IN THE DISTRICT COURT
AT WELLINGTON

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

[2022] NZACC 208 ACR 266/21

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

Hearing:	10 November 2022
Held at:	Rotorua/Rotorua Nui A Kahumatamomoe
Appearances:	Mr C Leaf for the Appellant P McBride for the Accident Compensation Corporation
Judgment:	15 November 2022

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for weekly compensation – s 63, Accident Compensation Act 1982]

Introduction

[1] This is an appeal from the decision of a Reviewer dated 15 October 2021. The Reviewer dismissed an application for review of the Corporation's decision dated 28 January 2021 declining Mr Roberts' claim for weekly compensation, based on loss of potential earnings (LOPE).

Background

[2] Mr Roberts was born in June 1970. He left school in 1985.

[3] On 6 March 1987, aged 16 years and nine months, Mr Roberts sustained significant injury, when he fell from the back of a utility vehicle. He received cover, lump sum compensation and rehabilitation support from the Corporation. He also received income support from the Ministry of Social Development and its predecessors.

[4] A medical certificate dated 16 March 1987 recorded Mr Roberts' employment status as "unemployed". An ACC medical certificate dated 18 March 1987, signed by Mr Roberts' father, stated that Mr Roberts had been employed by New Zealand Forest Service Nursery from "?Aug 1986" for three weeks. This certificate described him as being unemployed, and with "TAPS Salvation Army Cambridge? From Nov 1986 to Accident".[1] An ACC Information Consent Form dated 9 June 1987, signed by Mr Roberts' mother, described him as unemployed.

[5] On 30 January 2001, Mr Colin Higgins noted in a letter that he was a used car dealer and did not employ full-time staff. However, some school leavers without occupations spent time preparing cars for sale. They included the Roberts boys, one of whom was injured when he fell from a truck.

[6] On 22 September 2014, a psychiatric review undertaken by Dr Karen Mitcheson suggested that Mr Roberts was purportedly in training as a car valet at the time of his accident.

[7] In 2020, Mr Leaf, on behalf of Mr Roberts, asked the Corporation to consider a payment in terms of loss of potential earnings ("LOPE").

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[1] The Training Assistance Programme was a scheme to train unemployed people and prepare them for employment, either directly or indirectly. Participants in that scheme were given training in non-apprenticeable skills which were assumed to be in demand in local labour markets; and participants in the scheme were paid training allowances instead of wages. Organisations including the Salvation Army were paid by the Department of Labour to deliver training to school leavers hoping to prepare them for employment. See Andrew Punabantu Mulengul (1994) *From Job Creation to training 1840 - 1990: A descriptive analysis of the development and demise of job creation policy as the mainstay of state responses to unemployment in New Zealand* (PhD Thesis, Massey University) at p 210. See also (1985) 464 NZPD 5807 and (1986) 473 NZPD 3748.

[8] On 8 January 2020, Mr Michael Bockett, Technical Specialist, reviewed the evidence against the statutory criteria and concluded that there was no entitlement to LOPE. Specifically, Mr Bockett noted:

> While I acknowledge the 'Advice of Injury Form' completed in real time, notes the client being engaged in employment at date of accident, all other information on file supports the proposition that the client was not employed (ie unemployed). If the client was genuinely employed it is unclear why WC entitlements were not requested in real time and provided by ACC accordingly, in particular given the family's financial hardship at the time and post this.
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> Given there is no collaboratory evidence to support fulltime study at date of accident, the available evidence would not appear to support the prospect, meaning there currently isn't sufficient information to consider the section 63(c) ((iii) criteria to be met.
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> If further information could be provided in support of this criteria matters could be reconsidered.

[9] On 28 January 2021, the Corporation declined Mr Roberts' claim. This was on the basis that it was unable to pay LOPE because it did not have sufficient information. The Corporation noted that Mr Roberts had been requested to supply information confirming any pre-accident employment(s) undertaken or pre-injury study/training but he had declined to supply this information. He applied to review this decision.

[10] On 9 February 2021, Mr Roberts' brother, Mr Shane Roberts, signed a statutory declaration referring to Mr Roberts being part of a training employment service called TAPS with the Salvation Army from November 1986, through to the date of the accident on 6 March 1987. Mr Shane Roberts stated that he and Mr Roberts were training to be horticulturalists.

[11] On 11 March 2021, Dr Shailesh Kumar noted in a psychiatric report:

> [Mr Roberts] had however worked in a part time capacity as a car groomer on a car sale yard and under Targeted Assistance for participation (TAP). He had also attended a few courses and had a brief period of work with New Zealand Forestry Service. It was difficult to ascertain the nature or length of his employment.
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> Aged 15 he also won the New Zealand championship in boxing and showed a lot of potential. His dreams about professional sport were however thwarted post injury. He was unable to achieve his potential as a professional rugby player and boxer.

