

[2018] NZSSAA 018

Reference No. SSAA 138/16

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

Mr G Pearson - Chairperson

Mr K Williams - Member

Mr C Joe - Member

Heard on the papers

Appearances

The Appellant: XXXX, lawyer, Rotorua District Community law Centre, Rotorua.

The Chief Executive of the Ministry of Social Development: Ms Aniko Katona,
agent.

INTERIM DECISION

The Issues

[1] We are to decide whether the Chief Executive was correct to establish and seek recovery of an overpayment of money the appellant received as a supported living payment (SLP). She received the payments for the period from 5 January 2015 to 22 November 2015 being in total \$11,839.98.

[2] The appellant has made two points: first, she says there was no overpayment; and second, any overpayment should not be recovered. Her grounds are:

[2.1] The Ministry of Social Development (MSD) says she was not entitled to the money paid to her under the SLP scheme because she received income. The SLP is income-tested, and that income affected her entitlement to instalments of SLP. The appellant says any money she received was not income for the purposes of the Social Security Act 1964, so she was entitled to the instalments of SLP.

[2.2] Alternatively, if she was not entitled to some or all of the instalments under the SLP scheme, overpayments were due to errors on the part of MSD and the Ministry of Health (MOH); and she is protected from recovery of the money.

The Facts

No oral hearing

[3] The parties agreed that this matter should be heard on the papers rather than having an oral hearing. Implicit in this agreement is an acknowledgement that the facts were not contentious, in the sense that the parties agreed on what happened. However, it is for the Authority to evaluate the significance of what happened with reference to the legal issues.

[4] For the reasons discussed below, we do not consider this was a case that could be adequately considered on the papers. The appellant says she acted in good faith, and the Ministry says she did not. That is not an issue that should be determined on the papers; however, we do have a clear view that on the papers the Ministry's allegation is not supportable.

What the appellant says

[5] A general description of the circumstances has been provided by the appellant's counsel. The key elements are as follows:

[5.1] The appellant resides in a provincial city and has done so for most of her life. Her brother had been in State care for nearly 40 years.

The appellant and her whānau decided to withdraw their brother from State care because they believed whānau support would be better for his well-being. The appellant's brother requires day-to-day care and monitoring due to his medical condition. The appellant took primary responsibility for her brother's care.

[5.2] The appellant and her whānau sought assistance and direction from MSD and MOH regarding the new arrangements. The appellant had multiple appointments and discussions with MSD and told MSD officials about the new care arrangements.

[5.3] The appellant asked MSD officials if financial assistance was available in the form of social security payments, and told the officials she was also seeking financial assistance through MOH.

[5.4] MSD staff advised the appellant what type of benefit she could apply for, the details to put into the relevant forms, and she completed the forms under the guidance of MSD personnel. The appellant lacked experience with MSD and MOH processes, and relied on the advice she received from personnel from both ministries.

[5.5] The appellant acted in good faith throughout the process of seeking assistance, and spent the money she received in good faith.

[5.6] MSD did not properly inquire into the appellant's circumstances. The appellant told MSD staff she had sought financial assistance for her brother from MOH, but they did not investigate those arrangements. MSD personnel advised the appellant she was entitled to the SLP, notwithstanding the financial support from MOH. They gave that advice at a time when full information was available to them regarding the support the appellant was seeking from MOH.

What MSD says

[6] MSD provided a description which was broadly similar to that of the appellant. However, MSD provided a more technically-focused background which described the circumstances of the case, and drew

inferences of bad faith on the part of the appellant. The key elements of that background were:

- [6.1] The appellant is a 61-year-old widow. From 4 September 2014 to 4 January 2015, she received jobseeker support payments from MSD; and from 5 January 2015 to 22 November 2015, support from the SLP scheme.
- [6.2] On 19 January 2015, the appellant contacted MSD regarding her application for a SLP. She met with a case manager from MSD on 30 March 2015. At this interview, MSD ascertained that the appellant's brother had lived in residential care for 38 years before moving to the appellant's home on 5 January 2015. The appellant signed the usual forms to access SLP, including an acknowledgement that she was obliged to inform MSD of any changes in her circumstances.
- [6.3] MSD confirmed on 30 March 2015 that the appellant would receive support from the SLP scheme, with a commencement date of 5 January 2015. The notification letter said income above \$5,200 (before tax) per annum would affect her main benefit.
- [6.4] On 16 February 2015, the appellant was "added as an agent for her brother". That involved a form completed in the name of her brother with a section where the appellant indicated she had authority to represent him. The general effect of the form was to say that the appellant would deal with MSD on behalf of her brother.
- [6.5] On 22 June 2015, MSD's Centralised Processing Unit received a "Confirming your Circumstances" form from the appellant. The form indicated that the appellant was working in paid employment with Healthcare NZ Community Health. In the section that asked how much gross weekly wages the appellant earned, the appellant put "please refer attached documents". The appellant also referred to a payment document with a number, and referred to a particular person as the coordinator of community health and provided their phone number.

