

BETWEEN ACCIDENT REHABILITATION
COMPENSATION INSURANCE
CORPORATION

Appellant

A N D ANGELA MARY WARD

Respondent

Hearing: 25 November 1997

Counsel: AD Barnett for Appellant
K Reid for Respondent

Judgment: //6th December 1997

(ORAL) RESERVED OF MORRIS J.

Solicitors:

AD Barnett, Broadmore Barnett, DX SP21007, Wellington, for Appellant;
K Reid, PO Box 2205, Auckland, for Respondent

The appellant, pursuant to s 111 of the Accident Compensation Act 1982 (hereinafter referred to as “the Act”) seeks an order granting it special leave to appeal to this Court against the decision of Accident Compensation Appeal Authority (hereinafter referred to as “the Authority”) (Judge Middleton) delivered on 26 November 1996 being Decision No.249/96

The application is opposed by the respondent but both parties agreed in the event of my granting leave I then determine the appeal

Section 111 of the Act provides for the right of appeal to the High Court from a decision of the Authority. The material provisions are subsections (1) and (2) which provide:

- “(1) Where any party is dissatisfied with any order or decision of the Accident Compensation Appeal Authority, that party may, with the leave of the Authority, appeal to the High Court against that order or decision;

Provided that, if the Appeal Authority refuses to grant leave to appeal, the High Court may grant special leave to appeal.

- (2) The Appeal Authority or the High Court, as the case may be, may grant leave accordingly on a question of law or if in its opinion the question involved is one which by reason of its general or public importance or for any other reason ought to be submitted to the High Court for decision.”

Application for leave to appeal was made to the Authority on the grounds provided for in subsection (2) but in particular there was an error of law or “other reason” why this should be given

The Authority, in a decision dated 29 May 1997 (Decision No.76/97) declined leave.

The grounds upon which the appellant seeks leave are set out in its notice of appeal dated 26 June 1997 and are as follows:

1. The Authority has not given reasons or otherwise made it clear that the decision as to “relevant earnings” was arrived at on a correct legal basis contrary to the principles espoused by the Court of Appeal in *R v. Atkinson* [1984] 2 NZLR 381 and *Marshall Cordner & Co v Canterbury Clerical Workers IUOW* [1986] 2 NZLR 43;
2. The decision offends against reason in that no reasonable Tribunal properly instructed on the law could have come to it,
3. The decision to the extent its reasons are discernible (if at all) misapplies the provisions of s 53 of the Act.

Grounds upon which the respondent opposes the grant of leave are set out in its notice of opposition dated 23 September 1997 and are as follows:

1. The merits of the case have already been traversed twice by the Authority. The first time after a full hearing by the Authority and the issue of a decision in favour of the respondent on 26 November 1996 (Decision No.249/96) and secondly, by a further consideration of the merits on the appellant’s application for leave to appeal resulting in such leave being declined by decision dated 29 May 1997 (Decision No.76/97);

2. The reasons for the Authority's decision in favour of the respondent are discernible and were clearly based on an arithmetical analysis of the respondent's submissions on the question of relevant earnings;
3. The decision of the Authority being one of fact simply applied the respondent's arithmetical analysis to the already clearly defined provisions of s 53 of the Act;
4. No question of law arises in this instance. The issue in contention being the level of *relevant earnings* applicable to the respondent;
5. The matter is essentially one of fact and the facts of the case are personal and peculiar to the respondent's earnings and employment pattern so no question of general or public importance arises from the case.

BACKGROUND AND FACTS:

The respondent suffered personal injury accident on 19 March 1990. At the time of the accident she was in receipt of the unemployment benefit. The injury rendered unfit for work. In the immediate financial year the respondent had been unemployed for a period 1 April 1989 to 10 August 1989 - earning \$14,746.37, unemployed for the period 11 August 1989 to 26 November 1989; self-employed nurse for a period 26 November 1989 to 23 December 1989 earning \$3203 and unemployed for the period 24 December 1985 to 19 March 1990. For the 50 week period 1 April 1989 to 19 March 1990, the respondent was employed for 22 weeks in a row and her total earnings was \$17,949.87.

At the time of the accident the respondent was contracted to work for Southern Star Group Operations Ltd as a nurse commencing on 2 April 1990 and ending

on 30 May 1990 at a weekly “wage” of \$1,100. Earnings related compensation has been paid for this period and based on these expected earnings and this was not in issue before the various tribunals. Different statutory provisions apply to that period. There was evidence the respondent was available for other work in the year ahead even when such work was available. She was enrolled as a part-time University student.

On 23 January 1995 the respondent’s solicitor advised the appellant two options for the calculation of relevant earnings. The first option was to combine self-employed and employee earnings for the period 1 April to 23 December 1989 of \$22,857 divided by 22 weeks being the number of weeks actually worked. The resultant figures being \$1,038. The second option was to take the respondent’s self-employed earnings for 3.5 week (26 November to 23 December 1989) and which totalled \$3,096 producing a relevant earnings figure of \$884 per week. The respondent’s solicitor advocated the first option.

