

[2018] NZSSAA 11

Reference No. SSAA 101/17

**IN THE MATTER** of the Social Security Act 1964

**AND**

**IN THE MATTER** of an appeal by **XXXX** of **XXXX**  
against a decision of a Benefits  
Review Committee

## **BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

**S Pezaro** - Deputy Chair

**C Joe** - Member

## **DECISION ON JURISDICTION**

### **Background**

[1] On 16 August 2017 **XXXX** (the appellant) filed a notice of appeal. He gave his address for service as that of counsel, Mr Tupara, who has filed all subsequent documents. The appellant said his appeal was against the decision of the Benefits Review Committee (BRC) dated 16 May 2017. He said he appeals on the grounds that:

- a. WINZ and the Benefit Review Committee took into account irrelevant information, that is a Maori land matter which I am party to, and in respect of which I have taken the necessary steps to protect my interests and that of my whanau.
- b. The process I was subjected to before the Review Committee was biased against me, and procedurally unfair, even though my lawyer was present, hence our early withdrawal. Perhaps highlighted by the written decision itself not having been signed by all Committee members.
- c. The actions of WINZ and the Committee are in breach of my rights as a descendant of signatories to He Whakaputanga and Te Tiriti o Waitangi. That is the Crown, through the actions of WINZ and the Committee, has exceeded its kawanatanga obligations and deliberately interfered with my

rights as a member of a sovereign people. That is, my tipuna who signed Te Tiriti did not cede sovereignty to the Crown.

- [2] Pursuant to s 12N of the Social Security Act 1964 (the Act) an appeal to the Authority proceeds by way of a rehearing. Section 10A of the Act restricts the decisions which can be appealed to the Authority to decisions that either have been confirmed or varied by a BRC or made by the Chief Executive other than pursuant to a delegation.
- [3] In the appellant's case, the only decision that the Authority can consider on appeal is the decision which was reviewed and confirmed by the BRC. We are not reviewing the process adopted by the BRC in reaching its decision. The issues raised by the appellant in his notice of appeal may be amenable to review by the High Court but the Authority has no jurisdiction to determine them on appeal.
- [4] The relevant decision of the Chief Executive, made on 21 April 2016, was to treat money deposited into the XXXX Trust as under the appellant's control and therefore income for benefit purposes and to establish an overpayment of \$19,928.90. This is the decision that the BRC upheld. If this decision had not been reversed by the Ministry, it would be the subject of this appeal.
- [5] However, after the appeal was filed, the Ministry reviewed its decision and disestablished the debt. The appellant was notified of this decision by letter dated 12 October 2017. On 27 October 2017 Mr Tupara filed a memorandum seeking costs and compensation (the costs application). The Ministry then filed a memorandum submitting that the Authority has no jurisdiction to award costs when no appeal has been heard.
- [6] We must determine whether the Authority has jurisdiction to award costs in these circumstances. As this preliminary question is appropriately determined on the papers, I set a timetable for the appellant to file submissions on jurisdiction. In accordance with that timetable, Mr Tupara filed a memorandum on 2 February 2018.

#### **Relevant law**

- [7] Section 12O of the Social Security Act 1964 provides that when an appeal is allowed, either in whole or part, the Authority may allow the appellant the costs of bringing the appeal or any part thereof.

**The case for the appellant**

- [8] Although the appellant did not make submissions on jurisdiction until directed to do so, I have considered all documents filed on his behalf. In the costs application, Mr Tupara included a section entitled *'The appellant's concerns'*. The 'concerns' are 12 paragraphs written in the first person, as if by the appellant. They relate to the process of the Ministry's investigation, the way that the Ministry treated the appellant's former wife and daughter, and the failure of the Ministry to observe customary law and protocol.
- [9] The 'concerns' conclude with statements that the appellant will not ever agree to the review process; wants full disclosure of the Ministry's investigation and outcome, and wants 'MSD and all other Government agencies to acknowledge and accept my "Treaty of Waitangi Contemporary Claim Filed"'.
- [10] Following these concerns, is a section headed *'The harm suffered'*. Mr Tupara states that:
6. Through the actions of the Ministry the appellant and his whanau have been demeaned, belittled and oppressed causing the appellant to suffer from significant harm. That is causing sickness suffered by the appellant.
  7. Knowing about the sickness being suffered by the appellant, the Ministry increased the pressure on the appellant, further demeaning, belittling and oppressing the appellant.
  8. In doing so, the actions of the Ministry have been vindictive and subjugating towards the appellant.
- [11] No evidential basis is provided for the assertions that the Ministry has either harmed the appellant or failed to address Treaty issues. It appears that Mr Tupara is attempting to adduce evidence which as counsel he may not do.
- [12] Mr Tupara states that given the harm suffered, the appellant does not intend to withdraw his appeal and seeks a hearing on costs and compensation. Mr Tupara then states that on a 'without prejudice' basis the appellant is prepared to settle with the Ministry.

