IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 170 **ACR 234/22**

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

Hearing:	19 September 2023
Heard at:	Auckland/Tāmaki Makaurau
Appearances:	Mr B Hinchcliff for the Appellant Ms B Johns for the Respondent
Judgment:	25 October 2023

RESERVED JUDGMENT OF JUDGE C J MCGUIRE
[Employment Status at time of Incapacity; clause 43, First Schedule Accident Compensation Act 2001]

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[1] In this case, Counsel have helpfully agreed a summary of facts and issues as follows:

Agreed Issue

[2] At issue is whether the Accident Compensation Corporation (the Respondent) in its decision dated 3 October 2022, correctly decided to decline weekly compensation on the basis that the appellant was not an earner at the date of his injury.

[3] The position for the appellant is that he was an earner at the time of his incapacity, due to the application of clause 43 and because his company had income at the date of his incapacity. Therefore, he qualifies for weekly compensation.

[4] The respondent's position is that clause 43 of Schedule 1 of the Act does not apply and the appellant does not meet the statutory criteria to receive weekly compensation. In particular, the appellant was in employment at the time of his incapacity as a shareholder-employee of a company; but did not have earnings.

Agreed Facts

[5] The appellant has ACC cover for a treatment injury (namely, subcostal nerve injury, following a right hemihepatectomy, open cholecystectomy and reversal of ileostomy on 30 March 2015). The date of injury is 31 March 2015, being the date on which the appellant first sought or received treatment for the symptoms of his personal injury.

[6] Union Jacks Limited was incorporated on 26 July 2011 ("the company").

[7] The appellant is the sole director and is a 75 per cent shareholder of the company (and has been since the company was incorporated). Prior to suffering the injury, the appellant had worked at the company.

[8] Prior to suffering the injury, the appellant was an employee of 58 Distribution Limited. However, that employment ceased on 10 March 2015 and he received an eight week redundancy payment from 58 Distribution Limited.

Background

[9] In relation to the appellant's employment at 58 Distribution Limited:

(a) He had been on unpaid medical leave since 30 January 2015 as recorded in his weekly compensation interview of 13 August 2019.

(b) On 10 March 2015 (some 20 days before his surgery), his employment ceased due to redundancy and he received an eight week redundancy payment.

[10] On 30 June 2022, in an affidavit, the appellant affirmed that:

(a) Prior to his surgery, he was working at Union Jacks Limited.

(b) Prior to his surgery, he accepted redundancy at his previous employment, 58 Distribution Limited.

(c) After the surgery he was only able to work a few hours per week (at Union Jacks Limited), but he planned on working there full time.

[11] On 30 September 2022, ACC's technical accounting specialist, Ms Roets, provided a memorandum of advice regarding the appellant's claim. In it she noted that in the year to 31 March 2014, the appellant earned wages and salary of $67,005 and in the year ended 31 March 2015, the appellant earned salary and wages in the sum of $86,154. However, for the same periods, he had no earnings as a shareholder-employee.

[12] The appellant received a final redundancy payment of $12,307.69 from 58 Distribution Limited on 10 March 2015. Ms Roets notes that "unlike holiday pay, redundancy payments are not a substitute for the earnings".

[13] The appellant was not a PAYE earner at the time of his incapacity (31 March 2015) because his employment at 58 Distribution Limited ceased on 10 March 2015.

[14] On the basis of the appellant's evidence that he worked between 10 to 15 hours per week as a shareholder-employee, Ms Roets concluded that he is considered an earner as defined in s 6 of the Accident Compensation Act.

[15] Mr Roets noted that the relevant year, when assessing the appellant's entitlements, is the year ending 31 March 2014, that being the most recent year end

before the commencement of the period of incapacity. In this regard, she refers to clause 30 of Schedule 1, which says:

> In this part, relevant year means the most recent tax year … last ended before the commencement of the period of incapacity.

[16] Although the appellant was "an earner at the time of personal injury", he was not "in receipt of shareholder-employee earnings at the time of incapacity".

[17] As the appellant's PAYE earnings ceased before his incapacity, Ms Roets outlined that they cannot be included in any calculation of earnings for weekly compensation under clauses 33 to 36.

[18] She further noted that as there are no earnings immediately before the appellant's date of incapacity, clauses 33 to 39 cannot operate. Consequently, clause 42, which relies on clauses 33 to 39 to operate, does not apply.

[19] Ms Roets therefore concluded that the appellant was not entitled to weekly compensation.

[20] On 3 October 2022, ACC issued a decision that:

(a) Revoked its decision of 27 April 2022 regarding earner status, as it accepted that the appellant was an earner at the date of his injury by virtue of his shareholder-employee status with Union Jacks Limited.

