



## **Background**

[2] Mr Rostami was born in 1983. He worked as a self-employed carpenter for a company called Precision Construction Limited (“Precision”). In October 2018, he incorporated a company called ZRS Construction Ltd (“ZRS”).

[3] On 26 February 2021, Mr Rostami finished working “on the tools” for Precision, as he was expecting the birth of his child. His new-born child arrived on 5 March 2021.

[4] On 31 March 2021, Mr Rostami injured his back when he lifted his other (then) 10-year-old child, who was sleeping.

[5] On 8 April 2021, Mr Rostami attended a consultation with Dr Nasar El Hassan, GP. He completed a medical certificate recording a diagnosis of lumbar sprain and certifying that Mr Rostami was unfit to resume any work duties for a period of 14 days from 31 March 2021. An ACC injury claim form was also submitted to the Corporation on Mr Rostami’s behalf in respect of the accident event. The injury was described as follows: “My 10 years old son was asleep lifted him and injured my back”.

[6] On 14 April 2021, the Corporation wrote to Mr Rostami to advise him his injury claim had been accepted.

[7] On 15 April 2021, a Corporation representative spoke to Mr Rostami and asked him several questions about his claim. The transcript generated from this conversation included the following information (in question and answer form):

### **Weekly Compensation Questions:**

Does the client wish to apply for weekly compensation? Yes

Is there already a MyACC weekly compensation request in progress? No

As a result of your injury have you been off work at all? Yes

When was the last time you were able to work? 2021-02-26

Date of First Incapacity (DOFI)? 2021-03-31 Did you have any income in the 4 weeks prior to your injury? Yes

Client is eligible Yes

Do you receive any income tested benefits from Ministry of Social Development (MSD) (previously known as Work and Income)? No

**Self Employed Questions:**

What is your Trading name or Company name? Mohammed Shafe Rostami

Have you been self employed for more than 2 years prior to DOFI/DOSI? Yes

What days and hours of the week do you normally work? Monday:10, Tuesday:10, Wednesday:10, Thursday:10, Friday:10, Saturday:0, Sunday:0,

How many hours have you worked each week in the 4 weeks prior to your incapacity? 50,50,50,50,

Is this typical? Yes

Is your tax return for the most recent financial year lodged? No

What is the planned or actual lodgement date? 2021-04-29

Type of assessment agreed Actual Do you have an accountant? Yes

Can you please provide details? Socus [sic] Accounting Services - 021077850

Are you back at work in any capacity? No

Do you have a Cover plus Extra Policy (CPX)? N

[8] Inland Revenue real-time earnings records were requested by the Corporation, which showed that Mr Rostami's most recent declared income prior to the accident event was schedular income from Precision for the pay periods: from 18 February 2021 to 24 February 2021, totalling \$2092.50 (gross); and from 25 February 2021 to 3 March 2021, totalling \$810 (gross).

[9] On 15 April 2021, the Corporation wrote to Mr Rostami and advised that it had determined that he was not entitled to weekly compensation. The following explanation was provided:

Your last derived income was the week ending 3 March 2021, thereafter you have taken time off work to look after your sick wife and new-born child. Unfortunately, due to not being an earner at time of injury you are not eligible for weekly compensation.

[10] On 16 April 2021, Mr Rostami emailed a review application to the Corporation, regarding its decision of 15 April 2021 declining weekly compensation.

On 28 April 2021, Mr Hinchcliff, on Mr Rostami's behalf, lodged a duplicate review application with the Corporation. It was contended that Mr Rostami worked up to and including 5 March 2021, when his son was born.

[11] The Corporation referred the matter to the ACC technical specialist team. On 2 July 2021, Mr Simon Bates, technical specialist, reported:

In essence it is irrelevant if the client worked on 26/02/21 as he initially informed ACC or 05/03/21 as he is now claiming, which would mean the client had been in employment within 28 days before the commencement of incapacity. For Clause 43(2)(a) to apply, in addition to the client being required to have worked within the 28 days before incapacity, subclause 43(2)(a)(ii) states there is a requirement that he "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". As a person in receipt of Scheduling income, the client is regarded as being in self-employment. Unless he had arranged work as an employee within the period specified in subclause (3), he would not be entitled to a weekly earnings assessment under Clause 43. There is no evidence he had arranged such work.

"Employee" is defined in Section 6 of the Act as:

employee means a natural person who receives, or is entitled to receive,-

(a) any amount that is treated as income from employment, as defined in paragraph of the definition of income from employment in section YA 1 of the Income Tax Act 2007; or

(b) any salary, wages, or other income to which section RD 3B or RD 3C of the Income Tax Act 2007 applies.

Neither would Clause 44 apply in the client's case, even if it is accepted the client was on unpaid parental leave at the date his incapacity commenced.

Clause 44(1) states: (1) This clause applies to a claimant who is an employee on unpaid parental leave immediately before his or her incapacity commenced.

Again, there is a requirement for the client to have been an "employee" and his circumstances do not fit with the definition of an employee.