- [6.6] The appellant had not completed questions 13 to 15 of the form regarding her asset details, and MSD returned the form to her with a cover letter dated 23 June 2015. On 11 November 2015, the service centre sent a letter to the appellant to invite her for a follow-up interview.
- [6.7] On 23 November 2015, the appellant attended the interview and provided invoices issued by MOH to her brother for a paid family carer. The MSD official then suspended the appellant's SLP. On 22 December 2015, MSD cancelled the appellant's SLP.
- [6.8] MSD's National Fraud Unit investigated the matter and concluded the appellant was not employed by Healthcare NZ Community Health. However, Healthcare of New Zealand Holdings Limited had made two payments to the appellant. Those payments were for the costs of her brother's motel accommodation while modifications were carried out on the appellant's home. The modifications were to accommodate her brother's special needs. MSD concluded that the appellant was employed by her brother and had received a monthly income of \$5,700 in April 2015, \$1,180 in August 2015 and \$1,180 in September 2015.
- [6.9] MSD's investigators also concluded MOH commenced paying family carer payments from 5 January 2015 to the appellant's brother. The first payment of \$6,924 was made to him on 20 March 2015 as a lump sum backdated to 5 January 2015. After that, payments were made on a fortnightly basis.
- [6.10] MOH says the appellant's brother was receiving fortnightly payments of \$1,384.80 from 5 January 2015 and this amount increased to \$1,432.80 from 30 March 2015 and was still being paid in 2016.
- [6.11] Funded Family Care (FFC) payments are made to people with high or very high needs, to employ family members living with them to provide support for needs arising from their disability. The payments are made every two weeks, paid to the account of the person in need of support, and that person in turn pays the carer for services provided in the course of their employment.

- [6.12] According to the general information available on the MOH website, the receiver of the payment is required to comply with New Zealand employment and tax law and must make and sign an employment agreement with the family carer, who in turn must provide the support agreed on and listed in the individual service plan.
- [6.13] A printed brochure regarding FFC states that the wages paid to the family carer are treated as an income and may affect any benefit the carer receives, but this depends on how much the carer earns.
- [6.14] Both the MOH website and the printed brochure refer to the MSD website, which says that receipt of FFC may disentitle a person to benefits.
- [6.15] MSD investigated the appellant for potential fraud. On 1 March 2016, the appellant attended a meeting with a staff member of MSD's National Fraud Investigation Unit. On 11 April 2016, the appellant enquired about reapplying for a benefit. She said that she received \$1,432 a fortnight to care for her brother but was not sure whether this was considered as a form of income.
- [6.16] On 7 July 2016, MSD established an overpayment of \$11,839.98 of SLP from 5 January 2015 to 22 November 2015.
- [6.17] The issues surrounding the decision went through the review process. MSD noted that the appellant said she first received payment from MOH in April 2015, which was after she completed the relevant forms. The appellant said she did not advise MSD of the payments from MOH as she understood that the FFC payments and the benefit payments came from the same agency.

The Appellant's Grounds for Supporting the Appeal

No income from the appellant's brother

- [7] The appellant's counsel says that the FFC payments are not "income" as defined in s 3 of the Social Security Act 1964 (the Act). She says the relationship between the appellant and her brother is not that of employer/employee. The appellant cares for her brother in a familial

relationship. The appellant took no steps, other than those described, because she did not think she was receiving income from her brother. Further, there is no evidence that the appellant received income from her brother.

- [8] Counsel for the appellant referred to the decision of *Director-General of Social Security v K & M* HC Wellington AP 255/95, 7 February 1997, which held that “due regard to the underlying principles applicable to income per se” must be given for the definition of “income” in s 3 to apply. Counsel also referred to the High Court decision of *Reid v Commissioner of Inland Revenue* (1983) 6 NZTC 61, 624, which observed that the fundamental nature of a payment was important when applying a statutory definition of “income”. On appeal, Richardson J in *Reid v Commissioner of Inland Revenue* [1986] 1 NZLR 129 (CA) reiterated the importance of the true character of income in relation to ordinary concepts, set against the relevant statutory background.
- [9] Counsel noted that the amount and regularity of the transactions between the bank accounts of the appellant and her brother were not consistent, regular payments for employment. She said that the money was transferred for the purpose of paying essential costs arising for the appellant’s brother’s health and living expenses.
- [10] Counsel submitted that exclusions from the definition of “income” in s 3 of the Act are analogous to the appellant’s circumstances. She referred to subparagraph (f)(xv)(B) of the definition. The effect of that provision is to exclude payments of income-related insurance claims for:
- ... any essential costs arising as a consequence of the applicant’s health or disability (being costs arising from the contingency in respect of which the payment was made) to the extent that assistance towards those costs is not available under this Act or any other Act.
- [11] Counsel described the exclusion as being analogous to the present case in that payments for the appellant’s brother’s health and disability were similar to an insurance payment.

- [12] Counsel also drew attention to the following statement in the Section 12K Report:

... The appellant was never employed by Healthcare New Zealand ...

The Ministry of Health ("MOH") advised that MOH commenced Paid Family Carer payments (or Funded Family Care (FFC)) from 5 January 2015 to the appellant's brother ...

MOH confirmed that [the appellant's brother] was receiving fortnightly payment in the amount of \$1,384.80 ...

- [13] The submissions for the appellant go on to say that MSD contends that the appellant's brother is employed by Healthcare NZ, not the appellant. The appellant's counsel also says the Authority cannot determine employment status as it does not have the power to "make a decision in accordance with employment law."

- [14] Counsel then contends that the financial transactions between the appellant and her brother are reimbursements of the cost of care; they do not evidence a relationship of employment and are not income accruing to the appellant.

If there is a debt, it is not recoverable

- [15] If there was income accruing to the appellant disentitling her to SLP, then the submissions say there should be no recovery. The basis for that submission is that MSD had a statutory duty to provide correct advice to the appellant. The appellant relies on s 12(1) of the Act which requires the Chief Executive to investigate claims for benefits, and s 11D(2) which relates to processing applications for benefits.
- [16] Counsel says that the appellant clearly communicated her situation to MSD officials, sought guidance and assistance from MSD and was provided with that assistance by MSD officials. The officials advised the appellant on what should be contained or written in the application forms. Having relied on this advice, she received payments and then spent the funds in good faith.

