IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2010-485-001331

	UNDER	the Accident Compensation Act 2001
	BETWEEN	ACCIDENT COMPENSATION CORPORATION Appellant
	AND	DOMINIQUE VANDY Respondent

Hearing: 22 November 2010

Counsel: A D Barnett and J Roberts for Appellant
No appearance for Respondent
A C Beck - Amicus Curiae

Judgment: 25 November 2010

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 12noon on the 25th day of November 2010.

RESERVED JUDGMENT OF GENDALL J

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[1] Ms Vandy was aged 12 in 2003 when she fell from a horse and suffered shoulder and hip injuries. She was not then employed. After she left school in late 2008, she entered employment but then suffered an aggravation of her original hip injury which incapacitated her from continuing in that employment. She sought weekly earnings related compensation which was declined by the Corporation and Reviewer. Her appeal to the District Court was allowed by Judge M J Beattie.

[2] The Corporation obtained leave to appeal this decision to the High Court. Given that Ms Vandy has taken no further part, Amicus was appointed by MacKenzie J.

Statutory provisions

[3] Before dealing with the essence of the decision of Judge Beattie, I record the relevant statutory provisions.

[4] The starting point is s 67 of the 2001 Act:

> **67 Who is entitled to entitlements**
>
> A claimant who has suffered a personal injury is entitled to 1 or more entitlements if he or she–
>
> (a) has cover for the personal injury; and
>
> (b) is eligible under this Act for the entitlement or entitlements in respect of the personal injury.

[5] Weekly compensation is an entitlement under the Act: s 69(1)(a).

[6] Entitlement to weekly compensation is the subject of s 100:

> **100 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 or clause 44 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:
>
> (c) 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:
>
> (d) 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 clause 47 of Schedule 1 for weekly compensation.
>
> ...

[7] It is for the Corporation to determine whether a person is incapacitated under ss 103 or 105. Section 103 provides:

> **103 Corporation to determine incapacity of claimant who, at the time of incapacity, was earner**
>
> (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
>
> (b) a claimant who was on unpaid parental leave 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.

[8] Section 105 was not directly relevant to the facts in this case although, as it happened, Ms Vandy qualified for weekly compensation as a "potential earner" (she suffered personal injury before turning 18) and received compensation on that different basis.

[9] Finally, the Corporation's obligation to pay weekly compensation is also subject to cl 32 of Schedule 1 which provides, relevantly:

> **32 Corporation to pay weekly compensation for loss of earnings to claimant who was earner**
>
> (1) The Corporation is liable to pay weekly compensation for loss of earnings to a claimant who–
>
> (a) has an incapacity resulting from a personal injury for which he or she has cover; and
>
> (b) was an earner immediately before his or her incapacity commenced.
>
> (2) The claimant is entitled to weekly compensation for loss of earnings–
>
> (a) on and from the day after the first week of incapacity ends; and

(b) for any period of incapacity, after that first week, resulting from the personal injury for which he or she has cover.

(3) The weekly compensation payable is 80% of the claimant's weekly earnings, as calculated under clauses 33 to 45 and 48.

(4) ...

(5) ...

(6) In this clause, **earner** includes a person who has purchased weekly compensation under section 223.

The decision of Judge Beattie

[10] The Corporation declined Ms Vandy's application for weekly compensation because Ms Vandy was not in employment at the date she suffered the personal injury in 2003. So, she did not suffer an "incapacity" as defined by s 103 of the 2001 Act. Its view was that the entitlement to weekly compensation requires that the claimant suffers an "incapacity", or "personal injury" when in employment (as an earner). That decision was upheld on review.

