IN THE DISTRICT COURT
AT AUCKLAND

[2017] NZACC 44 **ACR 105/16**

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

Hearing:	14 March 2017
Appearances:	L Newman for the Appellant S Kinsler for the Respondent
Judgment:	27 April 2017

RESERVED JUDGMENT OF JUDGE NICOLA MATHERS

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[1] This is an appeal against a decision of the Accident Compensation Corporation ("the Corporation") which was upheld on review declining cover for Mr Toomey's mental injury on the grounds that he did not meet the criteria for a work-related accident.

Background

[2] The circumstances surrounding this claim are tragic. Mr Toomey developed post traumatic stress disorder ("PTSD") after assisting emergency services at the PGC site in Christchurch following the February 2011 earthquake.

[3] There is no dispute between the parties in relation to the factual situation. I note that Mr Toomey gave evidence at the review hearing on 25 February 2016. Mr Toomey is a self-employed builder based in Christchurch. At the time the

earthquake hit on 22 February 2011 he was at home, meeting with his insurer in respect of the rebuild of his own home after the previous earthquake.

[4] Concerned about the damage in the city Mr Toomey drove with another of his employees to see whether he could be of any assistance. He emptied one of his work vans and travelled into the city, arriving at the PGC building. He gave the keys of his van to a St John's Ambulance member to provide transport if required. A fireman asked if anybody had building experience. He indicated that he had and then he was taken into the PGC building with two other volunteers and three firemen.

[5] Mr Toomey used his building skills during the course of his assistance including drilling through a concrete floor. He comforted a woman who was crushed but alive, and he assisted other people trapped in the building. He gave advice to emergency professionals in relation to the building structure. He saw one person dying in front of him, saw other dead bodies, and attempted to rescue other trapped people. Mr Toomey said he feared that he would not be able to make it out of the building alive. Mr Toomey's company paid for the other employee that he took with him who was also assisting. Some time after these disturbing events he was diagnosed with PTSD.

[6] After considering Mr Toomey's claim the Corporation declined cover for his mental injury on the basis that because he was acting voluntarily and not as part of his employment he did not meet the criteria to be fulfilled under the provisions of s 21B, that is, he did not meet the criteria for a work-related accident.

[7] Mr Toomey applied for a review of that decision which was heard on 25 February 2016. The Reviewer, Mr Walker, considered the definition of employment under s 6 Accident Compensation Act 2001 and he found that Mr Toomey was not engaged in work for pecuniary gain or profit when helping with the rescue of survivors at the PGC site. He then went on to consider s 28(1)(a) which provides:

28 Work-related personal injury

(1) A work-related personal injury is a personal injury that a person suffers—

> (a) while he or she is at any place for the purposes of his or her employment, including, for example, a place that itself moves or a place to or through which the claimant moves; or

[8] The Reviewer then said:

> I find that section 28 states that a work-related personal injury is one that occurs while person is at any place for the purposes of his or her employment. In other words, I find that Mr Toomey would have to show he was at the PGC site for the purposes of pecuniary gain or profit in order to meet the test contained in s 28. I find it is uncontested that he was there as a volunteer.
>
> In addition, I find there is no evidence that Mr Toomey attended the PGC site in order to perform a contract which he or his company had entered into.

[9] Mr Walker rejected Ms Newman's submissions that the definition of employment used by ACC was too narrow and restrictive, resulting in discrimination of a person with a mental psychiatric condition and as a result is inconsistent with the Bill of Rights Act 1990. He was not prepared to accept that the phrase "work-related" should encompass the fact that Mr Toomey was using his building skills while on the PGC site. He said that if he accepted that wider definition then it would necessarily require him to ignore the definition of "employment" under s 6 of the Act.

[10] He concluded:

> I consider the evidence shows that Mr Toomey sustained his PTSD condition while helping in a volunteer capacity. It follows that I find the circumstances of his claim mean that his PTSD is not a work-related mental injury as defined under the Act. Accordingly, I dismiss the application.

[11] Both counsel agree that the sole question to be determined is whether Mr Toomey's mental injury was "work-related" within the meaning of s 28 of the Act.