[17] The legal underpinning for the claim of no recoverability is s 86(9A) of the Act. Under that section, debts resulting from errors to which the debtor did not intentionally contribute may not be recovered if the debtor:

[17.1] received the benefit payment in good faith; and

[17.2] changed their position in the belief they were entitled to the payment; and

[17.3] it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

[18] Section 86(9B) makes it clear that the error must be an error on the part of "an officer of the department"; and not simply the act of making a payment to which the recipient is not entitled.

[19] Counsel submitted that in the present case the appellant was fully compliant with MSD requirements and relied on the advice provided by MSD.

MSD's grounds for opposing the appeal

Whether the appellant received income

[20] MSD refers to Part 4A of the New Zealand Public Health and Disability Act 2000 and says:

[20.1] That Act generally makes families responsible for the well-being of their members.

[20.2] MOH is responsible for policy implementing that Act.

[21] MSD says that the FFC the appellant's brother received was paid under operational policy determined by MOH. This policy regulated how persons with disabilities would be supported by parents and resident family members under the scheme, and applied to the appellant and her brother. MSD produced an introductory pack sent to persons to apply for support under the FFC scheme, and a copy of the Funded Family Care Notice 2013.

[22] MOH policy is that a host provider under the operational policy schedules a face-to-face meeting between a facilitator, the person with a disability, their advocate, and the family carer. In this meeting, the host facilitator explains the terms of the operational policy and completes an individual service plan. There was such a meeting with the appellant and her brother, and a “Funded Family Care: Individual Service Plan” resulted. It is sufficient to note that:

[22.1] The plan identifies that the appellant’s brother faces considerable difficulties.

[22.2] In relation to “employment services”, the document refers to contacting “SmartPayroll” directly for assistance with setting up casual employee/s, and refers to employment contracts and employment relations information available from the Department of Labour’s website (now the Ministry of Business, Innovation and Employment).

[23] The role of the family is identified. One of the provisions in the plan states:

For the purposes of processing wages for the family carer do you consent to a copy of your client’s support plan summary being provided to the ASB? Doing so eliminates the requirement for photographic ID for the disabled person.

[24] MSD says that the individual service plan accepted the terms of the Funded Family Carer Notice 2013; a legal document issued under s 88 of the New Zealand Health and Disability Act 2000, and acknowledged that adequate information about the FFC had been provided.

[25] The submissions for MSD go on to claim that it was made clear to the appellant that her brother was required to employ and pay her, comply with all laws as an employer and ensure that payments relating to employment obligations were used only for that purpose. That information appears in a *New Zealand Gazette* notice “The Funded Family Care Notice 2013”, and not in the plan itself.

[26] MSD contends that when the appellant’s brother accepted his first FFC payment, he and the appellant, as his agent, accepted the conditions of

the funding. The appellant's brother was therefore subject to the following obligations in cl 20 of the *Gazette* notice:

[26.1] To employ the family carer;

[26.2] pay the family carer;

[26.3] comply with all laws as an employer;

[26.4] [ensure] that any payments relating to employment obligations are made; and

[26.5] [use] the funding only for the purpose of paying the family carer.

[27] MSD concludes that when the appellant and her brother accepted the payment, the payments were for employment purposes and that defines the nature of the payments.

Any debt was recoverable

[28] MSD contends that its officials correctly and properly advised the appellant, and investigated and administered her entitlements. The essential elements are:

[28.1] The appellant informed MSD that her brother was in her care. The correct benefit was SLP. It is payable when a person is not able to work due to caring for a person who requires full-time care and attention (there are other grounds on which it can be paid that are not presently relevant).

[28.2] The SLP application referred to the appellant having past employment.

[28.3] The Benefits Review Committee report records that the SLP application form indicated that the appellant did not expect to receive any income in the next 52 weeks. The Committee questioned that answer, and the appellant said that at that time she was not getting any payments for caring for her brother. She told the MSD official assisting her with completing the form that she was getting a benefit for her brother. She also told the

Committee that she understood the SLP and FFC payments were from the same agency and did not understand that the two payments were incompatible.

[28.4] The MSD service centre correctly paid SLP, as it did not have full information. This was the appellant's fault as she "was confused in relation to the nature of the FFC payment"; it was her responsibility to understand its nature and declare it.

[29] MSD says:

[29.1] The appellant received regular payments to her bank accounts, and the funds were sourced from MOH and MSD.

[29.2] The appellant understood the FFC payments were income, after deduction of tax and other employment-related costs. She knew the payments affected her benefit entitlement, but chose not to respond to MSD's requests for information and did not disclose the payments she received. She did not act in good faith. This was evidenced by the fact that:

[29.2.1] The appellant declared income to the Inland Revenue Department (IRD) for April, August and September 2015, identifying her brother as her employer. The document relied on as evidence is a data matching report run by MSD's Internal Fraud Unit which identifies the appellant's brother as an employer and appears to suggest \$5,700 was paid for April, and \$1,180 for the other two months. The material does not identify the source of the information, but MSD asserts it is evidence that the appellant declared income to IRD.

[29.2.2] From 20 August 2015, the appellant received regular payments to her bank account referenced "MOH Caregiver payment".

[30] In short, MSD says that the appellant dishonestly took money from it and MOH, knowing that the latter (the FFC payments) was income; the

appellant reported the FFC payments to IRD, but did not report those payments to MSD. Accordingly, she is responsible for repaying the proceeds of her dishonesty.

The Appellant's Reply to MSD

[31] The appellant provided a final right of reply. Aside from reiterating points made earlier, her position was:

[31.1] MSD's position is not consistent with her having sought assistance, and disclosing she was seeking assistance from both MSD and MOH to care for her brother.

