IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 26 **ACR 077/22**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPLICATION UNDER SECTION 162 OF THE ACT TO APPEAL TO THE HIGH COURT ON A QUESTION OF LAW
BETWEEN	SARAH CURGENVEN Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the papers

Appearances: Mr Hinchcliff for the Applicant
Ms Becroft for the Respondent

Judgment: 21 February 2023

JUDGMENT OF JUDGE D L HENARE
[Leave to Appeal to the High Court, Section 162(1), Accident Compensation Act 2001]

Introduction

[1] This is an application for leave to appeal against a judgment of His Honour Judge P R Spiller, delivered on 6 October 2022.[1] His Honour upheld a review decision dismissing an application for review of the Corporation's decision dated 19 November 2021, concerning calculation of backdated weekly compensation and interest.

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1 *Curgenven v Accident Compensation Corporation* [2022] NZACC 196.

Background

[2] The Court set out a comprehensive background to the appeal as follows.

[3] Ms Curgenven was born in September 1973.

[4] On 6 July 1994, Ms Curgenven was granted cover for injuries she suffered in a motor vehicle accident, including fractures to both ankles. She underwent surgeries following the accident, and in the following years. However, she continued to have stability issues with her ankles.

[5] Weekly compensation was sought. The Corporation based her compensation on an Earnings Certificate dated 15 July 1994 associated with Ms Curgenven's work for a café called "A Taste of Kapiti", owned by her father. Ms Curgenven had been working 25 hours per week in this job.

[6] Between 1994 and 10 January 1996, weekly compensation was paid. It then ceased, as Ms Curgenven returned to study and later undertook further work.

[7] On 29 May 2009, the Corporation issued a decision declining an application for backdated weekly compensation (to 1996), on the basis there was no clinical evidence that Ms Curgenven had been incapacitated since 10 January 1996.

[8] On 27 May 2009, Ms Curgenven applied for a review of the Corporation's decision and, in the review application, wrote:

> I may have received some weekly compensation in 1994 to 1996 but this was at the student allowance rate and did not include my income from working at the cafe and should be adjusted to fix this.
>
> My weekly compensation was stopped in January 1996 when I returned to study as I was told by my case manager at the time ACC would help and assist me the costs involved in my training. This did not happen.
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> The course I started studying I could not complete as the pain I was in was unbearable and my doctor told me stop before I did any further damage to my ankles. This has become the pattern of my life since. I always dreamed of doing hotel management and owning my own hotel since I was a kid and this was what I went to study only to find that within a matter of weeks my dream was shattered when I had to withdraw from the course as the pain I was in was unbearable. I was told by my doctor to stop immediately. As a requirement of

> the course I had to have a job working in the hospitality industry and I had a position as a Kitchenhand which was one day a week. I was on my feet for the entire 4 hours I worked and as enjoyable as it was (and getting some income and having a job) I then spent the next 3 days recovering from it and getting pain levels back to some sort of normal. I had to give this job up as it wasn't worth the pain I was in.
>
> I have since only had one paid position as a Teacher Aid for 6 hours a week. Again the pain was too much and the recovery from it not worth it.
>
> I have had 16 operations (the first 9 were during the initial 8 weeks in hospital). On my ankle in 15 years and the length of recovery from these is up to a year which makes my life very difficult.

[9] On 11 December 2009, the Corporation's decision was quashed at review. The Reviewer determined Ms Curgenven was entitled to backdated weekly compensation from 10 January 1996. Weekly compensation was reinstated and back paid.

[10] On 18 December 2009, Ms Curgenven sent an email to the Corporation claiming she had earned $268 from the café, A Taste of Kapiti, and $162 from Gosling Gear, a shop where she worked, for a total of $430 per week gross. She said she had filed no tax returns from the shop as there was no profit. At the time the records were included in her father's tax returns.