[12] Section 28(1)(a) provides that:

> A work-related personal injury is a personal injury that a person suffers—
>
> (a) while he or she is at any place for the purposes of his or her employment, including, for example, a place that itself moves or a place to or through which the claimant moves; or

Subsection 7(c) provides that it is irrelevant as to whether the person:

> ... may have been indulging in, or may have been the victim of, misconduct, skylarking, or negligence.

[13] Section 6 defines "place of employment" as:

> Any premises or place (a) occupied for the purpose of employment; or (b) to which a person has access because of his or her employment; or (c) attended by a person for a course of educational training for the purposes of his or her current employment, if he or she receives earnings from that employment for his or her attendance.

[14] "Employment" is also defined in s 6 to mean:

> (a) means work engaged in or carried out for the purposes of pecuniary gain or profit; and
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> (b) in the case of an employee, includes a period of paid leave, other than paid leave on the termination of employment

[15] Ms Newman submits that the phrase "purposes of employment" in s 28 should be interpreted in a broad, rather than a restrictive manner. She says that this conforms with the "generous" approach to accident compensation cases directed by the Court of Appeal. She refers to the High Court decision of Kos J in *Murray v Accident Compensation Corporation*[1] where he says:

> In a recent decision I respectively suggested that the principle stated by Richardson J in *Accident Compensation Corporation v Mitchell*, that the 1982 Act be given a "generous unniggardly interpretation", still had application despite the more crystalline legislative drafting that has followed in later versions of the Act. I suggested that lines of exclusion in a social welfare context needed to be drawn clearly. Expectations which were the "fair and reasonable product of statutory language and ... consistent with the overall statutory purpose should not be read down except by language of the clearest kind".

[16] She also refers to s 5 of the Interpretation Act 1999 which says that the meaning of an enactment must be ascertained from its text and in light of its purpose. She says therefore that the purpose of the Act favours a broad interpretation, through ensuring that Mr Toomey can be rehabilitated to the maximum extent practicable. She also says that s 5 of the Interpretation Act states that in ascertaining the meaning of an enactment, indications provided for in the enactment, including headings may

be considered. She says the heading of the section in this case emphasises "work-related" personal injury. Those words, she submits, indicate that the legislature indicated that the injury be "related" to work rather than a more stringent test.

[17] Ms Newman submits that "purposes of employment" can be interpreted broadly, to include those who go to a scene because of their specialist employment, and specialist employment knowledge. She refers to the dictionary definition of "purpose" which is defined as "the reason for which something is done or created, or for which something exists". She says the reason why Mr Toomey was present at the PGC building was because of his employment as a builder. The evidence supports the fact that Mr Toomey was only involved in the rescue because of his knowledge of the building industry. Therefore the only reason Mr Toomey was present at the PGC building that day, she says, was because of his employment as a builder and therefore he was in the PGC building for the purpose of his employment as a builder.

[18] Ms Newman says that if a strict interpretation was upheld there is a serious question of the Act excluding those who are in effect constantly "on call" because of their specific duties. For example a police officer or a doctor on their day off may be required to attend a scene to give assistance because of their specialist knowledge. This is particularly so in a massive emergency situation in a small country such as New Zealand, where emergency resources may be more scarce. She submits that people who give assistance in these circumstances should come within the scope of the act because although they are not "on the clock" on the day they are, nevertheless, required to be present because of the specialist nature of their employment and the specialist knowledge they possess. She submits that the same reasoning is applicable to Mr Toomey. If I accept this interpretation Ms Newman submits that such an interpretation would extend cover to those claimants who, in narrow circumstances, were called upon to assist in emergency situations because of their specialist expertise. She says this would be a meritorious result given the public good is clearly served by such assistance.

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[1] *Murray v Accident Compensation Corporation* [2013] NZHC 2967

[19] Ms Newman then refers to the question of whether Mr Toomey was in the PGC building for pecuniary gain or profit. She submits that this does not answer the

question of whether being present at a place for the purposes of employment necessarily requires some form of pecuniary gain or profit, particularly, immediate pecuniary gain or profit given the interpretation sought by her. Because Mr Toomey is a self-employed builder she submits that it is his discretionary decision to determine what employment he engages in and what place he attends for the purpose of his employment and any corresponding pecuniary gain. She says he is in complete control of his own actions and what activities he undertakes for the purposes of his own employment.

