The PAYE earnings related to Mr Brown's previous weekly compensation under his earlier 2020 claim and were earnings within the 52 weeks prior to date of first incapacity. The reason was that weekly compensation payments are treated like PAYE payments and taxed like PAYE earnings under the Income Tax Act 2007.

[12] On 15 December 2021, the Corporation's records showed that Mr Brown was being paid $640 per week, being the minimum amount under clause 42 of the Act.

[13] Once Mr Brown's tax return for the tax year ending 31 March 2021 was available, it showed that he had shareholder employee earnings of $42,077.65 for the relevant year. The Corporation accepted these as reasonable shareholder employee earnings for the purposes of clause 39(2)(c) which sets out the formula for calculations.

[14] The Corporation decided that Mr Brown was also entitled to have his PAYE earnings from the previous 2020 ACC weekly compensation payments ($1,767.70) included in the calculation for weekly compensation. The Corporation's reasoning was that these payments were made within the 52 weeks prior to date of first incapacity.

[15] On 9 March 2022, the Corporation sent Mr Brown a payment advice notifying him of his new weekly compensation amount, based on $42,077.65 (including the PAYE amount of $1767.70). He was due to receive $375.17 (net) on 10 March 2022 for the seven days 28 February 2022 to 6 March 2022; and $541.89 (net) on 15 March 2022 for the seven days 7 March 2022 to 13 March 2022.

[16] On 11 March 2022, Mr Brown contacted the Corporation stating that it should have included the full $14,000 he received for weekly compensation under his 2020 claim. Mr Brown also referred to his inability to work during the Covid-19 pandemic and its impact on his earnings.

[17] The Corporation undertook to check whether the government's Covid-19 wage subsidy payments had been included in Mr Brown's earnings. The Corporation confirmed that the $42,077.65 on which his weekly compensation was based was made up of $35,048.05 shareholder employee earnings and $7,029.60 Covid-19 wages subsidies.

[18] On 12 March 2022, Mr Brown told the Corporation that:

> … this $42,077.65 is for 3/4 of a year's worth of work so it is not very accurate to calculate what I would make in a year usually. It either needs to be multiplied to represent a full year or the ACC income needs to be included. (This ACC income is also only 80% of my usual earnings so this would need to be multiplied to represent 100% of my usual earnings).

[19] On 23 March 2022, the Corporation emailed Mr Brown explaining how much of his previous weekly compensation was taken into account:

> ACC earnings are only included in the calculation for the 52 weeks pre DOFI – meaning that the calculation does not include the full $14,000 paid in the tax year period, instead it only includes 28/05/2020 - June 2020 (when client came off of WC in that year).

[20] On 6 April 2022, Mr Brown lodged an application for review of the decision of 9 March 2022, "to get a fair weekly compensation so I can cover my everyday bills as per usual".

[21] On 8 April 2022, the Corporation's records showed that Mr Brown was being paid $674.54 per week, as from 7 March 2022.

[22] On 20 April 2022, the Corporation's technical accounting advisor, Ms Erica Roets, performed an internal review of Mr Brown's weekly compensation calculations. Ms Roets provided the following information about Mr Brown's current and previous earnings in her memorandum:

> Period ending 31 March Shareholder employee (no deductions) salary
>
> 2021 ($35,048.05)
>
> 2020 ($33,928.59)
>
> 2019 ($68,940.07)

[23] Ms Roets noted that Mr Brown's shareholder-employee earnings for the year ended 31 March 2021 of $42,078, which included the Covid-19 wages subsidy of $7,029.60, was accepted as reasonable remuneration for the purposes of calculating weekly compensation in accordance with clause 39 2(c). Ms Roets did not agree that Mr Brown's weekly compensation payments were relevant to the calculations. She noted that his PAYE Salary and Wages received from the Corporation ceased on 7 June 2020 and did not fall within the 52 weeks immediately prior to incapacity and therefore should not have been included in the calculation. Ms Roets explained how it had come about that Mr Brown's weekly compensation payments had (mistakenly) been included in the calculations:

> Because the income from ACC was lodged the earnings for the period 26 June to 7 July 2020 during June 2020 with Inland Revenue, ACC included the $1,767.70 earnings in the clients' earnings for the calculation of his weekly compensation entitlement.
>
> … The client's earnings for weekly compensation were overstated by $33.99 resulting in an additional weekly payment of $27.20 in favour of the client ACC will not seek to recover the overpayment in this instance.