[12] On 8 April 2021, Mr Bockett submitted a further report. He noted that Mr Roberts had no earnings declared to the Inland Revenue Department in the 1987 (tax year of accident) and 1988 (tax year post accident) tax years. Mr Bockett further noted (reproduced *verbatim*):

> The criteria detailed under section 63(1)(c)(iii) does not, on the balance of probabilities, appear to be met as there is insufficient evidence that the client was "actively engaged in study or training for an occupation, career or profession which he intended to take up on completing his study or training". In support of this I note:
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> - the "Advice of Injury" form notes T.A.P.S. to be an employment, rather than study, noting my guidance as above rejects the notion that the client was engaged in paid employment at date of accident.
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> - the 17 December 2020 advocate email correspondence with ACC notes the T.A.P.S. as being "Worked/and or Studied". In other words which is this.
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> - the Statutory Declaration completed by the client's brother indicates they were both part of a "Training Employment Scheme" with T.A.P.S, but does not provide any information to corroborate that this was a formal study or training programme.
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> - that in summary, given the passing of time and likely prejudicial impact on ACC, there remains insufficient evidence to support this criteria being met.

[13] On 27 September 2021, review proceedings were held. On 15 October 2021, the Reviewer dismissed the review, on the basis that Mr Roberts was not a potential earner immediately before his accident in March 1987, and so not entitled to weekly compensation as LOPE.

[14] On 18 November 2021, a Notice of Appeal was lodged.

[15] On 20 January 2022, Mr Eddie Roberts and Mr Shane Roberts provided statutory declarations stating that they and their brother Jason Roberts were part of a Training Employment Scheme with the Salvation Army from November 1986 to the date of the accident on 6 March 1987. They attended the end of term function for this scheme and trained to become skilled in horticulture.

Relevant law

[16] Section 8(1)(a) of the 2001 Act provides that (except as specifically provided), its provisions as to cover are only in respect of personal injury suffered during the currency of this Act, namely, since 1 April 2002.

[17] Section 365 of the 2001 Act provides for persons who, immediately before 1 April 2002, *were entitled to* weekly compensation, and states that this compensation continues to be payable at the rate payable as if it were calculated under the 2001 Act.[2] There is no provision for the determination of entitlement to weekly compensation to be according to the 2001 Act.

[18] The legislation that applies to the determination of entitlement to weekly compensation is thus the statute in force when Mr Roberts suffered his injury in 1987, namely, the Accident Compensation Act 1982. Section 63 of this Act provided for compensation for loss of potential earning capacity in certain cases:

> (1) Where, as a result of incapacity due to personal injury by accident, a person suffers any loss of potential earning capacity, compensation shall be payable in accordance with and subject to this section, if-
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> (a) The accident occurred in New Zealand; and
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> (b) The person was at the time of the accident ordinarily resident in New Zealand; and
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> (c) At the date of the accident, the person-
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> (i) Had not attained the age of 16 years; or
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> (ii) Was a pupil enrolled for secondary education or special education as those terms are defined in section 2 of the Education Act 1964; or
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> (iii) Was actively studying or training for an occupation, career, or profession which he intended to take up on completing his study or training, and satisfies the Corporation to this effect; or
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> (iv) Was not in regular work in paid employment in any occupation, career, or profession, and had completed a course of secondary education or special education within a period of 6 months before the date of the accident; or

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[2] Section 365(1) referred to compensation payable under the Accident Insurance Act 1998, which had provided ongoing entitlements to claimants entitled to compensation under the 1992 Act, which had in turn provided ongoing entitlements under the 1982 Act.

> (v) Had completed his study or training for an occupation, career, or profession, and satisfies the Corporation that he intended to enter upon that occupation, career, or profession within 6 months after so completing his study or training; or
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> (vi) Having completed his study or training for an occupation, career, or profession, had entered upon that occupation, career, or profession, and the fixing of his relevant earnings under subsection (5) of this section would result in a higher rate of compensation being payable to him for the time being, under section 59 of this Act, than would otherwise be so payable: …

[19] Section 98 of the 1982 Act provided for limitation of time for making claims:

> (1) Except as provided in this section and in sections 28 and 29 of this Act, no rehabilitation assistance or compensation under this Act shall be given or paid unless a claim in writing in respect of the relevant injury is received by the Corporation within 12 months after the date of the accident causing the injury, or (in the case of death) within 12 months after the date of the death.
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> (2) A failure to forward any such claim within the time specified in subsection (1) of this section shall be no bar to the claim if the Corporation is of the opinion that it has not been prejudiced in the determination of the case by the failure, whether in the making of inquiries or otherwise, or that the failure was occasioned by mistake of fact, or by mistake of any matter of law other than the provisions of this section, or by any other reasonable cause.

[20] In *Kerr*,[3] where the Court considered whether the appellant was "actively studying or training" for an occupation, career or profession at the date of his accident (under the equivalent section of the 1972 Act), Panckhurst J observed:

> [18] … the study or training must be for a particular occupation, career or profession. This I think indicates that there must be a clear nexus between such study and training and the occupation, career or profession in question.
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> …
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> [21] … a close connection is different from the nexus about which I spoke earlier between the study or training and the particular career as contemplated in the subsection itself.
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> [22] It is not enough that the naval reserve experience of the appellant resulted in his acquisition of skills which were transferable and useful should he enter the navy. The statutory definition requires something more than that. On the evidence that was presented in this case it seems to me that there is no course of study or training for a naval career, the completion of which facilitates that end. In other words the navy is one of those careers where training begins after one has gained entry, not before. It is the process of application and passing the

[3] *Kerr v Accident Rehabilitation & Compensation Insurance Corporation* [2001] NZAR 651.