[31.2] The appellant's actions were consistent with the advice from MSD officials. MSD were the experts, not the appellant. MSD had the information required to understand the appellant's situation and failed to make inquiries (until alleging fraud).

[31.3] The appellant acted in good faith and reasonably; the overpayment, if there was an overpayment, was the result of official error. The appellant did what she could in the circumstances.

[31.4] This Authority has no jurisdiction to:

[31.4.1] determine whether there was an employment relationship between the appellant and her brother; or

[31.4.2] determine or discuss the obligations under the New Zealand Public Health and Disability Act 2000, or the FFC.

[31.5] MOH could not impose obligations on the appellant's brother due to his lack of capacity.

[31.6] The appellant would only receive income if there was a clear employer and employee relationship (which the Authority could not determine). She would have received regular income and time and wage records if this was the case.

[31.7] Any income was exempt under the definition of “income” in s 3 of the Act. The exemptions in subparagraphs (f)(iva) (relating to assistance provided under the Act) and (f)(xii) (insurance payment) of the definition were relevant. She says any money received was not within the definition of “income” in the section, regardless of the exemptions.

[31.8] As an alternative to the submission that the debt could not be recovered, it was only recoverable only for the months of August to November 2015, when the appellant did receive regular payments from her brother’s bank account.

Discussion

Overview

[32] Hearing this matter on the papers has not been satisfactory. At the core of the position taken by MSD is an allegation of dishonesty, and the appellant denies that is the case.

[33] We also find some of the positions taken are unrealistic as an evaluation of the documentary material produced; and there are also unrealistic contentions regarding legal issues that further compound the difficulty of determining this appeal.

[34] In *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541 the Court emphasised that the Chief Executive and this Authority have a duty to facilitate the just resolution of appeals.¹

[35] Given the way in which the parties have approached the matter, we will reach our conclusions relying on the written material before us. However, this leads us to identify that the issues have not been properly investigated and we have been asked to reach conclusions without the most pertinent information available to us. If necessary, we must make a decision on what information we have. Given this is a case where a clear and reliable answer is available, we will seek to achieve that objective.

¹ *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541 at [13]–[19].

Our role

- [36] This Authority is a “judicial authority for the determination of appeals in accordance with section 12J of the Act” (s 12I of the Act). It must obviously consider and make factual and legal determinations to reach conclusions as to the appellant’s entitlements.
- [37] The appellant contends that the Authority has no jurisdiction to determine whether there was an employment relationship between the appellant and her brother. Accordingly, she says the Authority cannot decide whether she received wages from her brother. However, if, and to the extent, the disputed receipts in the appellant’s hands were employment remuneration, it was obviously “income” under s 3. That is the Chief Executive’s position. Counsel for the appellant did not explain whether she contends that the Authority cannot decide the Chief Executive was wrong, or whether it should ignore the fact receipts were employment income if that was in fact the case. Regardless, the proposition that this Authority cannot determine whether receipts were from employment is wrong.
- [38] This Authority must determine whether the disputed funds were income in the hands of appellant, and one potential factor is whether or not the appellant received employment remuneration. Section 161 of the Employment Relations Act 2000 provides that the Employment Relations Authority has exclusive jurisdiction to make determinations about employment relationship problems. It does not prevent other bodies from deciding whether there is an employment relationship for other purposes, such as the Taxation Review Authority or the High Court making such a decision for taxation purposes; or this Authority making such a decision in relation to the entitlement to benefits under the Act.
- [39] Similarly, this Authority is required to make decisions regarding the effect of the New Zealand Public Health and Disability Act 2000 and the FFC, to the extent that they are relevant to the appellant’s entitlement to SLP.

The statutory exemptions relied on by the appellant do not apply

- [40] As an analogy, the appellant, through her counsel, claimed in her initial submissions that any payments she received came within the exemptions of paragraph (f) of the definition of “income” in s 3 of the Act (the

definition). In the final reply, that submission was elevated by saying that the statutory exemptions applied. We do not agree.

- [41] The exemption in subparagraph (f)(xii) of the definition relates to a “debt insurance payment or any health or disability insurance payment”. On any view, that is not relevant in this case. The appellant’s brother was the initial recipient of the disputed funds, and they were not insurance payments. There is no basis to suggest that if the payments passed from her brother to the appellant, they were insurance receipts in her hands.
- [42] The exemption in subparagraph (f)(iva) of the definition relates to benefits or assistance under the Act for a person “with a sickness, injury or disability to obtain or remain in employment”. The appellant was not sick, injured or disabled, and the contentious funds are not funds paid under the Act. The contentious funds are money paid to the appellant’s brother by MOH, and only relevant for present purposes if paid to the appellant. The exemption has no application in this case.
- [43] There may be cases where, as an aid to interpretation, exemptions may give some guidance as to the primary scope of a statutory definition. In the present case, the parties have not identified any relevant element in the exemptions. In this case, whether, and if so, how much income the appellant received, is principally a question of fact. Of course, it is necessary to relate the facts to the definition of “income”..

The facts

- [44] The approaches both MSD and the appellant have taken to the facts have been less rigorous than necessary. In part, MSD has conflated payments from MOH to the appellant’s brother and payments from the brother to the appellant. They are quite different. The factual dispute concerns payments made in these circumstances:
- [44.1] The appellant’s brother received money under the FFC scheme. The material we have examined makes it clear beyond doubt the purpose of FFC funding is to employ one or more persons to care for him.
- [44.2] The appellant received a benefit under the SLP scheme, paid because she was caring for her brother. That benefit was income

tested; so if she was also an employee, to the extent she was paid remuneration, it was income.

