PURSUANT TO S 160(1)(B) accident compensation act 2001 there is a suppression order forbidding publication of the appellant's name and any details that might identify the appellant

IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 37 **ACR 180/20**

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

Hearing: On the papers

Judgment: 11 March 2022

DECISION OF JUDGE P R SPILLER
[Leave to appeal]

Introduction

[1] This is an application for leave to appeal against a judgment of Her Honour Judge Cunningham, delivered on 16 July 2021.[1] At issue in the appeal was whether the appellant was an earner and in employment as at the date of her injury, in order to qualify for weekly compensation. The Court dismissed the appeal, for the reasons outlined below.

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1 *W v Accident Compensation Corporation* [2021] NZACC 105.

Background

[2] On 7 June 2012, the appellant suffered mental injuries as a result of an earlier criminal act against her, and she was duly granted cover. (She suffers from Post Traumatic Stress Disorder, Major Depressive Disorder and an alcohol use disorder.) On 7 June 2012, the appellant was a full-time student at a Technical Institute undertaking a Bachelor of Applied Social Sciences (Social Work) degree. She was undertaking a placement in a Women's Refuge as part of the requirements of the degree course she was studying. The appellant received no remuneration for the work she did at the Women's Refuge, although, in the circumstances of such a placement, payment for the work was possible if agreed between the parties.

[3] On 19 August 2019, an ACC 18 medical certificate was completed by the appellant's GP. He considered that the appellant was fit to work only 20 hours per week. Immediately prior to that point, the appellant was in full-time employment. The Corporation then considered whether she was entitled to weekly compensation. The Corporation declined weekly compensation on the basis that the appellant was not an earner at the time of her injury and therefore was not entitled to earnings-related compensation. The appellant's application for review of the Corporation's decision was dismissed, and the District Court then dismissed the appeal. On 6 August 2021, the Corporation sought leave to appeal the Court's decision.

The Court's judgment of 16 July 2021

[4] Judge Cunningham quoted sections 100 and 103 of the Act, and referred to the definitions of earner and employer in section 6(1) of the Act. Judge Cunningham then referred to the case of *Beel*,[2] which was relied upon by the appellant in support of the proposition that she did not need to show that she was actually receiving pecuniary gain or profit from her placement at the Women's Refuge. Judge Cunningham disputed the appellant's interpretation of this judgment, and distinguished the case on the basis that the appellant in *Beel* received payment of rent in lieu of cash.

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2 *Beel v Accident Compensation Corporation* [2008] NZACC 252.

[5] Judge Cunningham turned to the argument for the appellant that, when she was on the placement at the Women's Refuge (which was a requirement in order to obtain her degree), she was doing it for the purpose of obtaining a pecuniary gain or advantage, being the obtaining of her degree which eventually led her to become a social worker. Judge Cunningham distinguished (and to an extent differed from the Court's judgment in) the case of *Bedford*,[3] which was relied upon by the appellant for the proposition that interpreting the word "employment" as being solely related to monetary remuneration was too narrow an interpretation.

[6] Judge Cunningham then returned to the statutory definitions of the words employment, employee and earnings. Her Honour noted that the definition of employment in section 6(1) included, in the case of an employee, a period of paid leave, as long as employment was not terminated. Her Honour deduced that employment meant an ongoing employment relationship for which the person is paid. Her Honour also noted that, in section 6(1), the definition of employee referred to income as understood in the Income Tax Act 2007; and the definition of earnings referred to those of an employee, self-employed person and shareholder-employee (the appellant being none of these at the time of her personal injury).

[7] In conclusion, Her Honour noted that the appellant's placement at the Women's Refuge was part and parcel of the requirements that she had to meet to enable her to obtain her degree. Her Honour found that, although the appellant during her placement was treated as an honorary employee and had to attend at specified hours and undertook certain work when she was there, this was not employment for the purposes of the Act, and she also did not meet the requirements of being an earner.

Relevant law

[8] 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.

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3 *Bedford v Accident Compensation Corporation* [1999] NZACC 287.

