IN THE DISTRICT COURT
AT WELLINGTON

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

[2023] NZACC 119 **ACR 156/22**

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

Hearing:	19 July 2023
Held at:	Auckland/Tāmaki Makaurau by AVL
Appearances:	P Schmidt for the Appellant S Bisley and N Udy for the Accident Compensation Corporation ("the Corporation")
Judgment:	28 July 2023

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Calculation of weekly compensation - s 15,
Accident Compensation Act 2001 ("the Act")]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 17 August 2022. The Reviewer dismissed an application for review of the Corporation's decision dated 11 January 2022 abating his weekly compensation and requiring a repayment of $38,134.01 in relation to weekly compensation received by Mr Fergusson, over the period 15 February 2020 to 24 December 2021.

Background

[2] On 12 November 1983, Mr Fergusson was injured in a motor vehicle accident, and was granted cover for that injury including to his right hip. After extensive rehabilitation, he managed to return to full-time work.

[3] In 2019, Mr Fergusson was a director of the company which owns the Taumaranui Mitre 10 Mega. The other director was, and remains, Mr Fergusson's wife Berwyn Fergusson. Mr and Ms Fergusson each own 50% of the shares in the company.

[4] In the 2019 financial year, Mr Fergusson's company: had a turn-over of $4,073,164; made a net profit, before owners' remuneration, of $544,854; and paid Mr Fergusson a salary of $67,000 (equating to $1,288 per week). Mr Fergusson estimated that he worked around 45 hours per week prior to incapacity, and so earned the equivalent of $28.63 per hour.

[5] On 11 June 2019, as a result of hip surgery to address his covered injury, Mr Fergusson ability to work deteriorated.

[6] On 5 July 2019, the Corporation advised Mr Fergusson of the payment of weekly compensation to him. The weekly compensation was calculated at 80% of his pre-injury salary of $67,000 per annum, and amounted to $841.45. The Corporation noted that Mr Fergusson needed to advise the Corporation if he received any earnings or undertook any work while he was on weekly compensation, as this might affect his payments.

[7] On 15 October and 6 November 2019, the Corporation was advised that Mr Fergusson was working three hours per day Monday to Friday. On 29 November 2019, Mrs Fergusson confirmed to the Corporation that Mr Fergusson was working 15 hours a week.

[8] On 29 January 2020, Mrs Fergusson advised the Corporation that Mr Fergusson:

> does not earn a 'wage'. The earnings that he is remunerated by ACC are based on the business balance sheet for taxation purposes.

[9] On 30 December 2020, Mrs Fergusson confirmed to the Corporation that Mr Fergusson was working three hours per day for a five-day week, and that he received $859.34 gross per week.

[10] On 1 January 2021, Mrs Fergusson advised the Corporation that:

> Bob is a director of our company and he does not get a 'wage' as you would think. His income is derived from personal tax returns lodged each year with the IRD. Tina has determined Bob's annual income based on this. Can you check which figure she has taken to calculate the current amount he gets paid and the abatement that has been given determined on the 15 hours he is [sic] been currently working.

[11] On 18 October 2021, the Corporation emailed Mrs Fergusson and noted that it had been advised that Mr Fergusson had continued to receive, while in receipt of weekly compensation, a salary of $40,000 for 2020 and 2021 (the Corporation not having been previously aware of this).

[12] On 22 October 2021, Mrs Fergusson advised the Corporation that:

> We have adjusted Bobs Shareholder Salary down due to the ACC compensation being received - however as he is still a Company Director; funds are attributed to him for tax reasons.
>
> In fact, we had several discussions with our Accountant in terms of what is a fair and equitable Salary Bob has due to his incapacity. We have deemed he is still a Company Director and has joint decision-making responsibilities for the company - hence the $40,000 allocation for tax reasons.
>
> We also have a duty and responsibility to IRD to ensure we a [sic] showing an equitable salary for Bob for tax reasons - as advised we must be seen to mitigate tax, rather than evade.

[13] On 18 November 2021, Mrs Fergusson advised the Corporation that:

> Bob has worked 15 hours per week since 2019 - your organisation has not been abating the payment - and now we have a massive overpayment situation due to this and also due it would seem to my mistake of accounting for taxation reasons. …
>
> Bob's remuneration figure provided in 2019 was for a financial year - 12 months - and is a gross figure.

> Based on a NORMAL person who would work 40 hours per week - it would be quite simple to calculate an hourly rate based on the information at hand $67,000 divided by 2080 (40 x 52) = $32.21 gross per hour.