- [45] If the appellant's brother received money to pay wages and spent it on something else, in ordinary circumstances that could not be attributed to the appellant. It is necessary to examine the appellant's circumstances to determine whether she received income as defined in s 3 of the Act. Her brother's situation is material background evidence, and we need to consider the extent to which she is her brother's agent, as that too may have a bearing. However, we cannot simply regard the appellant and her brother as one person.²
- [46] The first step is to consider the appellant's brother's circumstances. There seems to be little doubt as to his position. He had been in State care for 38 years. He would have remained there had it not been for whānau intervention. We reject MSD's claim that in this case Part 4A of the New Zealand Public Health and Disability Act 2000 had the effect of mandating the appellant and her whānau "have primary responsibility for the well-being" of their brother. They did not; the State had the responsibility of caring for him, as it had done for 38 years. The appellant and her whānau offered to relieve the State of its responsibilities by providing support services. In that situation, the New Zealand Public Health and Disability Act 2000 allowed the State to pay the whānau under an applicable family care policy (s 70C of the New Zealand Public Health and Disability Act 2000).
- [47] The appellant and her whānau agreed to care for their brother because of their concern for his well-being. MOH evaluated that offer and investigated how support could be provided. That process is documented clearly in the record before us. MSD provided information regarding the FFC scheme generally, and the initial part of the process for the appellant's brother.

² The fallacy of doing so is illustrated by *Commissioner of Inland Revenue v Databank Systems Ltd* [1990] 3 NZLR 385 where a clearing house supplied IT services to banks. The clearing house did not provide financial services (which are exempt for GST purposes). The fact the bank provided financial services to its customers did not affect the nature of the services provided by the clearing house. Each of the relationships: clearing house/bank and bank/customer was a distinct relationship with its own characteristics.

[48] The materials included statements of account showing family carer payments made to the brother on a two-weekly instalment basis, initially being \$1,384.80 and then increasing to \$1,432.80 per instalment.

[49] MSD provided generic website information describing FFC. We have reviewed the original material referred to as well as the extracts provided. This material describes FFC as a scheme providing funding for “disabled people with high or very high needs to employ their parents or other family or whānau members they live with to provide their disability supports.” The material indicates that:

[49.1] The application of the scheme relies on parties contracted by MOH; importantly, the process requires a Needs Assessment and Service Co-ordination organisation (NASC). These organisations are not part of MOH; they are contracted by MOH’s Disability Support Services Unit.³ The NASCs appear to generally be not-for-profit organisations, in some cases operated by District Health Boards.

[49.2] FFC payments can be used to pay whānau members⁴ over 18 years of age who live in the home of the recipient, and are employed on terms consistent with the FFC regime.

[49.3] The NASC is the first point of contact in the administration of entitlements to FFC. After the NASC assesses whether a person is eligible for FFC, a “host facilitator” will explain the details and give the participants a notice. MOH says:⁵

The host facilitator will help you and your family or whānau carers to make an individualised service plan. This plan will specify how your carers will provide personal care and do household management tasks in ways that meet your needs.

³ Ministry of Health “Needs Assessment and Service Coordination services” <www.health.govt.nz/your-health/services-and-support/disability-services/getting-support-disability/needs-assessment-and-service-coordination-services>.

⁴ They may not be the spouse of the recipient.

⁵ Ministry of Health “Funded Family Care — questions and answers” <www.health.govt.nz/your-health/services-and-support/disability-services/types-disability-support/funded-family-care/funded-family-care-questions-and-answers>.

The host facilitator will make sure that the support tasks described in the individualised service plan achieve the aims and goals in the support plan that your NASC made for you. You and your family or whānau carers will then need to sign the individualised service plan. By signing, you and your carers are confirming that you accept the plan and agree with the terms in the Notice.

[49.4] It appears the individual service plan is the document MSD was produced in respect of the appellant's brother, and this was the process referred to above at [22] to [27]. MOH says that the following passage from the standard document applied to the appellant's brother:⁶

What are my responsibilities when I am getting FFC?

When you get FFC, you are an employer. All employers need to obey New Zealand employment and tax laws. Your advocate, a friend or your circle of support may be able to help you to meet these requirements.

The law says you must make and sign an employment agreement with your family or whānau carers. Making an employment agreement can be quite simple — check the Employment agreement builder ... from the Ministry of Business, Innovation and Employment (MBIE).

You must pay an employer ACC levy. You also need to know how much tax and KiwiSaver and ACC contributions your family or whānau carers must pay and you must take off this amount from their wages. Find out more from Inland Revenue.

[49.5] In short, the person who has high or very high needs has the responsibilities of an employer imposed on them when they access FFC, which includes tax compliance, workplace health and safety and compliance with employment law. There is the suggestion that they may have an advocate, friend or person in their circle of support who can help.

[49.6] The plan in the present case, which MSD produced, shows that the appellant's brother has difficulties communicating verbally, and gets his point across using single words, gestures and body

⁶ Ministry of Health "Funded Family Care — Questions and Answers" <www.health.govt.nz/your-health/services-and-support/disability-services/types-disability-support/funded-family-care/funded-family-care-questions-and-answers>.

language which his professional carers would interpret. He was, as it appears in this documentation, in no position to take on any of the responsibilities of an employer. The appellant was not appointed as her brother's agent in respect of FFC, a MOH scheme. She was appointed as her brother's agent in relation to MSD.⁷ There is nothing in the material to suggest MOH could have conscientiously appointed the appellant as an agent, given the skills required to deal with tax compliance, health and safety and employment law. The fact MSD appointed the appellant as her brother's agent for MSD purposes appears to be because he was not able to manage his own affairs.