[9] In *O'Neill*,[4] 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 …;
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> (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 … .

[10] Section 100 of the Act provides:

> Entitlement to weekly compensation depends on claimant's incapacity for employment and vocational independence
>
> (1) A claimant who has cover and who lodges a claim for weekly compensation—
>
> (a) is entitled to receive it if the Corporation determines that the claimant is incapacitated within the meaning of section 103(2) and the claimant is eligible under clause 32, 44, or 44A of Schedule 1 for weekly compensation:
>
> (b) is entitled to receive it if the Corporation determines that the claimant is incapacitated within the meaning of section 103(2) and the claimant is eligible under section 210 for weekly compensation: ...

[11] Section 103 of the Act provides:

> 103 Corporation to determine incapacity of claimant who, at time of personal injury, was earner, on unpaid parental leave, or recuperating organ donor

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

(1) The Corporation must determine under this section the incapacity of—

(a) a claimant who was an earner at the time he or she suffered the personal injury: ...

(2) The question that the Corporation must determine is whether the claimant is unable, because of his or her personal injury, to engage in employment in which he or she was employed when he or she suffered the personal injury.

(3) If the answer under subsection (2) is that the claimant is unable to engage in such employment, the claimant is incapacitated for employment.

[12] Section 6(1) of the Act provides:

earner—

(a) means a natural person who engages in employment, whether or not as an employee; and

(b) includes a person to whom clause 43, 44, or 44A of Schedule 1 applies.

earnings means—

(a) earnings as an employee;

(b) earnings as a self-employed person:

(c) earnings as a shareholder-employee

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 (a) of the definitions 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 RD 3C of the Income Tax Act 2007 applies

employment—

(a) means work engaged in or carried out for the purposes of pecuniary gain or profit; and

(b) in the case of an employee, includes a period of paid leave, other than paid leave on termination of employment.

[13] In *Murray*,[5] Kos J noted the connection between injury and currency of employment under section 103:

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[5] *Murray v Accident Compensation Corporation* [2008] NZHC 2967. See also *Accident Compensation Corporation v Vandy* [2011] 2 NZLR 131 (HC) at [23].

> [38] That point is made even clearer when one looks at the words of the provision. Section 103(1)(a) filters eligibility by requiring the claimant to be "an earner" at the time he or she suffered the personal injury. That, I have noted already, may contemplate a person not currently in employment. However a finer mesh is then applied in s 103(2). That requires the Corporation to determine whether the claimant is unable (by reason of the injury) "to engage in employment in which he or she was employed when he or she suffered a personal injury". That I think must include (to make sense of s 103(1)(b)) a person who was at the time on unpaid parental leave. But Parliament has deliberately chosen the broader word "earner" at one place, and then subsequently the word "employment" later. It tinkered with the provision in 2005. It did not change the point of distinction, and indeed gave emphasis to it. It is in my view clear that Parliament intended in s 103(2) to identify a point in time at which injury and employments must be contemporaneous. "When" and "suffered" are both terms of precision. It is clear that, as Gendall J held in *Vandy*, the claimant must have been engaged in employment when he or she suffered the personal injury.

The appellant's submissions

[14] The appellant submits that, for the purposes of section 103 of the Accident Compensation Act 2001, a claimant can be an earner in employment without satisfying the Act's definitions of "employee", "earnings" and "earnings as an employee". To introduce these definitions to the meaning of "earner" and "employment" reads into section 103 additional criteria and results in unwarranted hurdles for the claimant to overcome. The definitions of "earnings" and "employee" become relevant only at the date of incapacity. Judge Cunningham misconstrued the statutory test by conflating the requirements for date of injury and date of incapacity, and this conflation amounts to an error of law.

[15] The appellant submits that there is a conflict between Judge Cunningham's judgment and previous case-law that needs to be resolved. In *Bedford*,[6] the District Court held, on analogous facts and almost identical provision in the 1982 Act, that a person undertaking workplace experience was in employment, and the fact that her remuneration was not monetary but obtaining experience and the ability to improve her employment prospects, did not mean that she was not in employment.