> required tests which is the threshold, there being no study or training before that point.

[21] In *Richardson*,[4] the Accident Compensation Appeal Authority (again with reference to the equivalent section of the 1972 Act) accepted that the claimant had incontrovertible evidence that he was undergoing training to become a full-time employed farm tractor driver:

> [7] On 23 May 1981, Mr Richardson sustained serious injuries while riding his motorcycle. He had been working that day with his father in a shearing gang. As a result of the accident, he did not complete the work experience with Mr Harding and was not able to take up the full-time employment as a tractor driver which had already been agreed between him and Mr Harding.
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> …
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> [29] It is not disputed that Mr Richardson is eligible for earnings compensation using the LOPE rate prescribed under s 118 of the 1972 Act. … At the time of the accident, Mr Richardson was undertaking training by way of work experience. Nor is it disputed that his expected wage as a tractor driver was to be $134 weekly from 1 June 1981.

Discussion

[22] The issue in this case is whether Mr Roberts was a potential earner immediately before his accident in March 1987, and so entitled to loss of potential earnings (LOPE). As explained above (in paragraphs [16] to [18]), the applicable criteria in assessing Mr Roberts' claim for weekly compensation are set out in section 63(1) of the 1982 Act which was in force at the time of Mr Roberts' accident. In terms of the relevant criteria, the only area of dispute is whether Mr Roberts satisfies the requirement that he was actively studying or training for an occupation, career, or profession which he intended to take up on completing his study or training, and satisfies the Corporation to this effect. Case-law establishes that it is not enough that training results in the acquisition of skills which are transferable and useful. There must be a clear nexus, more than a close connection, between the study and training and the particular occupation, career or profession in question, and evidence by way of placement or future employment is required.[5] Section 98 of the 1982 Act provides a one-year limitation of time (after an accident) for making

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4 *Richardson v Accident Compensation Corporation* [2019] NZACAA 1.

5 See above, footnotes 3 and 4.

claims for compensation, unless reasonable cause was shown for the claim being made late.

[23] Mr Leaf, for Mr Roberts, submits Mr Roberts was a potential earner immediately before his accident in March 1987, and so entitled to LOPE. He showed potential prior to his accident and since then he has been incapacitated for life. The statutory declaration by Mr Roberts' brother confirmed that Mr Roberts was studying to be a horticulturist in a TAPS Salvation Army course, and he was working in horticulture for three weeks prior to his accident. Mr Roberts and his brother were part of a training/study group. The 1982 Act must be considered as the Act that provided cover, but the 2001 Act is the applicable Act in terms of LOPE.

[24] This Court acknowledges the above submissions. However, the Court points to the following considerations.

[25] First, as noted above, the legislation that applies to the determination of entitlement to weekly compensation, based on LOPE, is the statute in force when Mr Roberts suffered his injury in 1987, namely, the Accident Compensation Act 1982, not the 2001 Act. This means that Mr Roberts is required to establish that he was actively studying or training for an occupation, career, or profession, which he intended to take up on completing his study or training, and satisfies the Corporation to this effect; and he was subject to a one-year limitation of time, after his accident, for making his claim for compensation, unless he showed reasonable cause for his claim being made late.

[26] Second, there is insufficient evidence of whether Mr Roberts was actively studying or training for an occupation, career, or profession. There is no relevant documentation in terms of study or training material, assessment, or completion of a course geared towards a particular occupation, career, or profession.

[27] Third, there is insufficient evidence of whether Mr Roberts intended to take up an occupation, career, or profession on completing his study or training. There is conflicting evidence of whether, at the time of Mr Roberts' accident, he was in training to become a car valet/groomer or a horticulturist or intended to become a

professional sportsman. There is no evidence that Mr Roberts had, at the commencement or during training, secured a placement or employment in a particular occupation, career or profession.

[28] Fourth, the evidence produced by Mr Roberts did not satisfy the Corporation that he was actively studying or training for an occupation, career, or profession which he intended to take up on completing his study or training. In light of the above two considerations, the Corporation's conclusion is a reasonable one.

[29] Fifth, Mr Robert's claim for LOPE was made nearly 33 years after his accident. This period is well passed the one-year time limit required for lodging of such claims, and no reasonable cause has been presented why the claim should now be entertained.

Conclusion

[30] In light of the above considerations, the Court finds that, in terms of the relevant legislation, Mr Roberts does not qualify for weekly compensation, based on loss of potential earnings. The decision of the Reviewer dated 15 October 2021 is therefore upheld. This appeal is dismissed.

[31] I make no order as to costs.

P R Spiller
District Court Judge

Solicitors for the Respondent: McBride Davenport James