[24] On 20 April 2022, Mr Brown responded that:

> … the $42,000 used in the calculation is not a whole year's wage as a portion of the year. I was unable to work due to covid lockdowns and a portion of the year I was on ACC. This amount needs to be adjusted to represent a year.

[25] On 25 May 2022, the Corporation advised Mr Brown that his weekly compensation would stop on 7 May 2022 as he had advised that he no longer needed to receive weekly compensation.

[26] On 17 October 2022, review proceedings were held. Mr Brown gave evidence that:

- He was on ACC weekly compensation under a different claim for around 13.5 weeks in the 52 weeks before incapacity.
- In 2018/2019 he worked for 52 weeks and Oxen Limited paid him an average of $1,325.77 per week.

- In 2019/2020 he worked for 38/39 weeks and Oxen Limited paid him an average of $1,742.48 per week.
- In 2020/2021 he worked for 8 weeks and Oxen limited paid him an average of $2,100 per week.
- In 2021/2022 his weekly wage from Oxen Limited was tracking at an average of $2,325 per week.
- The amount paid per week from ACC was not a reasonable representation of his earnings.
- The average NZ wage for site management in 2022 is between $92,000 and $224,000.

[27] On 7 November 2022, the Reviewer dismissed the review, on the basis that there was no evidence of a flaw in the method used by the Corporation in deciding Mr Brown's earnings.

[28] On 22 November 2022, a Notice of Appeal was lodged.

[29] On 7 March 2023, the Corporation clarified the basis on which it had calculated Mr Brown's base weekly compensation earnings and confirmed that he had been paid backdated payments on the basis of an adjustment between his original estimated earnings and actual earnings for the year ending 31 March 2021 (once that information was available).

Relevant law

[30] Section 15 of the Accident Compensation Act 2001 ("the Act') provides:

> (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).

[31] Clause 30 of Schedule 1 provides that relevant year means 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. Clause 31 requires the Corporation to use the claimant's 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.

[32] Clause 30 of Schedule 1 provides that the Corporation is liable to pay weekly compensation for loss of earnings to a claimant who has an incapacity resulting from a personal injury for which he or she has cover; and was an earner immediately before his or her incapacity commenced:

> 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.

[33] Clause 31 of Schedule 1 requires ACC to take into account a claimant's income tax return for the "relevant year" and provides:

> 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.

[34] Clause 39 of Schedule 1 sets out how the Corporation is to calculate weekly compensation for a claimant who had earnings as a shareholder-employee immediately before his or her incapacity commenced:

> (1) The weekly earnings of a claimant who had earnings as a shareholder-employee immediately before his or her incapacity commenced are the higher of -
>
> (a) the relevant amount calculated under clause 34 or clause 36, whichever is applicable; and
>
> (b) the relevant amount calculated under subclause (2).
>
> (2) The amounts to be calculated under this subclause are,-
>
> (a) for claimants who first commenced receiving earnings as a shareholder-employee in the tax year in which the incapacity commenced, the amount calculated using the following formula:
>
> a-;-b
>
> where-
>
> a is the total of the claimant's earnings as an employee in the 52 weeks immediately before the incapacity commenced
>
> b is the number of full or part weeks during which the claimant earned those earnings as an employee:

(b) for claimants for whom the relevant year was the first year during which they received earnings as a shareholder-employee, the amount calculated using the following formula:

(a + b) c

where-

a is the claimant's total earnings as an employee in the 52 weeks immediately before his or her incapacity commenced

b is the claimant's earnings as a shareholder- employee in the relevant year

c is the combined number of full or part weeks during which the claimant earned those earnings as an employee and the number of weeks that the Corporation considers fairly and reasonably represents the number of weeks or part weeks during which the claimant earned those earnings as a shareholder- employee in the relevant year, up to a combined maximum of 52 weeks or the total number of weeks in the claimant's relevant year if the relevant year is more than 52 weeks:

(c) for all other claimants, the amount calculated using the following formula:

a--:--c+b d

where-

a is the claimant's total earnings as an employee in the 52 weeks immediately before his or her incapacity commenced

b is the claimant's earnings as a shareholder- employee in the relevant year

c is 52 or such smaller number, if an adjustment is required under subclause (2A)

d is the number of weeks in the relevant year or such smaller number, if an adjustment Is required under subclause (2A).

(2A) The numbers referred to in items c and d of the formula in subclause (2)(c) must be adjusted by deducting any period during which the claimant was within a payment period under the Compensation for Live Organ Donors Act 2016.