I have considered if ACC could apply its unpaid leave policy to the client should it be accepted he did in fact work within 28 days of his incapacity commencing. Unfortunately, ACC's unpaid leave policy applies only to employees as ACC considers unpaid leave to be leave that an employee has chosen to take in agreement with their employer.

[12] On 6 July 2021, Mr Rostami provided an affidavit in which he stated that he was a self-employed carpenter. On 26 February 2021, he finished working on the tools as he was expecting the birth of his child. Prior to the birth of the child he was

busy purchasing a new van for his business. He spent a lot of time making sure that the van was suitable for his business and outfitting the van with appropriate sign writing. His child was born on 5 March 2021, and he did not do any work after the birth of his child.

[13] On 18 August 2021, a weekly compensation discussion group (WCDG) was attended by Michael Mercier, Principal Solicitor, Martin Shelton, Lead Technical Specialist, Michael Beckett, Technical Specialist, and Erica Roets, Technical Accounting Specialist. The WCDG reported:

In these individual circumstances it is quite clear that up to 26 February 2021 that the client was a long term withholding tax deducted/schedular tax deducted labour only contractor. These earnings are not considered earnings as an employee, and are self employed earnings when declared to the IRD for that tax year, in question which the client has done for many years prior to accident.

The WCDG note the applicant's review submissions detailing the client to be a shareholder employee of Z R S Construction Ltd from October 2018, however note there is no evidence of shareholder employee earnings ever being declared to the IRD in relation to this role.

It also appears quite clear that the client last physically worked "on the tools" as a self employed person on 26 February 2021 (over a month prior to accident), with his child being born on 5 March 2021 and the client not working at all after this date (ie no work performed immediately prior to 31 March 2021).

ACC's policy position with regarding (sic) to with-holding tax deducted/schedular earnings is well detailed as above, and requires there to be evidence of work performed and corresponding earnings immediately prior to accident/incapacity, such that there is consistency of approach between employees when considering eligibility to WC. ...

WCDG recommendations:

1. The WCDG remain of the opinion that ACC's decline WC decision issued, now at review, is robust and should be upheld based on the relevant legislation/case law and information to hand. This is because there is insufficient basis to consider the client an earner engaged in employment immediately prior to accident incapacity of 31 March 2021.

2. For transparency the WCDG disagree with the advocate submission that the client is eligible to WC entitlements via clause 43 (extension of employment status) of the Accident Compensation Act 2001. This is because:

- A) the available evidence does not support the client engaging in employment in the 28 days immediately prior to accident/ incapacity 31 March 2021, as is required under clause 43(2)(a)(i). This is because the client last worked "on the tools" on 26 February 2021 (ie outside 28 days);

and this is two part legal test under clause 43, hence even if A could be argued to be met, the below would still need to be accepted)

B) There is no evidence that the client would have been an “employee” (ie with PAYE deducted earnings as per section 9 of the Act) within 3 months of ceasing employment.

3. With regard to eligibility to WC the WCDG note that this will rely on the client or his representative providing evidence that he was engaged in employment for pecuniary gain or profit immediately prior to 31 March 2021.

The WCDG stress that this could potentially include administrative work performed for his self employed venture, or the purchases of tools/goods/expenses for self employed business use immediately prior to accident. If further information or evidence in support of this prospect can be provided to ACC eligibility to WC could be reconsidered accordingly.

[14] On 31 August and 21 September 2021, review proceedings were held. At the hearing, Mr Rostami testified that, prior to his accident, he did not get to the stage of getting money coming in or make any arrangements as to how he and the joint director and shareholder of the company (ZRS) would be paid by the company.

[15] On 5 October 2021, the Reviewer dismissed the review, on the basis that the Corporation’s decision of 15 April 2021 was correct, and no deemed decision was made in respect of the review application filed for Mr Rostami on 28 April 2021.

[16] On 26 October 2021, a Notice of Appeal was lodged.

[17] Mr Hinchcliff, for Mr Rostami, subsequently produced:

- (a) Warehouse receipts dated 15 March 2021: these reflect the purchase of office equipment, but do not refer to the name of the purchaser.
- (b) Toyota Repair Receipts dated 26 March 2021: these reflect car repairs with the customer listed as Mr Zikrulla Khan Aga.
- (c) Licenses Building Practitioner Details dated 6 April 2021: these reflect that Mr Rostami was granted a Building Practitioner licence on 6 April 2021, with the company involved being Precision Construction Ltd.

## Relevant law

[18] Section 100(1)(c) provides that a claimant who has cover and who lodges a claim for weekly compensation is entitled to receive it if the Corporation determines that the claimant is incapacitated within the meaning of section 105(2), and if the claimant is eligible under section 224 or clause 43 of Schedule 1 for weekly compensation.