[11] On 23 April 2010, Ms Curgenven wrote to the Corporation enclosing a letter from Mr A N Boyce, Accountant, dated 26 July 1994, which provided details in relation to her pre-injury earner status. The letter stated:

> When Sarah started on 16 May 1994 at A Taste of Kapiti she also started getting paid for her work at Gosling Gear. Sarah was paid $430.00 gross per week. This was earned by working 25 hours per week at A Taste of Kapiti and 17 hours per week at Gosling Gear. A total of 42 hours a week. Up until this time the Gosling Gear business had not been providing her an income. Her income in the previous 12 months had been received only in the form of a standard student allowance as she studied NCB at Polytech.
>
> Although Sarah is stated as being the owner of Gosling Gear the business' accounts were run through my client's accounts as she was only 17 years old when she started the business and at the time was not eligible for any business banking assistance. As the Gosling Gear business was being run through my client's business accounts that would mean she is an employee of the business, which should be reflected in the amount that you and ACC will be compensating her with.

[12] Ms Curgenven requested her weekly compensation be recalculated.

[13] On 31 May 2010, the Corporation, confirmed the earlier weekly compensation decision. The Corporation noted the absence of returns filed with the Inland Revenue Department, and there was no validation of the business for which she claimed to work or any associated earnings. Ms Curgenven applied for a review of this decision.

[14] On 20 August 2010, the Reviewer declined jurisdiction on the basis the 31 May 2010 letter was not a decision under the Act. The Reviewer made the following remarks about the accountant letter:

> For the sake of completeness, the accountant's letter of 1994 that Mrs Jones (nee Curgenven) was paid $430 per week cannot be verified. Mrs Jones' evidence was that she was paid cash into her bank account as an employee. She didn't know whether she did a tax return.
>
> Mrs Jones stated that IRD told her no records are held later than 7 years. Ms Richards stated IRD told her records are kept back to at least 1991.
>
> ... I record that if there is no taxable earnings there is no entitlement to weekly compensation

[15] On 6 November 2010, Ms Curgenven provided further information, including advice from the IRD as to her income in 1994-1995, and asked the Corporation to recalculate her weekly compensation again. The Corporation declined to revisit the matter.

[16] On 22 November 2010, an Initial Medical Assessment from Dr Waite noted Ms Curgenven's left ankle continued to be a problem, and by that stage she had undergone 16 operations. Ms Curgenven evidently had not returned to any full-time work since 2004. The report also noted Ms Curgenven now had three children aged 9, 4 and 3. Ms Curgenven admitted her main pre-occupation was caring for her children. Dr Waite considered Ms Curgenven would be able to work in the right environment. He acknowledged the difficulties that Ms Curgenven had with prolonged standing or walking.

[17] Ms Curgenven continued to receive weekly compensation and rehabilitation support in the years that followed. On 15 May 2011, she dislocated her right knee and fractured her right ankle during return-to-work rehabilitation.

[18] In 2012, Ms Curgenven underwent the vocational independence process. On 24 October 2012, the Corporation advised she had been found vocationally independent in a number of job options and her weekly compensation would cease effective 24 January 2013. At the time, Ms Curgenven did not challenge that decision.

[19] In 2018, Mr Hinchcliff began acting for Ms Curgenven. On 15 October 2018, he filed a late review application against the Corporation's letter of 31 May 2010. Mr Hinchcliff also applied for a review of the Corporation's 24 October 2012 vocational independence decision.

[20] On 30 October 2018, the late review application against the 24 October 2012 decision was declined by the Corporation. Ms Curgenven then applied for a review of this decision.

[21] Ms Curgenven subsequently withdrew the review application against the 31 May 2010 decision. On 24 December 2018, the Reviewer dismissed the review in relation to the Corporation's decision to decline the late review application against the vocational independence decision.

[22] On 13 April 2019, Dr A Matthews, GP, certified Ms Curgenven unfit for work until 11 July 2019 because of "extensive left foot injury".

[23] On 16 April 2019, the Corporation wrote to Ms Curgenven advising it had approved weekly compensation with effect from 11 April 2019. Weekly compensation payments would continue until Ms Curgenven recovered from surgery and was able to work 30 hours a week (that is, when she was vocationally independent).