[20] Mr Toomey's evidence at the review hearing was that he was a shareholder-employee and he took drawings during the financial year. Ms Newman also submits that the fact Mr Toomey paid his employee for the time he assisted adds weight to the submission that this was a unique situation, where Mr Toomey's discretion as the boss, meant his employment situation is less easily definable than the usual employee circumstances, where the limits of employment are more clearly delineated.

[21] Mr Kinsler, for the Corporation, submits that the wording of the sections in question is quite clear and in particular the definition of employment in section 6, where the act distinguishes between work for pecuniary gain or profit and non-profit work engaged in as a volunteer or as a hobby.

[22] Although Mr Kinsler accepts that there can be a generous and unniggardly approach to the legislation it cannot be accepted in these circumstances. He refers to the decision of Collins J in *Revitt v Accident Compensation Corporation*[2] where the learned Judge said:

> Before a generous and unniggardly approach can be taken, the legislation must be capable of being interpreted in the way suggested [by the appellant].

Mr Kinsler submits in the present circumstances the Act cannot stretch as far as the appellant contents in respect of the meaning of "the purposes of employment".

[23] Mr Kinsler also refers me to the recent decision of Judge McLean in *MC v Accident Compensation Corporation*[3] where he was considering s 21B. He said:

> Section 21B can be seen as a subset of category intended to ensure that people who suffer mental injury caused by exposure to sudden trauma during the course of employment receive cover in the same way that other work injuries receive cover, albeit not as a result of a gradual process.

[24] Mr Kinsler also refers to the history of the legislation and refers to the introduction of the bill to the House by the Minister for the Corporation when he was explaining s 21B which was inserted by s 6 of the Injury Prevention, Rehabilitation and Compensation Amendment Act 2008 which came into force on 1 October 2008. He said:

> This bill makes some significant changes to cover provided for work-related injuries by extending this cover to include mental injuries caused by a single traumatic event, and by making changes to the cover provisions for work-related gradual process, disease or infection. This Government believes that if a person is clearly harmed in the course of his or her employment, he or she should be covered by the scheme regardless of whether the injury was a result of an accident or an occupational illness. The changes proposed in this bill make that intent clear.

[25] He then refers to the explanatory note to the bill which said inter alia:

> Experiencing an extreme traumatic event affects people in different ways. Most will deal with the event in their own way, and with no longer term consequences. However, some people develop severe, longer term mental/psychological problems that impact on their ability to function in everyday life. The bill aims to ensure that these people are covered by the scheme in the same way that others physically harmed in the workplace are covered.
>
> The Bill introduces cover for mental injury caused by exposure to a sudden traumatic event in the course of employment.

[26] The Select Committee Report noted that the issue of the distinction between people who witnessed an event in employment and those who were not employed was raised as follows:

> Work related mental injury – inequity with non-work situation
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> Submitters representing employers argued it was unfair that the increased level of cover for work related mental injury provided by the bill is only provided to

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[2] *Revitt v Accident Compensation Corporation* [2014] NZHC 1394
[3] *MC v Accident Compensation Corporation*

> those people in paid employment. This creates an unfair distinction between working and nonworking individuals, and imposes an unfair burden on employers. For example, only workplace claims for workers witnessing traumatic events that cause mental injury will be covered, while nonworking witnesses to the same accidents will receive nothing.

[27] Despite the seeming inequity, the legislation was passed without amendment.

[28] I have also been referred to the fact that a distinction is drawn between employees and volunteers in employment law in New Zealand. In particular s 6 of the Employment Relations Act 2000 defines any person as "any person of any age employed by an employer to do any work for hire or reward under a contract of service". A volunteer is therefore not an employee. Mr Kinser points to two exceptions to the general rule, the first under the Health and Safety at Work Act 2015 and the second under the Human Rights Act 1993. The latter Act contains an expanded definition of "employment" that includes volunteers.