[19] Clause 43 of Schedule 1 of the Act provides:

### Weekly earnings if employment ended before commencement of incapacity

- (1) Subclause (2) applies to a claimant who, before his or her incapacity commenced, has ceased to be in employment.
- (2) The claimant is deemed to continue to be in employment and have 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; or
  - (b) the period for which payments that the claimant is entitled to receive on ceasing employment and on which earner levy is payable constitute earnings under subclause (4).
- (3) For the purposes of subclause (2)(a)(ii), the period is,-
  - (a) unless paragraph (b) applies, 3 months if the claimant had entered into an employment agreement, or had arranged to enter into an employment agreement, before the incapacity commenced; or

...
- (7) In this clause -
 

**employee** includes an employee who is on unpaid leave that is not unpaid parental leave;

**employment** means employment as-

  - (a) an employee; or
  - (b) a self-employed person; or
  - (c) a shareholder-employee.

[20] In *Davidoff*,<sup>1</sup> Judge Cadenhead noted, in relation to clause 43 of Schedule 1, that “the appellant had no settled agreement to return to work prior to his incapacity” and “therefore the appellant is unable to satisfy the statutory requirements”. Likewise, In *Mathieson*,<sup>2</sup> Judge Beattie referred to the state of affairs which clause 43(3)(a) requires to be satisfied, namely, “that the employee had entered or arranged to enter into an employment agreement before the incapacity commenced”.

[21] In *Polglase*,<sup>3</sup> Judge Walker stated:

[23] Clause 43(3)(a) provides that the time limitation is only able to be extended if the claimant has entered into an employment agreement, or had arranged to enter into an employment agreement before the incapacity commenced i.e. 16 October 2012.

[24] Although the appellant had been given a date for an induction, post the date of the accident, there was no agreement of continued employment being in place prior to the accident occurring.

## **Discussion**

[22] The issue is whether Mr Rostami was an earner, so as to be eligible for weekly compensation and, in particular whether the Corporation’s assessment of that question, and adduced at review, was correct. In Mr Rostami’s case, he was required to satisfy the requirements of clause 43 of Schedule 1 of the Act, because his employment ended before the commencement of his incapacity on 31 March 2021. Clause 43 requires that he:

- (1) had been in employment within 28 days before his incapacity commenced; and
- (2) would have been an employee within three months after the date on which his incapacity commenced, but for the incapacity, if he had entered into an employment agreement, or had arranged to enter into an employment agreement, before the incapacity commenced.

[23] Mr Hinchcliff, for Mr Rostami, submits as follows. To be eligible for weekly compensation, Mr Rostami must have worked up until 3 March 2021. The evidence

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<sup>1</sup> *Davidoff v Accident Compensation Corporation* [2009] NZACC 54, at [54].

<sup>2</sup> *Mathieson v Accident Compensation Corporation* [2009] NZACC 59, at [24].

<sup>3</sup> *Polglase v Accident Compensation Corporation* [2016] NZACC 147.



supports that, during the week around 3 March, Mr Rostami was working. He was purchasing his van, was outfitting the inside of the van, and had signwriting put on the van. Schedule 1, clause 43(7), defines employee and employment: because it is defined within the clause, it has priority over the definition in section 6 of the Act. At the time of the application of clause 43, Mr Rostami was in employment as a self-employed person. The evidence is that he was purchasing equipment, attending to the repair of a car, was granted a builder's licence, and was going to return to work if he had not sustained his injury. He would have been an employee again on or around 12 April 2021, but for his injury.

[24] The Court acknowledges the above submissions. However, the Court refers to the following considerations.

[25] First, the weight of evidence establishes that Mr Rostami was not in employment within 28 days before his incapacity commenced on 31 March 2021:

- (a) On 15 April 2021, a Corporation representative spoke to Mr Rostami and asked him when was the last time he was able to work, and he replied that this was on 26 February 2021.
- (b) Inland Revenue earnings records show that Mr Rostami's most recent declared income prior to the accident was from Precision for the pay periods: (1) from 18 to 24 February 2021 (\$2092.50), and (2) from 25 February 2021 to 3 March 2021 (\$810).
- (c) On 6 July 2021, Mr Rostami provided an affidavit in which he stated that he was a self-employed carpenter, and, on 26 February 2021, he finished working on the tools.
- (d) At the review hearing on 31 August 2021, Mr Rostami testified that, prior to his accident, he did not get to the stage of "getting money coming in".
- (e) The receipts provided by Mr Hinchcliff make no reference to Mr Rostami, and the date of the grant of the licence to him is 6 April 2021.

[26] Second, there is no evidence that Mr Rostami would have been an employee within three months after the date of his incapacity, but for the incapacity, in that he had entered into an employment agreement, or had arranged to enter into an employment agreement, before the incapacity commenced. On 18 August 2021, a weekly compensation discussion group reported its finding as to the lack of evidence of this statutory requirement. At the review hearing on 31 August 2021, Mr Rostami testified that, prior to his accident, he did not make any arrangements as to how he would be paid.

### **Conclusion**

[27] In light of the above considerations, the Court finds that Mr Rostami was not an earner, so as to be eligible for weekly compensation and that the Corporation's assessment of that question, and adduced at review, was correct.

[28] The decision of the Reviewer dated 5 October 2021 is therefore upheld. This appeal is dismissed.

[29] I make no order as to costs.

A handwritten signature in black ink, appearing to read 'P R Spiller', written in a cursive style.

P R Spiller  
District Court Judge