[11] Judge Beattie held that s 103(2) was not intended to be the sole criteria for weekly compensation but simply the criteria for "incapacity". The Judge said:[1]

> The criteria for weekly compensation and any other entitlements is that which is contained in Schedule 1, which specifically identifies the necessary criteria for eligibility for any particular entitlement. In the case of weekly compensation, that eligibility, by virtue of Clause 32, requires a claimant to be an earner immediately before incapacity commenced. There is nothing to suggest that incapacity and ate of injury must be immediate, one after the other. That which requires immediacy is the fact of being an earner before incapacity commenced.

The Judge went on to say "I ... find that the section does not require incapacity in the first place, but merely incapacity at the time when a claim for compensation is sought."[2]

[12] Judge Beattie considered a contrary decision of Judge D A Ongley in *Giltrap v Accident Compensation Corporation*.[3] On its facts it is indistinguishable, but

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1 *Vandy v The Accident Compensation Corporation* DC Hamilton 23/2010, 7 December 2009 at [20].

2 At [23].

3 *Giltrap v Accident Compensation Corporation* DC Wellington 141/2006, 9 June 2006.

Judge Beattie declined to adopt the approach in that case. There, the Judge said the statutory provisions were far from generous, but the proper interpretation of the legislation required that weekly compensation be denied to the category of persons who were not earners at the time of injury but who subsequently became earners, if at some later point the original injury caused them to be unable to continue as an earner. Judge Ongley said:[4]

> Therefore both s 100 and cl 32 require reference to s 103 for determination of incapacity. By s 103(1)(a) this determination is to be made for "a claimant who was *an earner at the time he or she suffered the personal injury*". It is not a determination for a claimant who was an earner at the time of suffering a later incapacity.

[13] In disagreeing with that view, Judge Beattie said:[5]

> If the statutory provisions were to have the effect that only a person who was an earner at the time of injury could be eligible for weekly compensation, then those who do not fall into that category, being anyone who was not an earner at the time of injury but who nevertheless subsequently gains employment and becomes an earner, and then suffers a worsening of the injury to the point where the employment cannot be continued but for which loss of earnings there could be no compensation, seems wholly contrary to the spirit and intent of the Act.

[14] The Corporation was granted leave to appeal by Judge Beattie, and it essentially contends that Judge Beattie misapplied ss 100, 101, and 103 and cl 32 of Schedule 1 of the Act. The appeal is by way of rehearing and the Court is required to form its own opinion (in terms of *Austin, Nicholls & Co Inc v Stichting Lodestar*),[6] which will always be the case where appeals involve questions of law.

Discussion

[15] The parties agree that the starting point is s 67. Personal injury by accident provides eligibility. Weekly compensation arises if the person is disabled (i.e. incapacitated) from pursuing employment. The legislation talks of "incapacity resulting from personal injury", which is plainly something different. The

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4 At [13].
5 At [24].
6 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

"incapacity" as it relates to the employment depends upon both its nature, and the nature of the employment.

[16] The reference to "incapacity" arising after being an earner in cl 32(1)(b) might suggest that it matters not, when the personal injury occurred, but rather when that later resulted in incapacity to engage in employment. That would be the case if cl 32 is to be read disjunctively, as Judge Beattie has held.

[17] But the requirements for entitlement to weekly compensation in s 100(1)(a) are clearly expressed as cumulative. The section says who is "entitled" and they must be "incapacitated" (unable to engage in employment) within s 103(2) (i.e. "in which he or she was employed when he or she suffered personal injury"). Of course, if a person is not in employment when suffering personal injury they may still, factually, be rendered incapable ("incapacitated") of continuing in later employment and have an "incapacity" commencing after engaging in employment (in terms of cl 32). Yet they still do not have an "incapacity" in terms of s 103.

[18] The provisions are awkward. The Court must endeavour to reconcile them to give effect to the intention of Parliament. In the amendment to s 37 in 1993 (carried through into the current Act), provision for non-earners at the date of the personal injury but who later were incapacitated from earning by the personal injury, was considered as a policy option but not adopted.