The Appellant adopted the first option advanced. However, it found the earnings of \$22,857 in fact included \$4,908 of unemployment benefit received. The appellant accordingly made a further calculation and its decision was given by letter to the respondent dated 10 February 1995. Earnings related compensation was then paid back to the date of the accident and continues to be paid. A review of that decision was not sought within the statutory time limit of one month.

It appears when the quite separate over-payment issue was not resolved, an application for review was lodged in respect of the decision of the relevant earnings decision on 10 February 1995 and also in respect of the separate over-

payment decision. A review application was dated 15 August 1995 and although therefore late in being filed, no objection was taken to it. In relation to the relevant earnings issue the respondent solicitor then argued the second as his less preferred option namely an assessment of relevant earnings solely on the respondent's pre-accident self-employed earnings over the 20 day period 26 November to 23 December 1989.

The review was heard on 28 November 1995 and a decision issued on 8 December 1995. The review officer heard evidence from the respondent and submissions from her counsel. The Review officer, as is normal practice, also considered all the material on the present appellant's file

In his decision the Review Officer considered the respondent's pre-accident earnings, the fact she was both an employee and self-employed and unemployed in the year prior to the accident, her earlier employment history and her evidence as to future employment prospects. The Review Officer concluded he was not persuaded relevant earnings be based on the brief period the respondent was self-employed prior to the date of incapacity divided by that period. The primary decision was accordingly upheld.

The respondent appealed the Review Officer's decision. The appeal was heard by the Authority on 22 October 1996 and its decision as I've indicated was issued on 26 November 1996

The Authority had before it two distinct issues namely:

1. A calculation of relevant earnings for the purpose of assessing the appellant's entitlement to earning related compensation; and

2. Whether the appellant should be required to refund an alleged over-payment of earnings related compensation.

In its judgment, the Authority detailed the history of the matter to date and details of the then appellant's earnings as outlined above. It also considered the Review Officer's decision. It then considered the submissions made by counsel for both the respondent and the appellant. At p 5 of its judgment, the Authority concluded:

“Accordingly both issues on appeal are allowed in favour of the appellant. It follows therefore the assessment of the appellant's relevant earnings has been made on her income as a self-employed person, \$3,203.50 divided by the 18 days actually worked. It also follows the appellant is not required to refund any of the over-payment ”

The present appellant does not seek leave to appeal against the ruling relating to the alleged over-payment.

THE APPLICATION:

The onus of satisfying me I should grant leave lies on the appellant. Clearly whether I should do so is discretionary. The leave to be granted is “special leave”. Leave is not to be automatically granted simply because of a question of law arises or if this Court is of the view the question involved is one which by reason of its general or public importance or for any other reason ought to be submitted to the High Court for decision. The word “may” in subsection (2) makes this plain.

Let me say immediately I do not consider this present case or the questions raised involve matters which are of such general or public importance as to justify leave being granted. The result of the Authority's decision, if it is incorrect, means the appellant receives a contribution somewhat greater than she is entitled to receive and will continue to receive such compensation for some time. I fail to see how such an individual situation can be elevated to one of public or general importance. Nor do I consider what must be described simply as a one-off situation can fall within the statutory wording of 'for any other reason' justifying it being submitted to this Court by way of appeal.

The appellant has submitted the Authority's decision as to "relevant earnings" was arrived at on an incorrect legal basis and contrary to the principles espoused in *Atkinson* (supra) and *Canterbury Clerical Workers* (supra). Counsel has also submitted the Authority failed to give reasons for its decision. In *Atkinson* (supra) Hardie-Boys J, in delivering the judgment of the Court of Appeal, said at p 383:

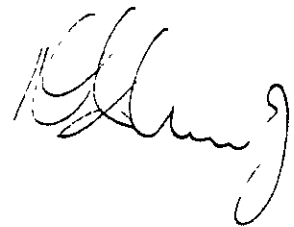
"In every case however it is essential for the judge to make it clear that he has properly applied his mind to the issue before him and has reached his conclusion on the correct legal basis."

The judgment in the *Canterbury Clerical Workers* (supra) case is to the same effect.

In my view, having read the judgment, it is perfectly plain the Authority has reached a conclusion on the facts before it and having considered the material and conflicting submissions.

I have considered carefully the details and helpful submissions made by Mr Barnett as to the meaning and effect of s 53 of the Act, particularly subsections (1) and (3) and the authorities to which he referred me. Having done so I am not satisfied the Authority has misconstrued or misinterpreted the very aims of the section. I am certainly far from satisfied the decision can be said to offend against reason and is one which no reasonable tribunal could have come to.

I do not consider the issues raised in the application are questions of law. They are, if anything, a mixed question of fact and law and in this regard, it was for the Authority to decide what weight it would give to the evidence and to the submissions made before it. A perusal of the judgment makes it plain this is exactly what the Authority did. Apart from anything, and even if I be incorrect in finding there is no true question of law involved in this application, I am of the firm view this case is very much a one-off situation and is not such a case as to justify me in exercising my discretion to grant leave in any event. The application is dismissed with costs to the respondent of \$1500 plus disbursements including photocopying.

A handwritten signature in black ink, appearing to be 'R. King', is located in the bottom right corner of the page.