

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

Ms M Wallace - Chairperson
Mr K Williams - Member

HEARING at WELLINGTON on 19 October 2016

APPEARANCES

Mr T McGurk – for the appellant
Ms E Kirkman – for Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant appeals against a decision of the Chief Executive upheld by a Benefits Review Committee to treat payments from two funds set up by the British Government, to compensate victims of contaminated blood products, as income when assessing the appellant's entitlement to Supported Living Payment.

Background

[2] The appellant suffers from Haemophilia. As a seven-year-old child, while travelling in the United Kingdom with his parents, he received contaminated blood products. This was not discovered until he was 13 years old and back in New

Zealand. As a result of receiving the contaminated blood products, the appellant developed an HIV infection and chronic Hepatitis C. The Hepatitis has in turn led to the appellant developing advanced liver disease. His immune system is compromised.

[3] As a result of the consequences of receiving contaminated blood, the appellant received a lump sum payment from the United States pharmaceutical company whose contaminated product the appellant received.

[4] In addition, the appellant received lump sum payments and continues to receive regular payments from two funds set up by the British Government. The first regular payment is a quarterly payment set at £696 (at the time relevant to this appeal)¹ received from the MacFarlane Trust. This trust was set up in 1988 by the British Government to support people with Haemophilia who were infected with HIV as a result of contaminated blood products.

[5] The second regular payment the appellant receives is from the Skipton Fund. This fund was established on 25 March 2004 by the British Government to make payments to certain people who were infected with Hepatitis C through treatment with contaminated blood or blood products received through the British National Health Service.

[6] At the relevant time the appellant was receiving quarterly payments of £3,643.50 from this fund.

[7] The appellant is married with one dependent child. He has been in receipt of Supported Living Payment (formerly Invalid's Benefit) at various times since 1988.

[8] In 2014, in the course of an annual review in relation to his entitlement to Supported Living Payment, the Chief Executive gave consideration to whether or not payments the appellant receives from the MacFarlane Trust and the Skipton Fund should be treated as income for benefit purposes. He determined that they were income. As a result of the income the appellant received from these funds, in addition to his wife's income from employment, it was assessed that the family had total income of \$71,335.78. As the income cut-out point for Supported Living Payment for a person in the appellant's circumstances was \$40,523, a decision was made to cancel the appellant's entitlement to Supported Living Payment.

¹ Now £702.

[9] The appellant sought a review of decision. The matter was reviewed internally and by a Benefits Review Committee. The Benefits Review Committee upheld the decision of the Chief Executive. The appellant then appealed to the Authority.

[10] The appellant says that he has significant medical and disability-related costs that he must meet himself. This has particularly been the case since he ceased to receive Supported Living Payment because at that point his Community Services Card was also stopped. He notes that his prescription costs can range from \$50 per month to \$100–\$120 per month. He regularly sees specialists and doctors in Wellington and at Wellington Hospital.

[11] The appellant says his family also has extra costs because he is unable to do household maintenance such as cleaning the gutters or painting the house.

[12] Because it is important that he exercises regularly, he has a gym membership. He also has massage sessions which are expensive. These are needed because his joints are progressively deteriorating due to his Haemophilia.

[13] The appellant says that his inability to work and his overall situation results in regular periods of depression for which he requires counselling.

[14] The complications arising from his coinfection have caused him to develop severe Sleep Apnoea. He incurs costs relating to maintaining a machine for this.

[15] The coinfection of both HIV and Hepatitis C also means that his energy levels are greatly affected. He is almost constantly tired and he is unable to engage in many activities.

[16] His wife's career has been compromised by her need to care for the appellant at various times. Since the Supported Living Payment benefit was stopped, the family have had to go without a number of items.

[17] On behalf of the appellant, it is submitted:

- (i) That the payments from the MacFarlane and Skipton Family Trust represent compensation for damage or injury and lack the essential quality of income.
- (ii) Relying on a statement of Richardson J in *Reid v Commissioner of Inland Revenue*,² the appellant emphasises that it is not enough to regard a payment as income purely on the basis of the statutory definition if the

² [1986] 1 NZLR 129.

payment is not in the basic nature of income. He submits that in this case the payments were not made for income-related purposes as envisaged by the definition at s 3 of the Social Security Act 1964. It is also important to have regard to:

- (a) the purpose of the payment;
 - (b) the relationship between the payer and the payee; and
 - (c) what is required of the payee for the payment to be made.
- (iii) The MacFarlane Trust payments are discretionary and dependent on the funds the Trust has available. The payments received are a method of allocating limited resources.
 - (iv) The Skipton Fund payments are made in accordance with the severity of the damage suffered by the person concerned. They are not made for income-related purposes because they are not a form of compensation for loss of income.
 - (v) Section 3 of the Social Security Act lists certain types of payments which are income and others which are not. The payments which are included are generally employment-related and the payments which are not are generally compensation-related.