(b) Determined that the appellant was not entitled to weekly compensation as a shareholder-employee because there were nil shareholder earnings assigned to him for the relevant years and year of incapacity (31 March 2014 and 31 March 2015).

(c) Determined that, regarding the appellant's employment with 58 Distribution Limited, the evidence did not support him being an "earner" at the date of injury.

[21] The appellant lodged a review application against the latter two findings of ACC's decision.

[22] In a decision dated 21 December 2022, the reviewer upheld ACC's decision and dismissed the review. The appellant filed an appeal against that review decision.

Appellant's Submissions

[23] Mr Hinchcliffe acknowledged that apart from having equity in Union Jacks Limited, the appellant had no earnings as a shareholder-employee and was not in employment with Union Jacks Limited immediately prior to the accident.

[24] Mr Hinchcliff notes that his client has been a director of Union Jacks Limited since its incorporation in 2011.

[25] In his affidavit of 30 June 2022, he said:

> …
>
> 3. I accepted redundancy at my previous employment, as I planned on working full time for Union Jacks Limited immediately after my surgery.
>
> 4. I was working at Union Jacks Limited prior to my surgeries and after my surgeries.
>
> 5. After the surgery, as soon as I was medically able to, I began working at Union Jacks Limited. Initially, this was only for a few hours per week.
>
> 6. After 10 March 2015, I had intended that Union Jacks Limited would be my primary source of income.

[26] Mr Hinchcliff acknowledged that Union Jacks Limited had not made a profit since its incorporation in 2011.

[27] Mr Hinchcliff acknowledges that Mr Dixon was not a shareholder employee prior to his injury. However, he intended to work for Union Jacks Limited after his surgery.

[28] He asks the Court to quash ACC's decision and to direct that ACC pays compensation under clause 43, as he would have been an employee of Union Jacks Limited within 28 days of his injury if that injury had not occurred.

Respondent's Submission

[29] Ms Johns submits that ACC has very carefully considered the appellant's position but cannot find entitlement to earnings related compensation under the provisions of the Act and the Schedules.

[30] She submits that as the appellant had no earnings immediately before his incapacity, clauses 33 to 39 of the First Schedule cannot operate.

[31] Therefore, she submits the sole focus of the appeal is whether the appellant satisfies clause 43 and in turn is eligible for weekly compensation by virtue of the extension provisions within that clause.

[32] She submits that the appellant's employment did not cease as he was a shareholder-employee of Union Jacks Limited both before and after his surgery. She submits that the appellant therefore cannot get past the strict wording of clause 43 that the appellant was no longer an employee and/or that he had ceased to be in employment before the commencement of his incapacity.

[33] She refers to the explanatory note to the Injury Prevention, Rehabilitation and Compensation Amendment Bill (Number 2) 2007 which enacted clause 43. The explanatory note said:

> **Lengthening extended employee status**
>
> Currently, most claimants are not eligible for weekly compensation if they are between jobs or on unpaid leave or are injured more than 14 days after stopping work. The Bill extends eligibility for weekly compensation for those claimants to 28 days after stopping work. The proposal reduces uncertainty for the majority of people who are injured between jobs.

[34] She notes that clause 43(7) specifically defines "Employment" as:

> An employee; a self-employed person; or a shareholder-employee.

[35] She submits that even though the appellant ceased to be an employee of 58 Distribution Limited (due to his redundancy prior to 10 March 2015) he continued to be in employment as a shareholder employee of Union Jacks Limited. He was not injured between jobs.

[36] It is therefore submitted on ACC's behalf that the appellant had not ceased to be in employment prior to the commencement of his incapacity and therefore clause 43(2) cannot apply.

[37] She submits that the fact that Union Jacks Limited elected not to allocate shareholder-employee earnings at all material times for tax minimisation purposes (because the company was continuing to trade at a loss), should not enable him now to receive the very entitlements that the Company elected not to pay.

[38] She submits that ACC acknowledges that this is an unfortunate reality for the appellant.

[39] She refers to Judge Ongley's decision in *Giltrap*[1] which acknowledges that the strict application of provisions relating to weekly compensation entitlements in the Act can produce unfairness in individual cases.

[40] In the alternative, Ms Johns submits that the cessation of the appellant's employment at 58 Distribution Limited does not satisfy the requirements of clause 43(2) where a claimant is deemed to continue to be in employment and to have earnings from that employment for the purposes of Schedule 1 for the periods of time set out in the section.

[41] She notes that employment as defined in s 6 excludes paid leave on the termination of employment.

[42] Also, the appellant advised the respondent on 1 August 2019 that he had been on unpaid leave from 30 January 2015. In order to satisfy clause 43(2)(a), he must have been in employment up to and including 3 March 2015, being 28 days before his incapacity.