[24] Ms Curgenven contacted the Corporation and said she wanted to receive a WINZ benefit instead of weekly compensation. On 20 May 2019, the Corporation wrote to Ms Curgenven advising that it had stopped paying weekly compensation in light of her preference.

[25] On 21 May 2019, a review application was filed against the Corporation's 16 April 2019 decision, challenging the quantum of weekly compensation paid on the claim.

[26] On 24 May 2019, the Corporation revoked its 20 May 2019 decision suspending weekly compensation, and reinstated weekly compensation payments.

[27] The issue of quantum was referred to the Corporation's Weekly Compensation Panel (the Panel) for a review of Ms Curgenven's weekly compensation calculation.

[28] On 25 September 2019, guidance from the Panel was provided by Mr Phillip Clayton, Technical Specialist. He advised:

> This raises the question whether or not Ms Curgenven was in receipt of earnings and whether an entitlement to weekly compensation exists? If it is accepted that weekly compensation was correctly paid, is there sufficient information to include the hours worked in the employment for Gosling Gear for the purposes of determining whether the combined employment was full-time, despite there being no evidence of earnings from this employment?
>
> These 2 questions were considered by the Weekly Compensation Panel on 25 September 2019. The Panel agreed that, although the income from the employment with A Taste of Kapiti cafe had never been subject to PAYE deductions, the contemporaneous records, coupled with the client's age at the time of the injury, make it difficult to establish the client was complicit in the failure to declare the Income to Inland Revenue. As a result the Panel considered that the client was eligible to weekly compensation.
>
> The Panel also considered that it was appropriate to include the hours worked in the second employment, with Gosling Gear, for the purposes of establishing an entitlement to the minimum full-time earner rate. Although the income derived from this employment also appears not to have been declared to Inland Revenue, the determination of full-time requires the person to have been engaged in employment for 30 hours or more per week; it does not require the person to be in receipt of earnings from that employment. Rather employment is defined more generally as work performed for the purposes of pecuniary gain or profit. Accordingly ,Ms Curgenven would be entitled to an increase to the minimum earner rate in accordance with s. 43 of the ARCI [Accident Rehabilitation and Compensation Insurance] Act 1992, as the combined hours from the 2 employments exceeded 30 hours, and this should be backdated for the entitlement periods beyond 5 weeks after the incapacity first commenced. Further the Panel considered that there was no evidence to support a discontinuation, under s. 43(3), to this increase.
>
> Ms Curgenven will be entitled to interest on this arrears payment. The Panel agreed that for the purposes of the all information date it would be appropriate to accept 26 July 1994, being the date of the letter from the accountant. We do not have evidence that this letter was received however it is addressed to the

> ACC Case Manager and it would not be appropriate to rely on the absence of evidence of receipt as the basis for a later all information date.

[29] On 1 October 2019, the Corporation issued a notice advising that it owed an additional amount of weekly compensation for the period from 10 August 1994 to 25 September 2019. That additional amount arose from Ms Curgenven's weekly compensation being uplifted to the minimum required. On 7 October 2019, Ms Curgenven applied for a review of that decision.

[30] On 22 November 2019, the Corporation issued a further decision in regard to interest on the backdated weekly compensation payment for the period 26 July 1994 to 9 October 2019. On 21 January 2020, Ms Curgenven applied for a review of the Corporation's 22 November 2019 decision.

[31] On 13 May 2020, there was a case conference for the various matters, which recorded:

> A hearing was set to take place at 1.00 pm on Wednesday, 13 May 2020. The day before, Mr Scott emailed Dr Hinchcliff confirming that Ms Curgenven was indeed entitled to be uplifted to the minimum rate however there had been a clerical error in the figures used in calculating her entitlement and Ms Curgenven was not paid the correct amount. He outlined what the correct calculation ought to have been and advised that this would affect ACC's calculation of Ms Curgenven's entitlement to interest also.
>
> Mr Paul asked Dr Hinchcliff how he wished to proceed in light of that new information. Dr Hinchcliff advised that the hearing should proceed as he still had queries about ACC's calculations.
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> The parties agreed that in lieu of a hearing, they would hold a case conference in an effort to iron out what issues needed clarifying.
>
> Dr Hinchcliff advised that based on the information ACC had provided to date, it was unclear to him on what basis ACC had calculated Ms Curgenven's entitlement. He understood that under 1992 Act the minimum entitlement was around $140.00 per week, yet judging by the sum ACC paid to Ms Curgenven, she had been paid less than $100.00 per week. Mr Paul advised that the calculation was based on the memorandum of Phillip Clayton from September 2019 and screenshots Mr Paul had been sent the day before. Even so, Dr Hinchcliff advised that he could not tell how ACC had broken down its calculation. He said in his experience, ACC had provided a weekly breakdown of the client's entitlement to weekly compensation which made it easy to see the basis of its calculations.
>
> There was also a period between 23 January 2013 and 11 April 2019 where Ms Curgenven was not in receipt of weekly compensation. Dr Hinchcliff noted that Ms Curgenven underwent surgery, which was funded by ACC during that

> period so he could not understand why Ms Curgenven's entitlement to weekly compensation was not reinstated earlier.
>
> Mr Paul advised that these matters he would need to investigate further and raise with the weekly compensation team. He asked Dr Hinchcliff to outline in a detailed memorandum exactly what he wanted ACC to look into and provide. Dr Hinchcliff confirmed that he would.

[32] On 20 May 2020, the Corporation issued a further decision in relation to interest on backdated weekly compensation. On 15 June 2020, Ms Curgenven applied for a review of that decision.

[33] The matter was referred to the Panel again to consider the issue whether Ms Curgenven was entitled to further weekly compensation for her work for Gosling Gear.

[34] On 3 March 2021, Mr Scott Paul, Review Specialist, noted the Panel advised that it could not accept the accountant's letter as evidence of earnings from Gosling Gear in the absence of any declared income. The view of the Panel was that, for the Corporation to undertake a reassessment of the weekly earnings, it would be necessary for Ms Curgenven to lodge her pre- and post-incapacity income from the employment with Gosling Gear as earnings with Inland Revenue. The Panel also remained unclear whether Ms Curgenven's work for Gosling Gear was as an employee (as the accountant suggested) or as a self-employed person (Ms Curgenven apparently owned the business).

[35] On 20 April 2021, the Reviewer quashed the Corporation's decisions of 1 October 2019 (on backdated weekly compensation), 22 November 2019 and 20 May 20202 (as to interest on backdated weekly compensation). The Reviewer was concerned there was not enough information to support the calculations of the Corporation. He issued the following directions:

> ACC will reinvestigate Ms Curgenven's entitlement to backdated weekly compensation and interest.
>
> ACC will put its reasoning in writing to Ms Curgenven.
>
> As part of the reinvestigation ACC will obtain an external peer review from an independent chartered accountant.

> Once ACC has obtained the chartered accountant's report it must issue a new decision in relation to both issues within 14 days.

[36] On 6 July 2021, Ms Roets, Technical Accounting Specialist, completed a full audit of Ms Curgenven's weekly compensation entitlement and interest payment from 10 August 1994. This audit showed two errors in the calculation of the interest payments and resulted in a recalculation with the correct interest due being $42,669.37. Ms Roets noted in her background information there were no PAYE earnings filed with Inland Revenue for self-employed earnings or other employee earnings relating to her work.

[37] On 4 August 2021, Ms Roets reported further that a full audit had revealed no errors in the calculation of weekly compensation for the period 10 August 1994 to 25 September 2019.

[38] Chartered accounting firm KPMG conducted an external peer review of the Corporation's findings. On 8 November 2021, KPMG reported the backdated long-term weekly compensation payment made to Ms Curgenven was $163,706.55, whereas the correct payment should have been $163,692.07. KPMG further reported the Corporation's recalculation of interest was marginally incorrect, but otherwise the logic of its recalculation was correct.

