IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-887

UNDER	the Injury Prevention, Rehabilitation, and Compensation Act 2001
IN THE MATTER OF	an appeal against a decision of Beattie DCJ in the District Court, No.72 (2010) NZACC
BETWEEN	BARTROM ESTATE Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 22 June 2011

Appearances: A Fisher for Appellant
A D Barnett for Respondent

Judgment: 5 August 2011

JUDGMENT OF ALLAN J

This judgment was delivered by me on .Friday 5 August at 3 pm.
pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

***Solicitors**:*
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***Copy for**:*
District Court Judge Beattie

[1] This is an appeal from a decision given on 19 May 2010 by Judge Beattie sitting in the District Court, following special leave given by Judge Barber on 17 January 2010 pursuant to s 162(1) of the Accident Compensation Act 2001 (the Act). The appeal is concerned with overlapping questions of fact and law concerning the proper application of s 15(3) and clause 39 of Schedule 1 of the Act, and in particular the relationship between these provisions.

[2] There are two principal issues. The first concerns the interpretation of clause 39 Schedule 1, which provides a formula for the determination of "weekly earnings" of a claimant who was a shareholder-employee before incapacity commenced. The second is as to the interpretation of the application of s 15 which defines the expression "earnings as a shareholder employee".

Factual background

[3] The material facts are not in dispute. Mr Bartrom (now deceased) suffered an injury by accident, with resultant incapacity for the purposes of the Act, on 5 December 2002. At the date of the incapacity he was a shareholder-employee of Alexander Bartrom Communications Limited (ABCL). That company was incorporated in 1992. Mr Bartrom held 999 of the 1000 issued shares.

[4] Down to 2002, the business of the company consisted of insurance broking, income being earned by way of commission. It appears that the company was something of a side-line business for Mr Bartrom.

[5] A modest income was received in the 1993 and 1994 years. There was a paucity of evidence as to the company's earnings during the period 1995 to 2001 but the evidence (although inconclusive) suggests that the company probably earned modest ongoing brokerage fees during that period. In the end, nothing turns on the existence or the extent of the company's earnings over that intervening period.

[6] For the greater part of the financial year ending 31 March 2002, Mr Bartrom was a full-time employee of a business known as Botica Conroy & Associates Limited, which ran a public relations business. Mr Bartrom was made redundant on 21 February 2002. In the period between 1 April 2001 and 21 February 2002 he earned a salary of $107,604 from that employment. Following his redundancy he commenced a full-time consultancy business of his own. For that purpose, he used the existing structure provided by ABCL. That business commenced from the date of his redundancy, that is, from late February 2002. In the brief period between late February and 31 March 2002, ABC earned a net profit of $7402 but no shareholder-employee earnings were credited to Mr Bartrom in that financial year.

[7] In the following financial year, that is, to 31 March 2003, ABCL made a net profit of $50,044 after deduction of expenses which included a PAYE deducted salary to Mr Bartrom of $6100.

[8] In August 2005, Mr Bartrom made an application for weekly compensation under the Act. The accounts for the year ended 31 March 2002 disclosed no shareholder-employee earnings in that year, while the accounts for 31 March 2003 disclosed the figure of $6100 referred to above. On that basis, the respondent decided on 22 February 2006 that the deceased would be entitled only to weekly compensation of the full-time minimum rate. That was because in the relevant year, namely to 31 March 2002, Mr Bartrom had no earnings as a shareholder-employee.

[9] That first decision was replaced by a further decision on 22 June 2006 in which the Corporation accepted that Mr Bartrom was entitled to have any earnings as an employee earned in the 52 weeks prior to 4 December 2002 factored into the weekly compensation calculation. In other words, that part of his salary earned with that company between 4 December 2001 and 21 February 2002, amounting to $25,123, could be taken into account; 4 December 2001 was the date 12 months prior to the accident and 21 February 2002 was the date on which his employment ceased by reason of redundancy.

[10] On 13 May 2008, the Corporation issued the decision which forms the foundation of the present appeal. The decision reads as follows:

At the date of Mr Bartrom's deemed date of accident, 4 December 2002, Mr Bartrom was a shareholder-employee, in Alexander Bartrom Communications Ltd ("the company"), working an average of 40 hours of work per week in this position.

Information received from Inland Revenue Department ("IRD") indicates that Mr Bartrom had shareholder-employee earnings in the 1993 and 1994 financial years. Please find enclosed IRD's 22 April 2008 to this effect.