[49.7] In relation to payment of wages to the appellant, the plan produced by MSD says that the appellant's brother should contact "SmartPayroll directly for assistance with setting up casual employee/s' and for ongoing payroll support". SmartPayroll is an online payroll system based in New Zealand that facilitates making payments to employees and contractors, and reporting PAYE obligations to IRD. It seems likely SmartPayroll would attend to paying wages, and PAYE compliance obligations. MSD produced an information sheet showing that when money is paid to the person with the disability, it then goes to a "Payroll provider", and from there to the family carer. The material before us points to SmartPayroll as being the payroll provider. However, the material does not disclose who inputs data to SmartPayroll or the relevant payroll provider if it was a different service provider.

[49.8] Whether it was SmartPayroll or someone else that attended to making payments and tax compliance, the data match with IRD's records shows there were only three payments of wages to the appellant from her brother. In April 2015, there was a payment of \$5,700, and payments of \$1,180 in both August and September 2015.

[49.9] In contrast, the appellant's bank records show the following payments which are potentially identifiable as "salary" from the

⁷ Refer above [6.4].

appellant's brother before the SLP payments were stopped on 23 November 2015:

Date	Amount	Narration
31/03/2015	\$1,602.40	Salary
20/08/2015	\$994.10	Salary
3/09/2015	\$994.10	Salary
17/09/2015	\$900.00	Brother's name
2/10/2015	\$900.00	Brother's name
16/10/2015	\$900.00	Brother's name
29/10/2015	\$900.00	Brother's name
12/11/2015	\$900.00	Brother's name
	\$8,090.60	

[49.10] Those amounts do not correlate with IRD's records, and it is not possible to be certain the \$900 payments were salary. It appears surprising that the first three payments are narrated "salary", and a different narration is used for the later instalments. The overall instalments do not match MSD's evaluation.

[49.11] On investigating deposits of \$1,150 and \$805 that MSD thought were remuneration, inquiries established the payments were not salary, and instead were reimbursements of the costs of the appellant's brother staying in a motel.

[49.12] It is also significant that the payments do not correlate with transactions in the appellant's brother's bank account; or at least the bank records MSD produced to support its case. His bank accounts do show payments to SmartPayroll. It is not conclusive, but the inference must be that he was paying SmartPayroll for services and, at least on the balance of probabilities, that must be related to making payments on his behalf under the FFC scheme. It appears:

[49.12.1] Probable the appellant's brother was assisted by SmartPayroll, and that organisation was responsible for payments that potentially constitute income to the appellant.

[49.12.2] Whether SmartPayroll conformed to the role contemplated in MOH publications can only be a matter of speculation.

[49.12.3] We can only speculate who, if anyone, provided data or instructions to SmartPayroll.

[49.12.4] It is probable, the payments made to the appellant did not come from her brother's bank accounts. Certainly, they did not come from the bank accounts for which we have statements.

[49.12.5] Somebody probably reported PAYE transactions to IRD, and SmartPayroll probably did so. It is unlikely the appellant did so.

[49.12.6] MOH has an obligation to ensure service providers deal properly with FFC payments.

[49.12.7] MSD has failed to produce a record that is either consistent, or shows what wages were paid to the appellant (other than the three receipts narrated as "salary" set out in the table above in [49.9]).

[49.13] Accordingly, we must conclude the bank records for the appellant, assuming MSD has produced the relevant bank statements, do not support the data match information. In April 2015, there were no identifiable payments at all made to the appellant that corresponded in whole or in part with IRD's record of a payment of \$5,700. The same applies to the claimed payments in August and September.

[49.14] The bank records for the appellant's brother do not disclose any transactions identifiable as wages he paid to the appellant.

[50] In a letter dated 30 March 2015, MSD stated that it was aware of the appellant's recent change in circumstances, and the SLP she received from MSD would be affected if she earned over \$5,200 per annum before tax.

- [51] Where, for any reason funds from FFC have not been paid out as wages, then there is a mechanism to repay undisbursed funds to MOH. MOH says:⁸

Clarifying what to do with unused funds

The policy now includes a process on what to do with unused funds. Unused funds can accumulate in the disabled person's account for a variety of reasons: for example, if the family or whānau member who's caring for them opts out of Kiwisaver, the disabled person decides to stop Funded Family Care, or their care is provided as voluntary care. The disabled person (and/or their nominated representative) should contact their NASC if they have unused funds they wish to repay. The NASC should give them a form to complete that has details on how the funds can be repaid.

- [52] MSD indicated to the appellant that it was reviewing her entitlement to SLP on 11 November 2015, by letter. That led to an intimidating interview where MSD took the view it had sufficient information to allege fraud. The interview took place on 1 March 2016, and the appellant unsurprisingly said "I feel as if I've been condemned straightaway".
- [53] MSD alleged fraud and it has gone through the process of:
- [53.1] conducting a fraud investigation;
- [53.2] presenting a case to the Benefits Review Committee; and
- [53.3] arguing this appeal.
- [54] MSD took those actions without gathering the basic, necessary and relevant information (which we discuss below at [70]). It instead took positions that relied on inconsistent records from IRD, the appellant's bank accounts and her brother's bank accounts. MSD failed to look into who made payments to the appellant and on what basis. FFC is a scheme which MOH runs on a professional basis, and it audits its service providers. If proper records were not available, that is a matter of serious public concern. For the reasons identified, it is not possible to contend the

⁸ Ministry of Health "Funded Family Care Operational Policy"
<www.health.govt.nz/publication/funded-family-care-operational-policy>

appellant's brother was personally responsible for his compliance as an employer under the FFC scheme.