[16] The appellant submits that the definition of employment is wide enough to encompass a work placement or training as the definition does not specify that the pecuniary gain must be immediate. In this respect, work undertaken resulting in

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6 *Bedford v Accident Compensation Corporation* [1999] NZACC 287.

future pecuniary gain (securing a job in social work) arguably satisfies the definition. It is therefore submitted that the questions of law are seriously arguable.

[17] The appellant therefore proposes the following questions of law for the High Court:

(a) What is required to establish a claimant is an "earner" pursuant to section 103(1)(a) of the Accident Compensation Act 2001?

(b) What is the proper ambit and meaning of "employment" in section 6 of the Accident Compensation Act 2001?

(c) In particular, does the meaning of "employment" extend to an unpaid work placement which was necessary to secure future paid employment (and therefore amounts to work carried out for the purpose of pecuniary gain)?

Discussion

[18] This Court accepts that the appellant is dissatisfied with the decision of a District Court as being wrong in law, and so may, with leave of the District Court, appeal to the High Court (in terms of section 162(1) of the Act). Whether or not a statutory provision has been properly construed or interpreted, and applied to the facts, is a question of law.[7]

[19] However, for leave to be granted, the contended point of law must be capable of *bona fide* and serious argument. Further, the Court has an extensive discretion in the grant or refusal of leave so as to ensure the proper use of scarce judicial resources, and leave is not to be granted as a matter of course.[8]

[20] Section 103 of the Act requires that, for a claimant to be entitled to weekly compensation, he or she: (1) must have been an *earner* at the time he or she suffered the personal injury; and (2) was unable, because of his or her personal injury, to engage *in employment in which he or she was employed* when he or she suffered the

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7 See n4 *O'Neill* at [24(vi)].
8 See n4 *O'Neill*, at [24(ii)] and [25].

personal injury. The High Court has affirmed that the statutory requirements of being an earner and in employment make clear that the claimant for weekly compensation must have been engaged in employment when he or she suffered the personal injury.[9]

[21] The reality of the appellant's situation is that, at the time that she suffered her personal injury, she was a full-time student at a Technical Institute undertaking a placement in a Women's Refuge as part of the requirements of the degree course she was studying. The appellant received no remuneration for the work she did at the Women's Refuge. Judge Cunningham found that the appellant did not meet the statutory requirements of being an earner and in employment at the time that she suffered her personal injury. Her Honour arrived at that conclusion by referring to the definitions of the words earner, earnings, employment and employee in the Act.

[22] This Court finds that the contended points of law raised by the appellant are not capable of *bona fide* and serious argument in the context of the present case, for the following reasons:

(a) A *prima facie* reading of the facts of this case does not sustain the appellant's argument that she was an earner and in employment at the time that she suffered her personal injury. The submission that a claimant who was not in receipt of actual earnings and not in actual employment, and yet was an earner and in employment, is not tenable.

(b) Judge Cunningham's use of the definitions of the key terms earner, earnings, employment and employee in section 6(1) of the Act was fully justified and supported her conclusion. Section 6(1) provides that, "in this Act, unless the context otherwise requires", the words mean as they are defined, and there is nothing to suggest that the context of section 103 of the Act requires different meanings to be attached to the words in question.

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[9] *Murray v Accident Compensation Corporation* [2008] NZHC 2967 at [38] and also *Accident Compensation Corporation v Vandy* [2011] 2 NZLR 131 (HC) at [23].

(c) As noted above, the law, as reflected in the current Act, has been well settled by High Court authority. Judge Cunningham's difference from a previous District Court pronouncement relates to a judgment which is now over 22 years old and which applied the previous Act of 1982.[10]

The Decision

[23] In light of the above considerations, the Court finds that the appellant has not established sufficient grounds to sustain her application for leave to appeal, which is accordingly dismissed.

[24] There is no issue as to costs.

P R Spiller
District Court Judge

[10] *Bedford v Accident Compensation Corporation* [1999] NZACC 287, applying the Accident Rehabilitation and Compensation Insurance Act 1992.