The legislation governing the calculation of weekly compensation for shareholder-employees is clause 39 of schedule 1 to the Injury Prevention, Rehabilitation and Compensation Act 2001 ("the Act"). ACC considers that this section applies to the late Mr Bartrom's claim in its form as amended from 1 July 2005. This is because it was not until after that date, on 23 August 2005, that Mr Bartrom applied for his weekly compensation entitlement.

Because Mr Bartrom had earnings as a shareholder-employee in the 1993 and 1994 tax years, his weekly compensation entitlement falls to be assessed under clause 39(2)(c) i.e. based on any earnings as a shareholder-employee in the income year ended 31 March 2002 combined with any earnings as an employee in the 52 weeks prior to 4 December 2002.

Shareholder-employee earnings in the 2002 tax year

ACC accepts Mr Hussey's advice that the company's accounts for the 2002 tax year were not competently drafted. For this reason, ACC has invoked the provisions of section 15(3) of the Act, and determined for itself the amount of Mr Bartrom's earnings as a shareholder-employee for the year ended 31 March 2002. ACC considers that the whole amount of $7,402.38 being the company's surplus before taxation in the 2002 tax year, represents reasonable remuneration for Mr Bartrom's services in that tax year. …

Earnings as an employee in the 52 weeks prior to incapacity

(i) In the 52 weeks prior to 4 December 2002, Mr Bartrom earned the following amounts from Botica Conroy & Associates:

As redundancy payments are not earnings as an employee under ACC legislation, only the amounts of $25,123.16 ($19,730.77 plus $5,392.39) can be factored into the formula at clause 39(2)(c).

(ii) Mr Bartrom received a payment from the company of $6,100.00 in or about the month of September 2002, which was subject to PAYE tax. As the payment was a source deducted payment, ACC has treated this amount as earnings as an employee.

This means that Mr Bartrom's total earnings as an employee in the 52 weeks prior to 4 December 2002 were $31,223.16.

The resulting weekly earnings amount is $742.80. Weekly compensation, payable at 80% of this amount, is $594.24.

Even though case law has confirmed that the July 2005 Amendment was not to apply for periods prior to 1 July 2005, because ACC considered at the

> time of our decision on 22 June 2006 that it could apply to Mr Bartrom's circumstances, ACC has made the decision to apply it to his case for the whole period of 11 December 2002 to 30 June 2005.

[11] Weekly compensation was payable at 80 per cent of Mr Bartrom's weekly earnings. The Corporation's decision was concerned with the calculation of those weekly earnings. The effect of the decision of 13 May 2008 was to include within the ambit of his weekly earnings the following amounts:

(a) $7420.38, being the whole of ABCL's surplus before taxation in the year ended 31 March 2002.

(b) $25,123.16, representing earnings derived by Mr Bartrom from his employment with Botica Conroy & Associates Limited between 4 December 2001 and 21 February 2002.

(c) $6,100, being a source deducted payment made by ABCL in September 2002 in respect of Mr Bartrom's status as an employee of that company.

[12] That outcome was not acceptable to Mr Bartrom. His counsel, Ms Fisher, contended that ABCL's profit for the year ended 31 March 2003 should also have been included in Mr Bartrom's earnings for the purposes of calculating his compensation entitlements.

[13] The matter went to review under the provisions of the Act but the reviewer confirmed the respondent's decision. Judge Beattie upheld the reviewer's conclusions.

[14] The accounts for the financial ended 31 March 2003 for ABCL show a surplus of $50,044 upon which the company paid tax. Among the expenses is the figure of $6,100 for Mr Bartrom's salary, as earlier noted. Ms Fisher and the appellant's expert accounting witness, Mr Hussey, are critical of the manner in which the accounts of ABCL were prepared. It is contended in particular that the whole of the surplus profit ought to have been credited to Mr Bartrom as shareholder-employee income. That would have produced a much better tax outcome and would

properly have recognised the value of Mr Bartrom's work for the company, Ms Fisher argues. She also contends that the respondent ought to have invoked s 15(3) in order to exclude Mr Bartrom's 1993-1994 earnings from consideration for the purposes of the cl.39 calculation.

Relevant statutory provisions

[15] Section 15 of the Act provides, as relevant:

> **15 Earnings as a shareholder-employee**
>
> (1) Earnings as a shareholder-employee, in relation to a person who is a shareholder-employee in 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 income 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 3(2) to (4) 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.