[18] On behalf of the Chief Executive, it is submitted that the term “compensation” does not have any magic quality in relation to the s 3 definition. The definition provides that any money received, excluding capital, will be income. The payments are not capital, but in any event, they are made and used for income-related purposes.

Legislation Relevant to this Appeal

[19] Section 3 of the Social Security Act 1964 defines “income” in the following way:

income, in relation to any person,—

- (a) means any money received or the value in money’s worth of any interest acquired, before income tax, by the person which is not capital (except as hereinafter set out); and
- (b) includes, whether capital or not and as calculated before the deduction (where applicable) of income tax, any periodical payments made, and the value of any credits or services provided periodically, from any source for income-related purposes and used by the person for income-related purposes; and
.....

Decision

[20] In the first instance, the paragraph (a) definition of “income” in s 3 of the Social Security Act 1964 provides that any money received before income tax will constitute income for the purposes of the Act. The only exception in (a) is capital.

[21] Paragraph (b) of the definition expands on the definition in paragraph (a) to include capital where the payments are paid periodically for an income-related purpose and are used for income-related purposes. It also provides clarification that any other payment, which may not be capital and which is paid periodically for income-related purposes and used for income-related purposes, will amount to income.

[22] Paragraph (b) does not place a limit on the definition contained in paragraph (a), with the effect that any money which is not capital must be received and paid for income-related purposes. For example, it is not necessary to prove that interest or dividends from investments are made for income-related purposes.

[23] The remaining paragraphs of the definition list a number of specific inclusions down to subparagraph (f) and a number of specific exclusions from paragraph (f) onwards. Payments of the type received from the MacFarlane Trust and Skipton Fund are not included in the exceptions.

[24] In addition to the specific exemptions referred to in the Act, the Social Security (Income and Cash Assets Exemptions) Regulations 2011 specifies certain further exemptions.

[25] The Regulations provide an exemption for any *ex gratia* payment made to a person who suffered a personal injury caused by Hepatitis C infection contracted through the New Zealand blood supply. The exemption extends to any income derived from the *ex gratia* payment. There is no similar exemption for persons who received contaminated blood products overseas.

[26] It is widely acknowledged that the definition of income contained in the Social Security Act 1964 differs from that contained in the income tax legislation. As Chisholm J noted in *Carswell v Director General of Social Welfare* HC Christchurch AP 132/98, 14 December 1999:

“The different definitions reflect that payment of benefits and the collection of taxation are at opposite ends of the spectrum. ...

The s.3 definition is based on '*money received*' or the value in moneys worth of '*any interest acquired*' ...”

[27] The definition was described by the Blanchard J in *Bramwell v Director-General of Social Welfare* [2001] NZAR 890 (CA) at 893–894 per as “particularly wide”.

[28] It is also relevant to bear in mind the purpose of the social security legislation in considering this wide definition.

[29] In *Director-General of Social Welfare v W* [1997] 2 NZLR 104 of 107–108, McGechan J noted:

"The object of the social welfare legislation is to provide a publicly funded safety net where such is needed. It is a secondary safeguard. ... It is policy to provide benefits where there is need; but it likewise is policy to expect claimants to call upon their own resources, and the resources of those properly obliged to them, before calling on the state."

[30] The sentiment expressed in this decision has since been incorporated into s 1A of the Act which sets out the purpose of the Act.

Compensation payments

[31] It is the primary position of Mr McGurk on behalf of the appellant that the payments received from the Skipton Fund and the MacFarlane Trust represent compensation and therefore do not have the essential quality of income. He says that compensation does not add to a person’s resources as its purpose is to restore, make amends and repair. Compensation is contingent on damage and significant loss of quality of life. He finds support for this position in an analysis of the paragraphs of the definition of “income” which specify matters to be included and excluded in the definition. In fact, there is only one exception in the s 3 definition which expressly relates to compensation, namely the Independence Allowance paid under s 54 of the Accident Compensation legislation.

[32] In his analysis, however, Mr McGurk has overlooked the provisions of s 71 and s 71A of the Act.

[33] Section 71 provides for the Chief Executive to take into account the recovery of compensation or damages, which include any *ex gratia* payment, in granting a benefit. He may refuse to grant a benefit or grant it at a reduced rate for the period of the disability, where the applicant receives such a payment.

[34] Section 71A provides for how weekly compensation payments are to be treated. Prior to 1 July 1999, they were treated as income and continue to be treated as income for those who were receiving weekly compensation at that time. Those

seeking income-tested benefits after 1 July 1999 must have their entitlement to benefits deducted dollar-for-dollar by any weekly compensation received.

[35] These provisions make it clear that for benefit purposes, compensation payments generally, including *ex gratia* payments, are to be regarded as part of the financial resources of the beneficiary and taken into account when assessing entitlement to benefit. This is consistent with the stated purpose of the legislation at s 1A that people should call on the resources available to them to support themselves before seeking assistance under the Act.

[36] Mr McGurk submits that compensation does not add to a person's resources; indeed it is to replace a loss.