[39] On 19 November 2021, the Corporation issued a new decision in line with KPMG's figures, advising:

> Following the directions of the Reviewer on 20 April 2021, an ACC technical accountant specialist undertook a reassessment of backdated weekly compensation and interest.
>
> The technical accounting memorandum was peer reviewed by KPMG, who provided its report on 8 November 2021.
>
> ACC now issues a new decision about backdated weekly compensation and interest. In accordance with KPMG's recommendation, ACC has determined that Ms Curgenven is entitled to:
>
> - Nil additional entitlement in respect of backdated weekly compensation.
> - $42,882.83 in respect of interest.

[40] On 25 November 2021, Ms Curgenven applied for a review of that decision.

[41] In December 2021, the Corporation paid Ms Curgenven the interest owed, as calculated above.

[42] At the review hearing, Ms Curgenven argued:

- The Corporation had omitted the first four weeks of weekly compensation from its calculations.
- Ms Curgenven's vocational independence deterioration date was earlier than what the Corporation said it was.
- The Corporation should accept the 1994 accountant letter as the basis for earnings.

[43] On 3 May 2022, the Reviewer dismissed the review. The Reviewer found it was not appropriate to determine the issue of vocational independence in the context of a challenge to the 19 November 2021 decision. The Reviewer also agreed with the Corporation that it would be impossible to calculate any weekly compensation associated with Ms Curgenven's work for Gosling Gear without earnings first being considered by Inland Revenue. He reasoned Schedule 1 prescribes how weekly compensation is to be calculated and there was not enough information available to apply that Schedule properly.

[44] Ms Curgenven then lodged her appeal

[45] On 1 September 2022, Mr Edward Cook, the Corporation's Recovery Coordinator, wrote to Mr Hinchcliff proposing to make a decision based on its vocational independence deterioration and surgery policy which allowed the Corporation to make a decision regarding the matter of Ms Curgenven's deterioration. Mr Cook noted that, if Mr Hinchcliff was intending to challenge the proposed decision, the Corporation would prefer to work with Mr Hinchcliff to resolve the matter before issuing a decision.

Relevant Law

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

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

[47] In *O'Neill*,[2] Judge Cadenhead stated:

> [24] The Courts have emphasised that for leave to be granted:
>
> (i) The issue must arise squarely from 'the decision' challenged: ... Leave cannot for instance properly be granted in respect of *obiter* comment in a judgment …;
>
> (ii) The contended point of law must be *"capable of bona fide and serious argument"* to qualify for the grant of leave …;
>
> (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 …;
>
> (iv) Where an appeal is limited to questions of law, a mixed question of law and fact is a matter of law …;
>
> (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 …;
>
> (vi) Whether or not a statutory provision has been properly construed or interpreted and applied to the facts is a question of law … .
>
> [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.

The District Court judgment

[48] His Honour considered the evidence and the relevant law and concluded there was insufficient evidence to accept the $430.00 weekly earnings advanced by Ms Curgenven.

[49] His Honour outlined the key considerations supporting his conclusion the Corporation had correctly calculated Ms Curgenven's weekly compensation in paragraphs [57] to [61] of the judgment as follows: [3]

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

3 See n1 *Curgenven* at [57] – [61].

> [57] First, governing legislation places primary importance, in calculating earnings, on tax returns and other tax documents lodged with the Inland Revenue Department. This importance is reflected in sections 9 and 14, and clauses 31 and 37 of the First Schedule, of the current Act. This importance was also reflected in the preceding Accident Rehabilitation and Compensation Insurance (Earnings Definitions) Regulations 1992, clauses 2-6.
>
> [58] Second, any income derived from Ms Curgenven's employment with Gosling Gear was not declared to Inland Revenue. This fact is noted by the Corporation's advisers Ms McKay (Case Administrator), Mr Clayton (Technical Specialist), Ms Roets (Technical Accounting Specialist), and Mr Paul (Review Specialist, for the Weekly Compensation Panel).
>
> [59] Third, Ms Curgenven acknowledged that she filed no tax returns from the Gosling Gear shop as there was no profit and the records were included in her father's tax returns at the time.
>
> [60] Fourth, there is no other evidence (such as bank statements, earnings records or employment contracts) to support the claims made by Ms Curgenven and her accountant, that she earned money from work with Gosling Gear. As noted by Ms McKay (Case Administrator), there was no validation of this business or any associated earnings.
>
> [61] Fifth, there is a lack of clarity as to whether Ms Curgenven's position in relation to Gosling Gear was that of an employee or as a self-employed person. The Corporation's Weekly Compensation Panel noted that, while the accountant suggested that Ms Curgenven was as an employee, he also noted that she was the owner of the business.