[16] Relevant also is clause 39 of Schedule 1 of the Act. It provides:

39 Weekly earnings if claimant had earnings as shareholder-employee immediately before incapacity commenced

(1) The weekly earnings of a claimant who had earnings as a shareholder-employee immediately before his or her incapacity commenced are the higher of—

(a) the relevant amount calculated under clause 34 or clause 36, whichever is applicable ; and

(b) the relevant amount calculated under subclause (2).

(2) The amounts to be calculated under this subclause are,—

(a) for claimants who first commenced receiving earnings as a shareholder-employee in the tax year in which the incapacity commenced, the amount calculated using the following formula:

$$\frac{a}{b}$$

where—

a is the total of the claimant's earnings as an employee in the 52 weeks immediately before the incapacity commenced

b is the number of full or part weeks during which the claimant earned those earnings as an employee:

(b) for claimants for whom the relevant year was the first year during which they received earnings as a shareholder-employee, the amount calculated using the following formula:

$$\frac{a + b}{c}$$

where—

a is the claimant's total earnings as an employee in the 52 weeks immediately before his or her incapacity commenced

b is the claimant's earnings as a shareholder-employee in the relevant year

c is the combined number of full or part weeks during which the claimant earned those earnings as an employee and the number of weeks that the Corporation considers fairly and reasonably represents the number of weeks or part weeks during which the claimant earned those earnings as a shareholder-employee in the relevant year, up to a combined maximum of 52 weeks or the total number of weeks in the claimant's relevant year if the relevant year is more than 52 weeks:

(c) for all other claimants, the amount calculated using the following formula:

$$\frac{a}{c} + \frac{b}{d}$$

where—

a is the claimant's total earnings as an employee in the 52 weeks immediately before his or her incapacity commenced

b is the claimant's earnings as a shareholder-employee in the relevant year

c is 52

d is the number of weeks in the relevant year.

[17] For the purposes of clause 39 Schedule 1, clause 30(2) defines the expression "relevant year" as follows:

> ... in the case of a self-employed person or a shareholder-employee, the relevant year is the most recent year ending with the balance date (whether 31 March or another date) of the self-employed person or shareholder-employee before the commencement of the period of incapacity.

Interpretation and application of clause 39((2)

[18] In the District Court, Judge Beattie held that clause 39(2)(c) applied. Mr Barnett says that Judge Beattie was right. Ms Fisher argues that he was not, because the case falls within clause 39(2)(a), which covers cases where the claimant "first commenced receiving earnings as a shareholder-employee in the tax year in which the incapacity commenced". Mr Bartrom's incapacity commenced on 5 December 2002, that is, in the tax year ended 31 March 2003. Ms Fisher argues that it is that financial year which must be factored into the clause 39(2) equation pursuant to clause 39(2)(a). But Judge Beattie held that clause 39(2)(a) was not available to the appellant because the financial year ended 31 March 2003 was not the first financial year in which Mr Bartrom commenced receiving earnings as a shareholder-employee, as he had shareholder-employee earnings from ABCL in 1993 and 1994.

[19] Ms Fisher argues that the Judge's approach was wrong. She points out that until February 2002 Mr Bartrom was a full-time employee, at which time he started a new business (his consultancy) working for himself but under the umbrella of

ABCL. Prior to 21 February 2002 Mr Bartrom was a full-time employee of another company. Ms Fisher lays some emphasis upon the fact that the business conducted by ABCL after February 2002 (a public relations consultancy), was quite different from that carried on by the company earlier (insurance broking). She argues that the fact that Mr Bartrom was a shareholder-employee 10 years earlier, in a different business, should not prevent the appellant from availing himself of s 39(2)(a) 10 years later for a new business venture. She says that to ignore the difference would be inconsistent with the requirements of s 3(d) of the Act which provides that Mr Bartrom was entitled to a "fair determination of his weekly earnings".

[20] In my opinion, the difficulty with Ms Fisher's approach is that it simply flies in the face of the plain words of clause 39(2)(a). Mr Bartrom had shareholder-employee earnings from ABCL in 1993 and 1994 and so he first commenced receiving earnings as a shareholder-employee of ABCL many years before the date of his incapacity. It makes no difference, in my view, that ABCL may have embarked upon a new business venture. On that footing, Judge Beattie properly determined that clause 39(2)(a) did not apply.