[29] Mr Kinsler therefore submits that in order to fall within the ambit of s 28(1), the appellant had to be at the PGC building for the purposes of his employment. To meet the definition of employment, the appellant needed to have been engaged in or carrying out work for the purpose of pecuniary gain or profit. There is no suggestion on the facts that the appellant received any monetary payment that could amount to pecuniary gain or profit, or that his presence at the site was otherwise for that purpose. The fact that he was a self-employed builder does not alter the situation because he was not present at the PGC building under a contract of work or on the basis he would be provided with, or seeking, even indirectly, a pecuniary gain or profit.

[30] Mr Kinsler acknowledges Mr Toomey's heroic actions but submits that his situation is not covered and the appeal must be dismissed.

Discussion and decision

[31] This was no ordinary emergency. It was a major emergency on a national scale involving very significant loss of life and damage in one of our major cities. There is no doubt that as a result of Mr Toomey's meritorious actions he has been left

with PTSD. The facts are not in dispute. The Corporation and the Reviewer are of the view that he was acting as a volunteer and not as part of his employment and therefore it was not a work-related accident. On review it was held further that Mr Toomey was not engaged in work for pecuniary gain and neither was he at a place of employment, while at the PGC site.

[32] I have already set out the relevant statutory provisions and certain references from decided cases. I approach this decision, which is one of statutory interpretation, upon non-disputed facts, on a "generous unniggardly interpretation" per Kos J in *Murray* and "consistent with the overall statutory purpose" which "should not be read down except by language of the clearest kind". But I do not overlook Collins J's cautionary note in *Revitt* that:

> Before a generous and unniggardly approach can be taken, the legislation must be capable of being interpreted in the way suggested [by the appellant].

[33] The Corporation and the Reviewer seem not to have considered that when Mr Toomey was requested to assist the Fire Service because of his specialist building knowledge he in reality became an agent of the Fire Service or, put another way, he was co-opted. It is true that he was not recompensed by the Fire Service but nevertheless he was there at their direction and not in the normal sense of a volunteer. Whether or not he fits precisely within the category of an agent, he was certainly under the direction of the Fire Service.

[34] Bearing in mind the factual situation, I agree with Ms Newman that the phrase "purposes of employment" in s 28 should not be read down to prevent cover and should be given a fair interpretation consistent with the overall statutory purpose of the ACC legislation.

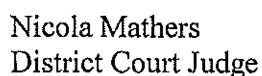
[35] Mr Toomey offered his services as a specialist builder based upon his shareholder/employee employment. He paid his employee who assisted him. In my view, a person in Mr Toomey's position does not have to charge for his time, in every situation, for "purposes of employment" to be maintained. Particularly when presumably he is receiving drawings as a shareholder/employee on a weekly or fortnightly basis.

[36] The legislation in the Select Committee report acknowledges some anomalies and in particular that "non-working witnesses to the same accident will receive nothing". I do not consider this was meant to exclude a person in Mr Toomey's situation. He was "working" as a builder as co-opted, and not a mere "non-working" volunteer to an accident.

[37] Mr Toomey was, in my view, at a "place" for "the purposes" of his employment as a builder. While "employment" in s 6 refers to pecuniary gain, Mr Toomey, as an employee of his company, could be expected to receive a pecuniary gain from his company and/or receive a pecuniary gain from the Fire Service. It is rather artificial for a shareholder/employee to be characterised as not receiving a pecuniary gain, even though not necessarily charging for every hour of his time, or while receiving drawings not necessarily based on a particular "place" of work or job. He was at a "place" carrying out work as a builder. In modern business jargon a branding exercise for example can bring pecuniary gain without physical building work taking place.

[38] Relying therefore upon the Court of Appeal and giving a generous unniggardly interpretation to the legislation, I consider the appeal should be allowed as the legislation, in my view, is capable of supporting the interpretation I found in the circumstances of this case. Through the ages certain emergency or wartime situations have led to interpretations which are fair and consistent with the overall legislative intent, taking into account specific circumstances or emergencies. I do not consider there was ever an intent in the legislation to deprive Mr Toomey of cover in this very fact-specific situation. Also there should not be a disincentive for someone like Mr Toomey not to cooperate with the fire service or perhaps the police when so requested.

[39] The appeal is therefore allowed. Mr Toomey is entitled to costs and disbursements, which I hope counsel will be able to resolve between them. If not, then I will receive memoranda.



Nicola Mathers
District Court Judge