

**IN THE DISTRICT COURT
AT WELLINGTON**

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

[2023] NZACC 204

ACR 211/22

UNDER THE ACCIDENT COMPENSATION ACT
2001

IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPEAL TO THE HIGH COURT ON A
QUESTION OF LAW UNDER
SECTION 162 OF THE ACCIDENT
COMPENSATION ACT

BETWEEN JONATHAN BROWN
Applicant

AND ACCIDENT COMPENSATION
CORPORATION
Respondent

Hearing: On the papers

Appearances: Mr B Hinchcliff for the applicant
Mr C Hlavac for the respondent

Judgment: 14 December 2023

**JUDGMENT OF JUDGE C J MCGUIRE
[Leave to Appeal to the High Court – Section 162
Accident Compensation Act 2001]**

[1] This is an application for leave to appeal against the judgment of the District Court in this matter delivered by Judge P J Spiller on 5 April 2023,¹ in which the Court found that the Corporation had correctly calculated Mr Brown's weekly compensation entitlements by adopting Mr Brown's income tax return for the year ended 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 s 15(3) of the Act.

[2] Section 162(1) of the Accident Compensation Act 2001 provides:

A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with the leave of the District Court, appeal to the High Court.

[3] Judge Cadenhead helpfully summarised the leave to appeal criteria in *O’Neill*.²

[24] The Courts have emphasised that for leave to be granted:

- (i) The issue must arise squarely from ‘the decision’ challenged: eg. *Jackson v ACC* (unreported), HC Auckland, Priestly J, 14 February 2002, AP 404-96-01; *Kenyan v ACC* [2002] NZAR 385. Leave cannot, for instance, properly be granted in respect of obiter comment in a judgment: *Albert v ARCIC* unreported, France J, HC Wellington, AP 287/01, 15 October 2002;
- (ii) The contended point of law must be “capable of bona fide and serious argument” to qualify for the grant of leave: eg. *Impact Manufacturing* unreported, Doogue J, HC Wellington, AP 266/00, 6 July 200;
- (iii) Care must be taken to avoid allowing issues of fact to be dressed up as questions of law; appeals on the former being proscribed: eg. *Northland Cooperative Dairy Co Limited v Rapana* [1999] 1 ERNZ 361, 363 (CA);
- (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law: *CIR v Walker* [1963] NZLR 339, 354;
- (v) A decision-maker’s treatment of facts can amount to an error of law. There will be an error of law where there is no evidence to support the decision, the evidence is inconsistent with, and contradictory of, the decision, or the true and only reasonable conclusion on the evidence contradicts the decision: *Edwards v Bairstow* [1995] 3 All ER 48, 57;
- (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law: *Commissioner of Inland Revenue v Walker* [1963] NZLR 339, 353-354 (CA); *Edwards v Bairstow* [1995] 3 All ER 48, 57;

¹ *Brown v Accident Compensation Corporation* [2023] NZACC 56.

² *O’Neill v Accident Compensation Corporation* [2008] NZACC 250

[25] Even if the qualifying criteria are made out, the Court has an extensive discretion in the grant or refusal of leave so as to ensure proper use of scarce judicial resources. Leave is not to be granted as a matter of course. One factor in the grant of leave is the wider importance of any contended point of law: eg. *Jackson* and *Kenyan* above.

Applicant's Submissions

[4] Mr Hinchcliff records that on 29 February 2020, the applicant had an ACC covered lumbar injury and received weekly compensation for this injury until 7 June 2020.

[5] On 27 May 2021, he had another lumbar injury. He is the sole director and shareholder of Oxen Limited. On 9 March 2022, ACC determined that weekly compensation should be based on the applicant's earnings of \$42,077.65.

[6] Mr Hinchcliff alleges that the judgment contained the following errors of law:

- (a) He submits that the outcome of ACC's calculation of earnings was not reasonable, given the facts. The calculation was unreasonably influenced by the previous period of incapacity. In indicating that clause 31 must apply before s 15(3) can apply, the judgment was wrong in law. Mr Hinchcliff refers to *Bartram Estate v Accident Compensation Corporation*.³
- (b) He submits that the Judge was wrong to rely on *Kacem v Bashier*⁴ in finding that ACC's decision under s 15(1)(b) is a discretionary one.

[7] Mr Hinchcliff submits that s 15(1)(b) does not allow ACC a discretion. It allows ACC to decide on what is a reasonable representation of the person's earning as a shareholder employee in the tax year. He submits that as it is not a discretionary matter, but one based on facts, the stricter criteria set out in *Kacem* does not apply.

³ *Bartram Estate v Accident Compensation Corporation* [2011] NZHC CIV-2011-404-000887.

⁴ *Kacem v Bashier* [2010] NZSC 112.

[8] Mr Hinchcliff submits that there is no “authority decision” on when s 15(3) applies and that therefore the matter needs to be decided by the High Court.

[9] He submits that the District Court made a mistake of law not to apply s 15(3). The tax returns were unreasonably influenced by the weekly compensation paid during the relevant year and not in the previous 52 weeks.

Respondent’s submissions

[10] Mr Hlavac notes that clause 31 of the First Schedule provides that in determining the earnings of a shareholder employee, ACC must take that shareholder employee’s tax return into account if ACC considers that the return has not been unreasonably influenced by either the fact of the person’s incapacity, or the effects or likely effects of the incapacity on the person’s income or business activities.