[14] Mr Fergusson's accountant filed the tax return for the company for the year ending 31 March 2021, which recorded Mr Fergusson's earnings as a shareholder employee in the amount of $40,000. Mr Fergusson took drawings debited from his shareholder current account.

[15] On 24 December 2021, Ms Erica Roets, Technical Accounting Specialist, assessed the following amounts as having been received by Mr Fergusson:

Period ending 31 March	**2021**	**2020**	**2019**	**2018**
Shareholder-employee salary	$40,000	$40,000	$67,000	$67,000
Weekly compensation	$54,602	$42,851	-	-
TOTAL	**$94,602**	**$82,851**	**$67,000**	**$67,000**

[16] Having reviewed the financial statements provided, Ms Roets recommended that Mr Fergusson's shareholder earnings of $40,000 for the 2020 and 202 tax year as filed in his personal tax return should be accepted as reasonable earnings for the abatement of his weekly compensation.

[17] On 11 January 2022, the Corporation issued a decision advising Mr Fergusson that it had overpaid him $38,134.01 for the period 15 February 2020 to 24 December 2021. The Corporation noted that it had received more details about his income after it had calculated and paid his weekly compensation for this period. Mr Fergusson applied to review this decision.

[18] On 1 April 2022, Mr Fergusson was replaced as a director of his company.

[19] On 20 July 2022, review proceedings were held. Mrs Fergusson stated at the review:

> … the figure of $40,000 is a book figure that's actually in the balance sheet. The reality of it was that Bob worked 15 hours a week, … The payment that

> was over and above was really a - a shareholder remuneration, rather than anything else, and was purely there as taxation - for taxation reasons.
>
> My biggest thing with it is that -- and that I -- I feel that the abatement was overly heavy handed and that there was never any real discussion with regard to the actuality of the situation. We tried to put that across to ACC. However, it was always -- we were always shouted down with regard to the fact that $40,000 is $40,000 and that's all there is to it, rather than me showing them what, in actuality, his payment would've been, all right. If we'd turned -- if we had restructured, like we've now done, to have him getting an hourly wage rather than resting on simply the employer/shareholder aspect. So, at the moment, what we've done is that, in order to show it very clearly, Bob is now on a weekly wage, earning an hourly rate, showing that he's earning -- and earning and paying PAYE as he goes, to make it as clear as possible to ACC how many hours he is actually working. Had we known that this was going to happen we could've easily have done that two years ago. But we were never actually advised or talked to by ACC that they needed us to restructure our whole business to -- in order to actually show what Bob's incapacity has done to us. That's the bottom end. They don't mind paying the money. That's all good, but it's got to be fair. This is not fair.
>
> [ACC] asked for literally huge amounts of information with regard to the day-to-day operation of the business. And I found … that information is summarised in our balance sheets that are sent through to the Tax Department. That was - that was the reason why I did not, and would not give them all of the information that fell from the balance sheets.

[20] On 17 August 2022, the Reviewer dismissed the application for review of the Corporation's decision dated 11 January 2022 requiring a repayment of $38,134.01. The Reviewer found the Corporation's decision to be correct, primarily because the Reviewer preferred the Corporation's interpretation of the relevant provisions of the Act.

[21] On 29 August 2022, a Notice of Appeal was lodged.

Relevant law

[22] Section 3 of the Accident Compensation Act 2001 ("the Act') provides:

> The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs), through—
>
> …

(d) ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation …

[23] Section 15 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).

[24] Section 31 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.

[25] Clause 31 of Schedule 1 of the Act provides:

31 Use of 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.

[26] Clauses 50-51 of Schedule 1 provide:

50 Estimation for abatement purposes of earnings that cannot be ascertained

(1) This clause applies to a claimant who has—

(a) earnings as a self-employed person; or

(b) earnings as a shareholder-employee.

(2) This clause applies when the Corporation cannot readily ascertain, for abatement purposes, the claimant's actual earnings during a particular period, during incapacity.

(3) In order to calculate the claimant's earnings under this Part, the Corporation may estimate an amount that represents reasonable remuneration for the claimant during the period.

(4) The Corporation must have regard to—

(a) the evidence available of the claimant's earnings; and

(b) the nature of the claimant's employment immediately before his or her incapacity commenced; and

(c) the nature of the claimant's employment that the claimant has during the period of incapacity.

51 Abatement of compensation

…

(2) In calculating weekly compensation under this Part, the Corporation must reduce the amount of weekly compensation paid to a claimant so as to ensure that the total of the claimant's weekly

> compensation and earnings after his or her incapacity commences does not exceed the claimant's weekly earnings as calculated under clauses 33 to 45 or 47.