[43] She submits that at best, on the evidence before the Court, the appellant can establish that he had been in employment up to 24 February 2015, being the last day

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1 *Giltrap v Accident Compensation Corporation* [2006] NZACC 141

he was paid a wage by 58 Distribution Limited, and that is well outside the 28 day period required to satisfy clause 43(2)(a) in that he had not been in employment within 28 days before his incapacity commenced.

[44] She refers to the High Court Judgment in *Bartrom Estate*[2] where the High Court said:

> … a formulaic approach introduces inherent rigidities which cannot be cured by purposive judicial interpretation. It is not for the Courts to resolve problems or injustices that flow from plain language of the legislation, but rather for the legislature, if it sees fit, to amend the legislation.

[45] She also refers to *Humphries*[3] where Judge Powell found that the appellant did not come within the limited exception contained in clause 43. Judge Powell commented:

> Finally I note for completeness that in the written material filed by the appellant, he also raises the issue of whether "some kind of discretion to exercise mercy" could be exercised in what he considers to be a "unique" situation.

[46] Unfortunately for the appellant however, that with regard to entitlement to weekly compensation, the legislation is both clear and precise, and leaves no residual discretion to allow weekly compensation if the legislative requirements are not met.

[47] Accordingly, Ms Johns submits that the respondent was correct to determine that the appellant was not entitled to weekly compensation.

Appellant's Reply

[48] In reply, Mr Hinchcliff notes that Parliament extended the "employment status" to deal with the "between jobs" situation. He says that is the situation of the appellant.

[49] He says it is not refuted that the appellant was working at Union Jacks Limited prior to his surgeries and after his surgeries as he asserts in his affidavit of 30 June 2022. Accordingly, he submits that the appellant satisfies clause 43(2) in that he is deemed to continue to be in employment.

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2 *Bartrom Estate v Accident Compensation Corporation*, HC Auckland CIV-2011-404-887, 5 August 2011 at [24].

Decision

[50] The appellant has ACC cover for a treatment injury, namely a subcostal nerve injury, following major surgery on 30 March 2015. The date of injury is 31 March 2015, being the date on which the appellant first received treatment for the symptoms of his injury.

[51] The appellant had been employed by 58 Distribution Limited and according to the Inland Revenue Department, he had earned a total of $67,005 by way of salary and wages for the year ended 31 March 2014 and $86,154 salary and wages for the year ended 31 March 2015.

[52] He had been on unpaid medical leave since 30 January 2015 and on 10 March 2015, his employment with 58 Distribution Limited ended due to redundancy and he received an eight week redundancy payment of $12,307.69 on 10 March 2015, that is some 20 days prior to his surgery.

[53] In his affidavit dated 30 June 2022, the appellant says that he accepted redundancy from his previous employment as he planned to work full time for Union Jacks Limited immediately after his surgery.

[54] Union Jacks Limited was incorporated on 26 July 2011 and according to the Companies Office file references in the appellant's submissions, he was and is a 25 per cent shareholder in that company and a director. The Companies Office record lists him as sole director at all relevant times, whereas the annual reports of Union Jacks Limited for the years ended 31 March 2014, 2015 and 2016 list two directors.

[55] In a joint memorandum dated 19 October 2023 counsel have clarified these matters, acknowledging that Mr Dixon has been a director and shareholder of Union Jacks Limited since it was incorporated and at the time the agreed summary of facts and issues was filed, he was the sole director and a 75% shareholder of the company.

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3 *Humphries v Accident Compensation Corporation* [2014] NZACC 123 at [17].

[56] Counsel also advise that this clarification does not impact their respective submissions.

[57] In his affidavit, the appellant says:

> 3. I accepted redundancy at my previous employment, as I planned on working full time for Union Jacks Limited immediately after my surgery.
>
> 4. I was working at Union Jacks Limited prior to my surgeries and after my surgeries.
>
> 5. After the surgery, as soon as I was medically able to, I began working at Union Jacks Limited. Initially, this was only for a few hours per week.
>
> 6. After 10 March 2015, I had intended that Union Jacks Limited would be my primary source of income.

[58] The accounting records for Union Jacks Limited before the Court for the years ended 31 March 2013 to 31 March 2016 show that for the year ended 31 March 2013, the appellant had equity of $6,656; for the year ended 31 March 2014, he had negative equity of $7,130; for the year ended 31 March 2015, he had equity of $13,762; and for the year ended 31 March 2016, he had negative equity of $2,754.

[59] Given that at the relevant time, March 2015, the appellant had equity in the company of $13,762, this provides some support to the appellant's declared intention to work for the company or to have the company as his primary source of income after 10 March 2015.