- [13] In reply to the Ministry's opposition and in response to the direction to address jurisdiction and quantify the claim, Mr Tupara quantified costs as \$5,000 plus GST legal costs incurred in defending the application for review and prosecuting the appeal, compensation of \$20,000 for the harm suffered by the appellant and his whanau, and remission of the appellant's current debt balance of \$6,095.66. There is no schedule showing how these sums are calculated and no proof of costs incurred.
- [14] Mr Tupara attached a copy of the appellant's claim in the Waitangi Tribunal, XXXX, and a copy of directions issued by the Waitangi Tribunal on 5 December 2017. The directions describe the claim as concerning the failure of the Crown to provide for the health care of Maori in respect of depression and mental illness.
- [15] Mr Tupara submits that s 12O(1) of the Act allows the Authority to refer the whole or any part of a matter under appeal back to the Chief Executive and award the costs of bringing the appeal to the appellant. Mr Tupara suggests that the Authority can refer Treaty issues back to the Ministry and award the costs claimed by the appellant. Mr Tupara states that "there are clearly Te Tiriti claim issues which the MSD needs to address but has failed to do so".

#### **The case for the Ministry**

- [16] For the Ministry, Mr Malaviya submits that as the overpayment was disestablished before the appeal was heard, it cannot be said that the appeal was 'allowed in whole or part' which is the prerequisite for the appellant to be entitled to costs under s 12O of the Act. It is submitted that there is no jurisdiction to award compensation for harm or any costs other than those arising from an appeal.
- [17] The Ministry says it acted in good faith pursuing the debt until it was disestablished. It disestablished the debt because it could not attribute all the money received by the XXXX Trust to the appellant. Criminal charges have now been brought against the appellant in relation to his management of the XXXX Trust and, according to the Ministry, these charges are related to the issues raised in this appeal. The Ministry says it would have disestablished the debt to ensure that there was no prejudice to the criminal proceedings, had it not done so already.

**Discussion**

- [18] Section 12O(1) provides that costs can be awarded to an appellant whether an appeal is allowed in whole or in part, or whether the Authority refers the matter back to the Chief Executive. The clear intention of this provision is that where an appeal has merit, the appellant is entitled to costs. A strict interpretation of this provision, requiring the appeal to be fully argued, is inconsistent with the purpose of a costs award in this legislation which must be to ensure that there is no cost barrier to meritorious challenges to benefit decisions.
- [19] The Authority has awarded costs when an appeal that has been prosecuted up until the date of hearing has been resolved without being fully heard.<sup>1</sup> However this is not an appeal that has been heard in part; the Ministry overturned the decision to establish an overpayment before any hearing was scheduled and before it had filed a report under s 12K of the Act. As the Authority has no jurisdiction to award costs other than pursuant to s 12O, this application for costs has no merit. Further, as the appeal was not heard or considered by the Authority to any extent, there is no basis for the appellant's submission that we should refer any issue raised by him back to the Chief Executive.
- [20] Even if there was a general costs provision, the only step taken by the appellant since the BRC issued its determination was filing the notice of appeal. As recorded, the appellant filed this notice on his own behalf; it was not filed by counsel or a representative. Even if counsel was engaged at this stage, as the Ministry did not file any report or submissions before it overturned its decision no costs were incurred by the appellant since the appeal was filed.
- [21] Furthermore, costs are discretionary. The appellant has largely failed to address the material issues in the appeal, and pursued a range of issues that are not within the jurisdiction of the Authority. If we had jurisdiction to award costs, we would not do so as the appellant has incurred costs on the part of the Ministry and the Authority in relation to irrelevant matters. Those costs significantly outweigh the appellant's costs of addressing relevant issues.

*Can the Authority award the costs of the Benefits Review Committee hearing?*

- [22] The appellant sought the cost of legal representation at the BRC hearing. The clear meaning of s 12O(1) of the Act is that the Authority has jurisdiction to

---

<sup>1</sup> *J v Chief Executive of the Ministry of Social Development* [2018] NZSSAA 008.

award the costs of bringing an appeal. There is nothing in this provision to indicate that such costs include the prior review by a Benefits Review Committee.

[23] The right of appeal is restricted to the circumstances prescribed in s 12J of the Act which are that a decision must either have been confirmed or varied by a Benefits Review Committee under s 10A, or have been made by the Chief Executive other than pursuant to a delegation.

[24] Because an appeal is unable to be brought, in circumstances where a Benefits Review Committee is relevant, unless a Benefits Review Committee has confirmed or varied the decision of the Chief Executive which is intended to be appealed, the costs associated with preparing or attending a Benefits Review Committee review arise before there is a right to appeal. As a result, those costs are not costs which have resulted from bringing the appeal.

[25] There are strong policy reasons against costs being awarded in relation to the Benefits Review Committee process. The review at this level is intended to be relatively efficient and not onerously costly on either party. It is intended as an administrative step, although with quasi-judicial elements, rather than a judicial forum which normally gives rise to costs.

[26] For these reasons, we are satisfied that the costs provision in s12O is not intended to include the cost of a review by a Benefit Review Committee. Accordingly, we conclude that the Authority has no power to award any costs in relation to either preparing for or attending a review by a Benefits Review Committee.

*Deductions made from the appellant's benefit*

[27] In reply, the appellant amended what he previously described as deductions from his benefit to an application for remission of his current debt balance of \$6,095.66.

[28] As this issue was not subject of the Benefit Review Committee determination which is under appeal in these proceedings, the Authority has no jurisdiction to consider this application.

[29] For these reasons, the Authority has no jurisdiction to determine this application.

**Order**

[30] The application for costs and compensation is struck out for want of jurisdiction.

**Dated at Wellington** this 16<sup>th</sup> day of February 2018

**S Pezaro**  
Deputy Chair

**C Joe JP**  
Member