What we will conclude based on the material we have

- [55] The only relevance of the FFC payments to the appellant's entitlement to SLP arises from the income she received from that source. The FFC payments were not her income; her income was any salary or wages she received. We would not ignore the potential for salary or wages to be applied on the appellant's direction, or accumulated to her account; however, there is no evidence such complexities arose. At this stage, we are concerned with what she received.
- [56] The appellant was never her brother's agent for FFC purposes. It would appear most inappropriate if she was, as she has no demonstrated expertise in tax compliance, employment law or employer health and safety obligations; she would be in an invidious position as the person responsible for compliance with FFC rules and the employee. Accordingly, we have no evidence that the appellant was in any way responsible for her brother's role as an employer.
- [57] The appellant's brother was in no position to comply with his FFC obligations; MSD was aware he had clearly been in State care for 38 years and had high needs that were incompatible with him taking on the responsibilities of an employer.
- [58] MOH has arrangements so that persons who cannot take on the responsibilities of employers have support. It includes NASCs, host facilitators and payroll providers. The evidence shows that, in this case, persons had those roles with regards to the appellant's brother. MSD has apparently failed to look into what these persons did, beyond obtaining some of the forms and selectively citing parts of them.
- [59] The incongruity of MSD's position is repeated throughout the material. An illustration of the incongruence lies in its report to the Benefits Review Committee, where the MSD report writer said in one paragraph that the FFC payments "are for people with high or very high needs". The level of the appellant's brother's difficulties is such that he has trouble communicating using more than one word. In the following paragraph, the report writer stated that the "[appellant's] brother is required to obey the

NZ Employment and Tax Laws. He is to keep a record of payments made to the [appellant], and there must be a signed employment agreement". The appellant's brother cannot do those things.

- [60] MSD seems unable to locate any signed employment agreement, or record of wages that corresponds to MSD's quantification of an overpayment; but those realities have been ignored. That deficiency in practice seem to have been shared by MSD's fraud investigators who accused the appellant of fraud but did not take the elementary step of identifying that she received the income they say she suppressed. In our view, a lack of inquiry into the essential information led to the difficulties in this case. Even now, we do not have an adequate evidential foundation to make the decision that should have been a matter of routine when the FFC and SLP arrangements were put in place. The FFC and SLP arrangements concerned vulnerable persons who sought assistance.
- [61] It is clear beyond any doubt from the material produced by MOH as to how the FFC scheme works. If it has any relevance to the appellant is because she is an employee, and any wages she receives are income. This is not a case where there is any real question of what "income" is; the question is how much income the appellant received.
- [62] MOH's contractors were obliged to establish a regime where the appellant was paid wages in circumstances that comply with New Zealand law, in the same way as any public or private sector employer. If there has been some systematic non-compliance, then MOH would deal with that. Its material explains that they will audit service providers and enforce standards. There are mechanisms to recover payments if they have not been disbursed for approved purposes.
- [63] Unless there has been systematic non-compliance, there will be PAYE records kept by both IRD and the payroll provider. These will be supported by bank statements. We have seen bank statements and IRD records that do not match; we have not seen any material from the payroll provider.
- [64] We have been left with a very clear impression that MSD's claims that the appellant is responsible for bad faith are as ill-founded as MSD's claim

that her brother should be complying with the complex compliance regimes employers must engage with.

[65] MSD needs to engage with the health system. It is an everyday occurrence that some health needs are provided by the health system, and some needs must be self-funded and impact on the level of social security support required. In the present case, entitlements to benefits are affected by the support provided by the health regime. To determine entitlement, it is necessary for MSD to engage with the MOH and its contractors. We need to address the issue of potential official error on the part of MSD in relation to recovery of any overpayments. The information before us leads us to the following conclusion regarding MSD's engagement with the issues:

[65.1] The appellant and her whānau sought assistance from MSD and MOH; there were multiple appointments and discussions. MSD was fully aware of the FFC, the lack of capacity of the appellant's brother, and that the arrangements would potentially affect the appellant's entitlement to SLP.

[65.2] MSD personnel told the appellant she was entitled to SLP, and the FFC arrangements would have no effect until she earned more than \$5,200 per annum.

[65.3] There is no evidence MSD personnel took any further interest in the matter until sending the appellant a form on 23 June 2015. At that point in time, the appellant's bank accounts showed one payment labelled "salary" on 31 March 2015.

[65.4] The appellant returned the form identifying that she understood she was in paid employment with Healthcare NZ Community Health. That was not correct, but appears to be what she understood. The evidence MSD has produced does not indicate that the appellant received any regular employment income; what income she did receive was below the threshold for affecting SLP. There was, apparently, no employment contract and she disclosed the situation as best she could understand it on the information available.

[65.5] MSD personnel dealing with the issue failed to appreciate that the appellant had difficulties given the fact that her brother was expected to be a compliant employer, and instead investigated her for fraud. They failed to investigate what had happened effectively, apparently omitting to make inquiries of the payroll provider that was part of MOH's process. They also failed to obtain records of what was submitted to IRD and made assumptions from the limited data-match information obtained from IRD. That data-match information was matched with the appellant's brother as an employer, and accordingly was probably PAYE information. The information does not correlate with the appellant's bank transactions. MSD investigators ought to have appreciated that the differing sources of information were inconsistent and did not support the allegations they had made.

[65.6] Even now, when presenting the case to this Authority, MSD personnel have failed to distinguish between payments made to the appellant's brother, what his agents have reported to IRD, and the wages the appellant received.

Disposing of the appeal

[66] If we must decide the appeal based on the evidence before us, our conclusions will be as follows:

Quantum of income

[66.1] The extent of the net income the appellant received between 31 March 2015 and 23 November 2015 when her SLP payments were cancelled was \$8,090, paid in accordance with the table in [49.9] above. We note that this is the most direct evidence of wages paid to the appellant, and there is no evidence wages were paid into any other account or accrued. We note an alternative view; that only the first three payments were salary, as they were narrated as such in the bank account. On the balance of probabilities, we accept that the five payments of \$900 (included in the total of \$8,090) were wages, given the regularity of the payments both as to timing and amount. The amounts are probably net of tax, however MSD has not obtained that information from IRD or MOH's contractors.