[27] In *Nicholas*,[1] Judge Beattie stated:

> [22] Having regard to the entitlement provision of Clause 39 and of the requirement that the Corporation must determine earnings by reference to income tax returns, I find that the purpose of the subsection (3) amount contained in the definition section of Clause [sic] 15 is there to be applied in tandem with Clause 31(b), and only comes into play if the Corporation considers there is a question-mark about the correctness of the subsection (2) amount. …
>
> [24] 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

[28] In *Davis*,[2] 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.

[29] In *Irwin*,[3] 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 [40] … as His Honour Judge Cadenhead observed in *Fairgray v Accident Compensation Corporation* "the legislation is not intended to provide a result which was unworkable or impracticable, inconvenient, anomalous or illogical".
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> [41] Employing s 15 in this way, is not inconsistent with clause 31 in the Schedule. The Schedule contains a wide range of detail to assist with the

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1 *Nicholas v Accident Compensation Corporation* [2008] NZACC 110.
2 *Accident Compensation Corporation v Davis* [2011] NZACC 134.
3 *Irwin v Accident Compensation Corporation* [2016] NZACC 58.

administration of the broad principles of the Act as set out in the sections including s 15. Ultimately, all clause 31 requires is that the respondent must take the tax return "into account" but that is not the same thing as saying that it is bound by what is in the tax return.

[42] Section 15 simply provides that in relation to a person who is a shareholder-employee a number of optional ways of approaching the calculation to be used for abatement or other purposes which introduces then under subs (3) the concept of "reasonable remuneration". That in turn then links back to the concept under s 3 of "fair" compensation or determination and appropriate entitlement.

[30] In *Hamilton*,[4] Justice Edwards stated:

[28] Section 15 applies at the pre-incapacity and post-incapacity stages. The interpretation of this section is therefore relevant to claimants trying to establish their pre-incapacity earnings, and in calculating the abatement of weekly compensation paid post-incapacity.

[29] The section provides two ways of ascertaining the earnings of a working shareholder-employee. The starting point is the "subsection (2) amount". That amount comprises: (a) the PAYE income payments received by the claimant, and (b) other income deemed to be income derived otherwise than from PAYE income payments under s RD 3B or s RD 3C of the Income Tax Act 2007. Those sections of the Income Tax Act broadly relate to amounts paid as income that were later allocated to a person as an employee for the income year. Neither party placed any reliance on them in interpreting s 15.

[30] If the Corporation decides that the subs (2) amount is "not a reasonable representation of the person's earnings as a shareholder- employee in the tax year", then earnings will be determined in accordance with subs (3). The "subsection (3) amount" comprises the total of the remuneration received as (a) an employee of the company; and (b) a director of the company. It is subs (3), and in particular, the calculation of "reasonable remuneration" received as a director of the company, that is at issue in this case.

[31] It is plain from the text of the section that the "subsection (3) amount" requires a two-step enquiry. First, the Corporation must consider the services provided by a person as an employee and as a director of the company. That is necessarily a fact-specific enquiry. It involves consideration of the nature of the tasks undertaken by a person as employee and as director, and the time spent on those tasks.

[32] It is only once the services provided by the claimant have been identified that consideration may be given to what constitutes reasonable remuneration for those services. This is the second stage of the enquiry. The fact that the subs (3) assessment operates as an alternative to the subs (2) measure means that the Corporation is not limited in its assessment to the actual payments made to a claimant. Indeed, the use of the word "reasonable" suggests that the assessment is an objective one.

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4 *Hamilton v Accident Compensation Corporation* [2019] NZHC 3109.

[31] In *Simpson*,[5] Justice Campbell stated:

> [33] In short, the s 15(2) method is the default. It applied unless the Corporation decides that the amount produced by that method is not a reasonable representation of the claimant's earnings, in which case the method in s 15(3) applies. The choice of method for determining "earnings as a shareholder-employee" therefore depends on whether the Corporation makes such a decision.

[32] In *Karem v Bashir*,[6] Justice Tipping 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 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

[33] The issue in this case is how, in terms of section 15 of the Act, the Corporation should assess Mr Fergusson's income from the 2020 financial year onwards for the purposes of abatement of his weekly compensation payments.