[60] Part 2 of Schedule 1 of the Accident Compensation Act 2001 deals with weekly compensation.

[61] For a person in the appellant's position, who has ceased to be in employment before his incapacity, he is deemed (by virtue of clause 43(2)):

> To continue to be in employment and having earnings from that employment for the purposes of this schedule for the longer of –
>
> (a) 28 days from the date he or she ceased to be in employment, if he or she -
>
> (i) Had been in employment within 28 days before his or her incapacity commenced; and

(ii) Would have been an employee within the period specified in subclause (3) after the date on which his or her incapacity commenced, but for the incapacity.

[62] Regrettably from the appellant's standpoint, he does not qualify for weekly compensation under this provision. On the one hand, the definition of "employment" in s 6 specifically excludes paid leave on termination of employment and the appellant had advised the respondent on 1 August 2019 that he had been on unpaid leave from 30 January 2015.

[63] To have qualified under this provision, the appellant would need to have been employed up to and including 3 March 2015, being 28 days before his incapacity.

[64] Ms Johns submits that after the appellant ceased to be an employee of 58 Distribution Limited, he continued to be in employment as a shareholder employee of Union Jacks Limited and therefore he was not "injured between jobs". Accordingly, clause 43(2) cannot apply.

[65] As noted earlier, Ms Johns refers to the explanatory note to the amending legislation in 2007 that extended eligibility for weekly compensation to 28 days after stopping work. The explanatory note said that the proposal reduces the uncertainty for the majority of people who are injured between jobs.

[66] Reference is made to *Bartrom Estate*[4]. In this judgment of 5 August 2011, Justice Allen notes that the appellant's company earned a net profit for the year in question of $7,402, but that no shareholder-employee earnings were credited to Mr Bartrom in that financial year.

[67] In that case, the Court noted that the whole of that figure was credited to Mr Bartrom by the Corporation pursuant to s 15(3) as representing reasonable remuneration for the services provided by Mr Bartrom during that brief period.

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4 *Bartrom Estate* see n2 above at [23] and [24].

[68] In this case, the appellant is credited with equity of $13,762 in Union Jacks Limited for the year ended 31 March 2015. However, for that year, Union Jacks Limited made a loss of $73,560. I conclude therefore that this figure represents not a payment to Mr Dixon, but from him into Union Jacks Limited so that it appears in the accounts as an amount of equity paid into the company by a shareholder.

[69] In *Bartrom*, the Court stated:

> [23] … I accept Mr Barnett's submission that clause 39 provides a formula for the determination of "Weekly Earnings" which excludes the exercise of any discretion. Instead, an element of certainty is introduced.
>
> [24] As was noted by this Court in *ARCIC v Tarr* [1996] 3 NZLR 715, a formulaic approach introduces inherent rigidities which cannot be cured by purposive judicial interpretation. It is not for the Courts to resolve problems or injustices that flow from plain language of the legislation, but rather for the legislature, if it sees fit, to amend the legislation.

[70] There was similar comment in *Giltrap*[5] where Judge Ongley was also dealing with the question of weekly compensation under Schedule 1 and His Honour said:

> [14] It appears that clause 32(1)(b) is applied by the Corporation from time to time on a liberal basis to ensure fairness to claimants. This was done initially in Mrs Giltrap's case. The Court has not heard evidence of Corporation policy. It can readily be seen that strict application of the provisions can produce unfairness in individual cases. In the present case, the appellant was not an earner at the time of her personal injury. If the above analysis is correct, she can never claim weekly compensation for later incapacity caused by the injury. That result must be regarded as unfair to a claimant such as the appellant who has a history of full employment before and after the personal injury, but who happened to be unemployed at the time of the injury. At the same time, a person with a history of unemployment, but briefly employed at the time of personal injury would qualify for weekly compensation.
>
> [15] Interpretation of these provisions is straightforward and does not require discussion of legislative policy. It can be imagined that there can be room for manipulation by a claimant if the provisions were interpreted in order to give a fresh chance for eligibility to a person who was not an earner at the time of the injury. The provisions as they stand reflect a legislative intention that weekly compensation is available only to persons earning at the time of suffering personal injury.

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5 *Giltrap* see n1 above at [14] and [15].

[71] It follows from the analysis of what has occurred in this case that the appellant does not qualify for weekly compensation and the Court has no power to reach a decision other than in accordance with the plain words of clause 43.

[72] Accordingly, the respondent's decision to decline weekly compensation dated 3 October 2022 was correct and the appeal therefore must be dismissed.

[73] Costs are reserved.

CJ McGuire
District Court Judge

Solicitors: ACC and Employment Law, Ellerslie
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