[21] A further obstacle in the way of Ms Fisher's argument, was not dealt with by Judge Beattie.

[22] It is not in dispute that ABCL commenced its consultancy business immediately upon Mr Bartrom's redundancy. Over a period of six weeks or so up to 31 March 2002, it earned a profit of $7,402. The whole of that figure has been credited to Mr Bartrom by the Corporation pursuant to s 15(3) as representing reasonable remuneration for the services provided by Mr Bartrom during that brief period. Accordingly, even if the earnings in 1993 and 1994 are ignored, it cannot properly be said that Mr Bartrom first commenced receiving shareholder-employee earnings in the financial year ending 31 March 2003, because there were shareholder-employee earnings in the previous financial year.

[23] On the material before the Court it seems apparent that ABCL, having been incorporated in 1992, carried on business (sometimes at a modest level) from that time onward. Until February 2002 it was involved in insurance broking. Thereafter,

it was the vehicle for Mr Bartrom's consultancy business. I accept Mr Barnett's submission that clause 39 provides a formula for the determination of "weekly earnings", which excludes the exercise of any discretion. Instead, an element of certainty is introduced.

[24] As was noted by this Court in *ARCIC v Tarr*,[1] a formulaic approach introduces inherent rigidities which cannot be cured by purposive judicial interpretation. It is not for the courts to resolve problems or injustices which flow from the plain language of the legislation, but rather for the legislature, if it sees fit, to amend the legislation.

Application of s 15(3)

[25] Ms Fisher submits that s 15(3) ought to be deployed by crediting Mr Bartrom with an assessed figure in respect of "reasonable remuneration for the services" provided by Mr Bartrom to ABCL in the relevant tax year. In reliance on Mr Hussey's evidence, she argues that Mr Bartrom should be credited with $26,250 by way of earnings in the year ending 31 March 2003 and that this figure should be included in the clause 39(2)(a) formulation for which Ms Fisher argues.

[26] I have already concluded that clause 39(2)(c) applies to the exclusion of clause 39(2)(a). But, even if the latter clause did apply, s 15(3) would be of no assistance to the appellant. Section 15(3) is concerned with the determination of earnings as a shareholder-employee and enables the Corporation to exercise a discretion by way of allowing a figure as reasonable remuneration for services provided as a shareholder-employee in the tax year concerned. In other words, a shareholder-employee will not necessarily be bound by the company accounts.

[27] Clause 30(2) of Schedule 1 defines the "relevant year" as being the complete tax year immediately preceding the incapacity. Accordingly, for the purposes of s 15(3), the Corporation had a discretion to assess "reasonable remuneration" for Mr Bartrom's services for ABCL during the year ending 31 March 2002. In that year, the company had a profit of $7402.38. None of that profit was declared by

[1] *ARCIC v Tarr* [1996] 3 NZLR 715.

Mr Bartrom as personal income but the Corporation nevertheless invoked s 15(3) in treating the whole of the income as "earnings as a shareholder-employee".

Summary

[28] I am satisfied that clause 39(2)(c) applies to Mr Bartrom's claim to the exclusion of clause 39(2)(a). The applicable formula required the respondent to take into account employee earnings in the last 52 weeks before incapacity, together with earnings as a shareholder-employee in the "relevant year", that is, the year ending 31 March 2002: clause 30(2) of Schedule 1. The respondent correctly took into account earnings of both types for the relevant time periods in assessing Mr Bartrom's earnings for compensation purposes.

[29] Ms Fisher argues that s 15(3) can be used to ameliorate the result of the application of clause 39 in a given case, but in my view s 15 is not of such wide application. Section 15 is concerned with the calculation of the earnings of a shareholder-employee (and confers on the Corporation an element of discretion for that purpose in s 15(3)(a)). Once that calculation is undertaken, the result must then be brought into the calculation prescribed by clause 39(2)(c). At this latter stage there is no discretion; the exercise is simply arithmetical. Section 15 defines and provides a method of determining the relevant "earnings as a shareholder-employee". Clause 39(2) then picks up that calculation for the purpose of determining "weekly earnings" pursuant to the formula prescribed by clause 39(2)(c). The result produces a figure for "weekly earnings" which is then carried over into the calculation of the ultimate compensation figure.

Result

[30] For the foregoing reasons, the appeal is dismissed. Costs are reserved. Counsel may file memoranda if they are unable to agree.

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C J ALLAN J.