[11] Where ACC finds that the tax return has been “unreasonably influenced” in this way, it may set the tax return aside. Where it does so, then s 15(1)(b) entitles ACC to instead determine the person’s earning based on an amount that represents “reasonable remuneration” for the services that they provided to the company in the relevant tax year.

[12] Mr Hlavac, in this regard, refers to Judge Spiller’s finding at paragraph [47] of the judgment, where he says:

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 tax return had been “unreasonably influenced” in the sense (as interpreted by the Court) of having been “in some way loaded”, “doctored”, or “deliberately manipulated”.

[13] Mr Hlavac notes that under s 15(1)(b), ACC still had a discretion to put the applicant’s tax return to one side if it decided that the returned income was not a reasonable representation of his earnings as a shareholder employee in the relevant tax year.

[14] Mr Hlavac also refers to paragraph [48] of the judgment, where Judge Spiller says:

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.

[15] Judge Spiller also notes at paragraph [48] that this issue was internally reviewed by Ms Roets, the Corporation's technical accounting advisor and that she confirmed that the Corporation had correctly applied the relevant legislation in calculating Mr Brown's relevant earnings.

[16] Mr Hlavac acknowledges that s 15(1)(b) involves a discretion on the part of ACC, with the use of the words:

If the Corporation decides that the section (2) amount is not a reasonable representation of the person's earnings ...

[17] Mr Hlavac submits that Parliament intended that ACC, as the statutory body responsible for administering the Accident Compensation Act, should have a discretion in the circumstances of any individual case to determine whether a person's tax return should be relied on to determine their earnings, or whether a reasonable remuneration assessment should be carried out instead.

[18] Mr Hlavac refers to *Nicholas*,⁵ in which the District Court confirmed that the overall scheme for the calculation of weekly earnings for a shareholder employee was by reference to the claimant's income tax return.

[19] He also refers to *Shaffett*,⁶ which found that ACC is not required to determine a market related salary for the claimant's occupation or services to the company under s 15 of the Act.

[20] Having held that he was not satisfied that ACC had wrongly exercised its discretion not to calculate earnings under s 15(3). Judge Spiller then went on in paragraph [48] to hold that:

The facts of the 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

⁵ *Nicholas v Accident Compensation Corporation* [2008] NZACC 110

⁶ *Shaffett v Accident Compensation Corporation* [2012] NZACC 367

relevant income tax return amount was a reasonable representation of his earnings.

[21] Mr Hlavac submits that the fact that the Court did not clarify generally the circumstances in which s 15(3) will apply, does not amount to an error of law.

[22] Mr Hlavac submits that the only issue of law that might give rise to a further appeal is whether in the particular circumstances of this appeal Judge Spiller correctly applied s 15(1)(b).

Decision

[23] Section 15, subs 3 sets out how the earnings of a shareholder employee are to be determined by the Corporation if it decides that the subsection 2 amount, (i.e. all PAYE payments of the person for the tax year derived from the company of which the person is a shareholder employee; and all income otherwise derived) is not reasonable.

[24] It is for the Corporation to determine the amounts that represent a reasonable remuneration for the services that the person provides a company as an employee of the company in the tax year and the amount that represents reasonable remuneration for the services that the person provides as a director of the company in the tax year.

[25] Section 31 of Schedule 1 requires the Corporation to take into account the income tax return of a shareholder employee if the claimant has given the return to the Commissioner and that the return has 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.

[26] Judge Spiller deals with these matters squarely in his judgment from paragraph [44] on. At paragraph [49] he notes that there is no law that states a tax return must be rejected before s 15(3) applies. In this regard he refers to the decision in *Hamilton*.⁷

⁷ *Hamilton v Accident Compensation Corporation* [2019] NZHC 3019.

[27] Judge Spiller found that for the amount of time that the applicant worked in the relevant period, he was paid a reasonable amount and that the relevant income tax return was a reasonable representation of his earning,

[28] This was a finding of fact made on the evidence before him. I must conclude therefore that there is no seriously arguable case that the principles of *Edwards v Bairstow* applied, namely that there was no evidence to support the decision; the evidence was inconsistent with and contradictory of the decision, or that the true and only reasonable conclusion on the evidence contradicts the decision.

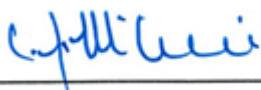
[29] The Applicant also submits that the Judge was wrong to rely on *Kacem v Boshier* in finding that ACC's decision under s15(1) (b) is a discretionary one.

[30] At para [48] of his Judgment Judge Spiller states that the corporation's decision in relation to calculation of earnings under s15(3) is a discretionary one and that the court is not satisfied that in exercising its discretion not to calculate earnings under s15(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.

[31] There is nothing in Judge Spiller's straight forward articulation of the *Kacem* principles that satisfies the threshold that a point of law is raised that is capable of bona fide and serious argument as per *Impact Manufacturing*, noted in *O'Neill* above.

[32] Accordingly, the application for leave to appeal is refused.

[33] Costs are reserved.



CJ McGuire
District Court Judge

Solicitors for the Respondent: Young Hunter