Overpayment not recoverable

[66.2] We would conclude that any overpayment of SLP was the result of error on the part of officers of MSD, and that the appellant did not contribute to the errors because:

[66.2.1] The appellant accurately reported her circumstances to MSD.

[66.2.2] It was, or ought to have been obvious, to the MSD officer that the appellant had to negotiate the complexity of wages from FFC and her SLP entitlement. The appellant was unlikely to fully understand the process, and the information provided regarding the effect of receiving gross annual income of \$5,200 was not adequate. There was a need to establish the effect of the periodic receipts of wages (which should have been regular) on the instalments of SLP.

[66.2.3] The payments received into the appellant's bank account reached \$5,390.60 after an instalment paid on 2 October 2015. By that time, the appellant had reported she was receiving income (before 23 June 2015), and no assistance was provided. Instead, MSD officers alleged fraud and failed to ascertain what income the appellant in fact received, and have still not done so.

[66.2.4] We are satisfied that the appellant received the payments in good faith, on the balance of probabilities; she had not received more than the \$5,200 gross payments before reporting to MSD in June 2015, and she did not know what she should do. She then faced allegations of fraud which she found perplexing, as we do. The allegations on the evidence before us were wholly unjustified.

[66.2.5] The payments that placed the appellant over the threshold all occurred after MSD was notified of the

appellant's difficulties. The appellant required assistance to understand the nature of the payments she received, the effect of the periodic payments on SLP, and assistance to ensure MSD could administer her entitlement. FFC and SLP involve a complex interface, and the persons engaged in it will typically be poorly equipped to address such complexities without assistance.

[66.2.6] This was a case where the proper response was for MSD officers to liaise with the appellant and MOH contractors, and ensure that adequate structures were in place to ensure the appellant knew what income she received, and her reporting obligations.

[66.2.7] The evidence points to openness on the part of the appellant and genuine confusion as to what she received as income. We note that MSD officials have to this point themselves failed to provide a reasonable foundation to quantify employment income the appellant received. Accordingly, we conclude that the appellant's confusion was, on the balance of probabilities, both genuine and reasonable in her circumstances. It was MSD officers who have unjustifiably failed to understand the complexities of the appellant's circumstances.

[66.2.8] The evidence also establishes that the appellant has changed her position, believing the payments were sums of money she was entitled to receive. The appellant complied with her obligations to notify MSD as she understood them, and consistently with the information MSD provided. The appellant did not have an understanding as to the nature of moneys she received; the only payments labelled "salary" were the first three instalments, and they amounted to less than the threshold MSD officials identified. The appellant actively sought assistance from MSD and reasonably placed her faith in MOH and MSD to put in place appropriate compliance measures.

Determining the Appeal

- [67] While we have indicated how we will determine the appeal, reaching conclusions on the balance of probabilities on the information before us, it is not an appropriate or adequate outcome. The appellant is entitled to the full support available from MOH and MSD.
- [68] It should be a simple matter to determine what happened regarding the FFC payments and the appellant. The process must have been documented. Potentially, the compliance has been seriously defective. The responsibility for that does not lie with the appellant's brother or the appellant. Her brother was not equipped to deal with compliance with employment and tax obligations; and it was not the appellant's responsibility to do so. MOH's contractors had a responsibility to ensure those matters were in hand.
- [69] Whether there has been a failure to pay the appellant money she should have received, or whether there are other records that provide a different picture to the records we have, can only be a matter of speculation. It appears likely that FFC payments have not been paid to the appellant, and, if so, there is a question of whether matters should be put right by repayments of FFC from the appellant's brother to MOH, and SLP paid to the appellant, or whether there is another answer. That is speculation. We do know money came from MOH, and went into bank accounts; it should not be difficult to find out what did happen.
- [70] We expect MSD to make inquiries and report on the following:
- [70.1] Provide a schedule of payments made by MOH to the appellant's brother.
- [70.2] Provide either an agreed schedule, or a copy of the bank statements for the account into which MOH paid the funds throughout the time payments have been made.
- [70.3] Identify who was responsible for the payment of wages to the appellant, and the bank account into which those payments were made. Then provide either an agreed schedule of the payments or a copy of the bank statements for the account over the time payments have been made.

[70.4] Identify who was responsible for PAYE compliance, and provide a full copy of the PAYE record, including the information submitted to IRD.

[71] Unless there is an agreed position regarding the proper analysis of the wages due to the appellant, witnesses who can address the issues can be called. While this will be a matter for the parties, it appears to us that the only sensible resolution (subject to potential tax issues) is to identify:

[71.1] the FFC payments;

[71.2] what should have happened to the FFC payments;

[71.3] what did happen to the FFC payments; and

[71.4] If the FFC scheme has not been implemented, to then look at a reconstruction to ensure that the proper level of support from MOH and MSD has been provided from the first payment of FFC entitlements to the present time.

[72] Unless there is information we have not received, there is no justification for any inaccuracy in what should have happened and what did happen regarding those matters.

Timetable

[73] We wish to have the issues resolved as soon as practicable.

[74] We request that MSD make inquiries urgently.

[75] We will convene a telephone conference to discuss the resolution of the appeal as soon as practicable.

[76] If MSD does not propose to make such inquiries, it should indicate that is the case as soon as practicable, and the Authority will issue a decision in the terms indicated, based on the information it currently has.

Dated at Wellington this 20th day of April 2018

G Pearson
Chairperson

K Williams
Member

C Joe
Member

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