[34] Mr Schmidt, for Mr Fergusson, submits as follows. The Corporation was required to assess a "reasonable remuneration" for Mr Fergusson under section 15(3) of the Act. The figure of $40,000 a year in the income tax returns for the years ending 31 March 2020 and 31 March 2021 does not represent reasonable remuneration for the services provided by Mr Fergusson. The Corporation should assess a notional (and lower) income, based upon a reality-based assessment as to the truth of Mr Fergusson's earnings. There is an obvious disparity between his hourly rates of pay pre- and post-incapacity, because post-incapacity his hours decreased from 45 hours a week to 15 hours a week. As a result, although his annual wage went down, and he had stepped away from management duties, his hourly wage went up from $28.63 per hour to $51 per hour. As a result, following *Hamilton*,[7] the Corporation must engage in a two-stage enquiry into what services were provided by the claimant and what a reasonable payment for those services would be. Having done so, the Corporation can then carry out the assessment required under clause 50,

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5 *Simpson v Accident Compensation Corporation* [2023] NZHC 1661. See also *Brown v Accident Compensation Corporation* [2023] NZACC 56.

6 *Kacem v Bashir* [2010] NZSC 112.

to ascertain, for abatement purposes, a claimant's actual earnings during a particular period of incapacity.

[35] This Court acknowledges the above submissions. However, the Court refers to the following considerations.

[36] First, section 15(2) of the Act provides that earnings as a shareholder-employee 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 (section 15(1)(b)). As noted by the High Court, the section 15(2) method of calculation is the default method and the application of section 15(3) depends on whether the Corporation decides to choose this method.[8] The High Court's interpretation of section 15 is, with respect, in accordance with the parliamentary history of the relevant area of the law.[9] In Mr Fergusson's case, the Corporation chose the section 15(2) default method of calculation.

[37] Second, 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 Fergusson's case, his company accountant provided the income tax returns for the years ending 31 March 2020 and 31 March 2021 to the Commissioner. Further, there was no basis for the Corporation to conclude that these income tax returns had been "unreasonably influenced" in the sense (as interpreted by the Courts) of having

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7 *Hamilton*, above note 4, at [31]-[32].

8 *Simpson*, above note 5, at [33]. In *Nicholas*, the District Court held that section 15(3) comes into play only if the Corporation considers that there is a question-mark about the correctness of the subsection (2) amount (above note 1, at [22].

9 Whereas the 1982 and 1992 accident compensation legislation provided for the assessment of shareholder-employee earnings purely on a reasonable remuneration basis, the 1998 and 2001 legislation re-centred income tax returns as the primary method of assessing earnings.

been "in some way loaded", "doctored to enable an insupportable income", or "deliberately manipulated".[10]

[38] Third, clause 50(2) of Schedule 1 of the Act provides that the estimation of a claimant's earnings on a "reasonable remuneration" basis applies only when the Corporation *cannot readily ascertain*, for abatement purposes, the claimant's actual earnings during a particular period, during incapacity. In Mr Fergusson's case, the Corporation could readily ascertain his actual earnings by reference to the income tax returns provided by the company accountant.

[39] Fourth, the High Court decision in *Hamilton* does not support the submission that the Corporation must engage in a two-stage enquiry into what services were provided by the claimant and what a reasonable payment for those services would be. The High Court in *Hamilton* addressed the way in which "reasonable remuneration" for a shareholder-employee should be calculated under section 15(3), *if the Corporation decided* that the appellant's declared income did not reasonably represent the earnings as a shareholder-employee. The Court in *Hamilton* did not address the circumstances in which the Corporation *should* carry out a section 15(3) "reasonable remuneration" assessment.[11]

[40] Fifth, the Corporation's decision to adopt Mr Fergusson's earnings as a shareholder-employee, as described in income tax returns, was 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 evidence of Mrs Fergusson (noted above at paragraph [12]) is that there were several discussions with the company accountant in terms of what was a fair and equitable salary for Mr Fergusson in light of his incapacity, and it was deemed that, as he was still a company director and had joint decision-making responsibilities for the company, the amount of $40,000 was allocated as his salary.

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10 *Nicholas*, above note 1, at [24]; *Davis*, above note 2, at [22] and *Irwin*, above note 3, at [34].
11 *Hamilton*, above note 4, at [30].
12 *Kacem v Bashir*, above note 6, at [32].

[41] This Court concludes that the Corporation was, in terms of section 15(2) and related provisions of the Act, entitled and required to assess Mr Fergusson's weekly compensation and the abatement of it by reference to the amounts he was paid according to the income tax returns provided.

Conclusion

[42] In light of the above considerations, the Court finds that the Corporation's decision of 11 January 2022 correctly calculated an overpayment of weekly compensation to Mr Fergusson, on the basis that the amount as recorded in his income tax returns should be accepted as shareholder-employee earnings for the abatement of his weekly compensation.

[43] The decision of the Reviewer dated 17 August 2022 is therefore upheld. This appeal is dismissed.

[44] I make no order as to costs.

P R Spiller
District Court Judge

Solicitors for the Appellant: Schmidt & Peart Law.