[50] Taking into account all the evidence before him, His Honour concluded the Corporation had reasonably advised it would not rely on the evidence of Ms Curgenven or her accountant as to the earnings from Gosling Gear.

Application for leave to appeal

[51] Mr Hinchcliff repeated his submissions on appeal and submitted the Corporation should have accepted a letter from Ms Curgenven's accountant in support of her own evidence, as the basis for her weekly compensation calculation.

[52] Mr Hinchcliff submitted two questions of law ought to be determined by the High Court:

(a) If the Corporation is found to have incorrectly determined an amount of weekly compensation and IRD records are not available for the period in question, can other records available from around the date of

incapacity be used to determine weekly compensation payment amounts?

(b) Is the Corporation allowed to profit from its mischief, as business, bank and IRD records were unavailable at the time the mischief was corrected?

Discussion

[53] The primary issue in the appeal to the District Court was whether the Corporation should have accepted a letter from Ms Curgenven's accountant (set out in paragraph 11 of this judgment), in support of her own evidence, as the basis for calculation of her weekly compensation.

[54] I find the questions proposed in the leave application to the High Court are essentially questions of fact dressed up as questions of law and are not seriously arguable for reasons that follow.

[55] The first question is misconceived because the Court did not find the calculation of weekly compensation was incorrect. In fact, the Court determined the contrary position. The question as framed, has no relation to the Court's judgment.

[56] Further, His Honour did not find that only IRD records could be used to validate Ms Curgenven's earnings. His Honour referred to the various kinds of possible alternative evidence. There was no finding that tax records alone were required.

[57] Rather, the Court noted if there had been other persuasive non-IRD evidence which established a taxable earnings figure of $430 in the form of pay slips, earnings certificates, bank statements, account ledgers, employment contracts and the like, the Court may have found differently. Instead, the sole supporting evidence was in the form of the accountant's letter, which His Honour found did not meet the evidential threshold in the case.

[58] It follows no question of law arises.

[59] The second question implies there has been a mischief from which the Corporation has profited. It is unclear what the mischief is. Mr Hinchcliff appears to suggest the Corporation has profited by not accepting the purported weekly earnings of $430.

[60] The extensive background cited by His Honour notes Ms Curgenven's uplift to the minimum came in 2019 due to a reinvestigation leading to an acceptance she was working 42 hours per week over both her employments. Whilst the Corporation accepted the work hours in the accountant's letter, it was unable to accept it as a basis to calculate weekly compensation. In consequence, Ms Curgenven received a substantial amount of weekly compensation together with interest back paid on that compensation.

[61] It appears a general suggestion of injustice is being made due to the lack of contemporaneous records. The Court observes this is not an unusual case when a claim is made some 25 years after the fact.

[62] However, this is not sufficient to raise a valid question of law arising from His Honour's judgment.

Decision

[63] Accordingly, the Court finds Ms Curgenven has not established sufficient grounds, as a matter of law, to sustain her application for leave to appeal, which is dismissed.

[64] Ms Curgenven has not established that Judge Spiller made an error of law capable of *bona fide* and serious argument.

[65] Costs are reserved.

Denese L Henare
District Court Judge

Solicitors: ACC and Employment Law, Auckland, for the Applicant
Medico Law Limited, Auckland, for the Respondent