(3) A claimant is eligible for the greater of-

(a) the amount calculated under subclause (2) with the inclusion of earnings as an employee in the calculation; and

(b) the amount calculated under subclause (2) with the exclusion of earnings as an employee from the calculation.

(4) If the claimant's weekly earnings are calculated under subclause (2) with the inclusion of their earnings as an employee, the claimant is not also eligible to have his or her weekly earnings calculated under clauses 33 to 36.

> (5) If a claimant's weekly earnings as a shareholder employee are calculated under subclause (2), the same earnings cannot be used as earnings as an employee for the purposes of clauses 33 to 36.

[35] Pursuant to clause 30 of Schedule 1, the "relevant year" (in the case of a shareholder-employee) is the most recent year ending with the balance date (31 March) of the shareholder-employee before the commencement of the period of incapacity.

[36] Section 9 defines "Earnings as an employee" as all PAYE payments received by the claimant for the relevant tax year. Because weekly compensation payments made by ACC have PAYE deducted at the source, they are treated as earnings as an employee under the Act.

[37] In *McSherry*,[1] Judge Beattie stated:

> [14] Having considered the wording of Clause 31, I find that its meaning and purpose does not allow it to include the circumstances put forward by the appellant. For the purposes of Clause 38 the appellant's earnings as a self-employed person in the relevant year are those earnings as were returned for income-tax purposes, and it is the case that the return of income-tax so made applies unless the Corporation were to consider that that return had been unreasonably influenced by the fact of a claimant's incapacity. The whole meaning of this provision is to give the Corporation the power to reassess income for the purposes of Clause 38 if it considers that the return is greater than it ought to be, with that return being made for the purpose of boosting income in the relevant year as it would be applied in the formula.
>
> …

[38] *In Nicholas*,[2] Judge Beattie stated:

> [26] I find that Clause 31 of Schedule 1 means that the income tax return is to be the amount which constitutes shareholder-employee earnings and it would only be if that amount returned was in some way "loaded" because of the fact of incapacity that the Corporation can reconsider the amount returned and re-allocate part only of the earnings so returned which represent reasonable remuneration for the two aspects of shareholder- employee earnings and which are to be considered the subsection (2) amount in Section 15.

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1 *McSherry v Accident Compensation Corporation* [2010] NZACC 96.
2 *Nicholas v Accident Compensation Corporation* [2008] NZACC 110.

[39] In *Davis*,[3] Judge Beattie stated:

> [22] The relevant words in Clause 31 involve the consideration of whether or not the tax return has been unreasonably influenced by the fact of the claimant's incapacity. Those words clearly indicate that if there is evidence that the tax return has been "doctored" to enable an insupportable income to be the basis of an assessment of weekly compensation, that income will not be accepted as being valid for weekly compensation purposes.

[40] In *Message*,[4] Judge Walker stated:

> [133] Judge Maclean, in *Irwin*, looked at the relationship between Clause 31 and s 15 and upheld the position that the Corporation is permitted to calculate a claimant's earnings as a shareholder-employee pursuant to s 15(3) of the Act regardless of the IRD returns.

[41] In *Irwin*,[5] Judge MacLean stated:

> [34] … I have concluded that this is not a clause 31 type of situation. Yes, an income tax return was made so the respondent "must take" it "into account". Yes, it has been taken into account, that is, the respondent has considered it, but there is not sufficient evidence to establish that the apportionment contained in the return was "unreasonably influenced" in the sense of a deliberate manipulation of the sort that the Court is sometimes considering in relation to allegedly inflated pre-accident earnings, to enhance post-accident compensation, as opposed to the situation here, where the respondent believes that the appellant has deflated post-accident earnings.

[42] In *Hamilton*,[6] Edwards J addressed the way in which reasonable remuneration for a shareholder-employee should be calculated under section 15(3), where the Corporation had taken the view that the appellant's declared income did not reasonably represent her earnings as a shareholder-employee.[7] In these circumstances, Edwards J addressed the principles that the Corporation needed to take into account in assessing reasonable remuneration.[8]

[43] In *Karem v Bashir*,[9] Tipping J stated in the Supreme Court:

> [32] … a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a

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3 *Accident Compensation Corporation v Davis* [2011] NZACC 134.
4 *Message v Accident Compensation Corporation* [2019] NZACC 146. See also *Gardner v Accident Compensation Corporation* [2016] NZACC 320, at [163].
5 *Irwin v Accident Compensation Corporation* [2016] NZACC 58.
6 *Hamilton v Accident Compensation Corporation* [2019] NZHC 3019.
7 Ibid at [17].
8 Ibid at [31]-[34].
9 *Kacem v Bashir* [2010] NZSC 112.

> successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

Discussion

[44] The question is whether the Corporation correctly calculated Mr Brown's weekly compensation entitlements by adopting Mr Brown's income tax return for the year ending 31 March 2021 in respect of his pre-injury earnings as a shareholder-employee, rather than calculating an amount which represented "reasonable remuneration" for the relevant period under section 15(3) of the Act.

[45] Mr Hinchcliff, for Mr Brown, submits as follows. The Corporation has not calculated what reasonable remuneration would be for someone working in Mr Brown's role at Oxen Limited. His statement supports that reasonable earnings are at least $92,000 per year. Section 15(3) is for situations like this, where it allows the Corporation to remediate shareholder earnings issues. There is no law that states a tax return must be rejected before section 15(3) applies. The Corporation has not applied *Hamilton*,[10] and has made an incorrect decision calculating weekly compensation.

[46] This Court acknowledges Mr Hinchcliff's submissions. However, the Court refers to the following considerations.

[47] First, clause 31 of Schedule 1 of the Act provides that, if the Corporation determines earnings in relation to a shareholder-employee, it must take an income tax return into account if: (1) the claimant has given the return to the Commissioner and (2) the Corporation considers that the return, and any related accounts, have not been "unreasonably influenced" by the fact of the claimant's incapacity or the effects or likely effects of the incapacity on the claimant's income or business activities. In Mr Brown's case, he provided the income tax return for the year ending 31 March 2021 to the Commissioner. Further, there was no basis for the Corporation to conclude that this income tax return had been "unreasonably influenced" in the sense

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10 Above n 6.

(as interpreted by the Courts) of having been "in some way loaded", "doctored", or "deliberately manipulated".[11]

[48] Second, section 15(2) of the Act provides that earnings as a shareholder-employee, in relation to a person who is a shareholder-employee and any tax year, means the amount as described in the person's income tax return for the relevant year. The Court acknowledges that section 15(3) allows the Corporation to calculate earnings as a shareholder-employee on a "reasonable remuneration" basis if the Corporation decides that the relevant income tax return amount is not a reasonable representation of the person's earnings as a shareholder-employee in the tax year. However, the Corporation's decision in this regard is a discretionary one, and this Court is not satisfied that, in exercising its discretion not to calculate earnings under section 15(3), the Corporation made an error of law, failed to take account some relevant matter or took into account an irrelevant matter, or that its decision was plainly wrong.[12] The facts of this case indicate that, for the amount of time that Mr Brown worked in the relevant period, he was paid a reasonable amount, and that the relevant income tax return amount was a reasonable representation of his earnings. Further, the Court refers to the internal review of Mr Brown's weekly compensation calculations carried out by Ms Roets, the Corporation's technical accounting advisor. Ms Roets confirmed that the Corporation had correctly applied the relevant legislation in calculating Mr Brown's relevant earnings for the purpose of determining his base weekly compensation entitlement.

[49] Third, the High Court decision in *Hamilton*[13] does not support the submission that there is no law that states a tax return must be rejected before section 15(3) applies. The High Court in *Hamilton* addressed the way in which "reasonable remuneration" for a shareholder-employee should be calculated under section 15(3), where the Corporation *had taken the view* that the appellant's declared income did not reasonably represent her earnings as a shareholder-employee.[14] The Court in *Hamilton* did not address the circumstances in which the Corporation *should* carry out a section 15(3) "reasonable remuneration" assessment.

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11 *Nicholas*, above n 2, at [26]. *Davie*s, above n 3, at [22]; and *Irwin*, above n 5 at [34].
12 *Kace*m, above n 9 at [32].
13 *Hamilton*, above n 6.
14 *Hamilton*, above n 7.

Conclusion

[50] In light of the above considerations, the Court finds that the Corporation correctly calculated Mr Brown's weekly compensation entitlements by adopting Mr Brown's income tax return for the year ending 31 March 2021 in respect of his pre-injury earnings as a shareholder-employee, rather than calculating an amount which represented "reasonable remuneration" for the relevant period under section 15(3) of the Act. The decision of the Reviewer dated 7 November 2022 is therefore upheld. This appeal is dismissed.

[51] I make no order as to costs.

P R Spiller
District Court Judge

Solicitors for the Respondent: Young Hunter.