[19] The terms of s 100(1) refer to a claimant being "entitled" and "eligible" as set out in [6]. Section 100(1)(a) 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 103(2) and the claimant is eligible under clause 32 or clause 44 of Schedule 1 for weekly compensation:
>
> (Emphasis added)

[20] The use of the word "eligible" in s 67 and s 100(1)(a) does draw some connection between the second limb of the test in s 67 and cl 32 of Schedule 1. But, I do not think that it means that "eligible" in s 67 can be determined solely by

reference to cl 32 of Schedule 1, as to enable the second requirement of s 100(1)(a) – incapacity determined by reference to s 103(2) – to be disregarded. Section 100(1)(a) is a more specific section relating to entitlement to weekly compensation. The words "a claimant who has cover and who lodges a claim for weekly compensation is entitled to receive it if ... " clearly shows that the provision is concerned with applications for weekly compensation. And s 100(1)(a) then provides two requirements for that entitlement: a determination of incapacity under s 103(2); and eligibility under cl 32.

[21] The use of the terms "entitled" and "eligible" can be reconciled in a different manner. In both ss 67 and 100(1)(a) "entitled" is a broader concept than "eligible". "Eligible" is, in both cases, a subset of "entitled". In order to be "entitled", the claimant must be "eligible" and meet a further requirement.

[22] There is force in the remarks of Judge Ongley in *Giltrap*:[7]

> ... strict application of the provisions can produce unfairness in individual cases. In the present case, the appellant was not an earner at the time of her personal injury. If the above analysis is correct, she can never claim weekly compensation for later incapacity caused by the injury. That result must be regarded as unfair to a claimant such as the appellant who has a history of full employment before and after the personal injury, but who happened to be unemployed at the time of the injury. At the same time a person with a history of unemployment but briefly employed at the time of personal injury would qualify for weekly compensation.
>
> Interpretation of these provisions is straightforward and does not require discussion of legislative policy. It can be imagined that there could be room for manipulation by a claimant if the provisions were interpreted in order to give a fresh chance for eligibility to a person who was not an earner at the time of the injury. The provisions as they stand reflect a legislative intention that weekly compensation is available only to persons earning at the time of suffering personal injury.

[23] I respectfully agree with those observations. The requirements in s 100(1)(a) are clearly cumulative. One is that the claimant was incapacitated within the meaning of s 103(2). The other is eligibility under cl 32. The Corporation cannot answer the question posed by s 103(2), because there was no employment when the injury occurred. Thus it cannot determine "incapacity" which for the purpose of the

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[7] At [14] – [15].

legislation has to be given the meaning provided in s 103(2). That requires a current inability to pursue employment that was held when the personal injury was suffered and earnings immediately before the current period of incapacity.

[24] Mr Beck submitted that if there is a clear link between the accident and the loss of earnings through consequent disability it is wrong to conclude that a claimant, although not employed at the time of injury, is never entitled to weekly compensation no matter what the employment status may have been previously or subsequently. It is of course the case that the legislative policy is not to be undermined by an ungenerous or niggardly approach[8] and a broad, rather than restrictive, interpretation is necessary. But where, as here, the meaning of the statutory provisions can be interpreted only in one direction, despite understandable notions of what might be "fair" in an individual case, the remedy if there is to be one has to be provided by Parliament. "Injury" and "incapacity" (to work) are not the same thing and do not necessarily occur contemporaneously, but nevertheless, "incapacity" has to be determined by the Corporation pursuant to the statutory test as confined by the provisions of s 103.

[25] It follows that this Court considers that Judge Beattie erred in his conclusions and the appeal must be allowed.

[26] The Court is grateful to Mr Beck for his helpful submissions and I have already directed that his fees and disbursements be paid forthwith by the Court.

J W Gendall J

Solicitors:
Accident Compensation Corporation, Wellington
(Counsel acting: A D Barnett, Wellington)
A C Beck, Wellington as Amicus Curiae

[8] *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) at [19].