[37] He relies on the decision of *Director-General of Social Welfare v K&M*³ for this submission. The particular context of this decision is relevant. The issue involved was whether Student Allowance payments derived from a Student loan constituted income. As the money had to be repaid, the Court found that such payments were not income. There is no suggestion in this case that the payments must be repaid.

[38] We do not accept the argument that compensation does not add to a person's resources, and that this places compensation, or an *ex gratia* payment paid on a periodic basis, outside the definition of income. Rather, such payments add to the resources the person might otherwise have.

[39] We note in passing that none of the information available describes the payments received by the appellant from the United Kingdom as compensation. In a letter dated 2 November 2016 from the MacFarlane Trust, the writer confirms that the payments from that source have never been classified by the British Government as "compensation".

Definition of capital

[40] When determining whether or not a payment meets the definition of income under the Act, the first step is to determine whether or not the payments received constitute capital.

[41] The online Oxford English Dictionary defines 'capital' as:

"Wealth in the form of money or other assets owned by a person or organisation or available for a purpose such as starting a company or investing in property."

³ HC Wellington AP 255/95, 7 February 1997.

[42] *Butterworths New Zealand Law Dictionary* (7th edition, Lexis Nexis, Wellington 2011) defines capital as:

Cash or goods used to generate income either by investing in a business or a different income property.

[43] A general theme of these definitions is that capital is accumulated wealth that can be used to produce income.

[44] In *Eisner v Macomber* 252 US 189 (1920), 206–207, Pitney J of the United States Supreme Court defined the relationship between capital and income as follows:

"The fundamental relation of 'capital' to 'income' has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter or the outlet stream, to be measured by its flow during a period of time ...

Here we have the essential matter: *not* a gain *accruing* to capital; not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in*, being "*derived*" -- that is *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal -- *that* is income derived from property. Nothing else answers the description."

[45] In *Brookers New Zealand Taxation 2005*, paragraph 2.2 defines capital as follows:

"An item of wealth or an asset capable of producing wealth. Buildings, land, plant and machinery, investments and intellectual property are all capital and the rent, interest, royalties, dividends and other payments derived from them are income. When a capital item is sold or realised it is a capital receipt and it is not income."

[46] The widely accepted test for determining whether a payment is income was outlined in *Reid v Commissioner of Inland Revenue* (1983) 6 NZTC 61624 as follows:

- income is something which comes in;
- it has periodicity, recurrence or regularity; and
- consideration must be given to its quality in the hands of the recipient.

[47] Whether or not a payment is made or used for income-related purposes may well be one of a number of factors which assists in determining whether a payment is capital or income.

The nature of the payments received from the United Kingdom

The MacFarlane Trust

[48] The appellant has received non-discretionary lump sum payments from the MacFarlane Trust as follows:

- £20,000 in 2000 (MacFarlane Special Payment Trust – first payment)
- £23,500 in 2001 (MacFarlane Special Payment Trust – second payment)
- £7,472 in 2010 (MacFarlane Special Payment Trust – Archer payment)

[49] A table provided by the MacFarlane Trust indicates that the appellant has received payments totalling £79,058 from the Trust.

[50] A letter from the trust dated 13 March 2015 records that the appellant currently qualifies to receive discretionary payments from the Trust at a rate of £132 per month and a supplement of £100 per month. From April 2015, he was to receive the sum of £696 per quarter.⁴

[51] In addition to regular payments, the Trust makes grants for accommodation-related matters such as house repairs, health-related grants such as counselling and mobility equipment, and education-related grants (for example, for the cost of vocational training).

[52] A Consolidated Trust Deed for the MacFarlane Trust dated 30 April 2012, records the objects of the charity as being:

“to relieve those persons suffering from haemophilia, who as a result of receiving infected blood products in the United Kingdom and suffering from Acquired Immune Deficiency Syndrome are infected with human immune deficiency virus and are in need of assistance, or the needy spouses, parents, children and other dependents of such persons and the needy spouses, parents, children or other dependents of such persons who have died.”

[53] The MacFarlane Trust website records that:⁵

“This Trust was set up in 1988 by the British Government to support people with Haemophilia who were infected with HIV as a result of contaminated NHS blood products, and their spouses, parents, children and dependents. During the late 1970s and early 1980s more than 1,200 with Haemophilia were affected with HIV through their clotting factor treatment. A large portion of people were also infected with Hepatitis C.

The trust currently receives approximately \$2.2 million each year from the Department of Health. The majority of this funding is spent on discretionary regular payments to those who were infected (primary beneficiaries) and to bereaved spouses/partners. There is also a small annual grants budget and MFT is also able to refer beneficiaries for specialist benefits and money management/debt advice.”

[54] Under the heading “Regular Payments” the website notes:

“MFT makes discretionary regular top-up payments to primary beneficiaries with a household income below £37,901. It also makes regular discretionary payments to

⁴ Since increased to £701 per quarter.

⁵⁵ www.macfarlane.org.uk.

bereaved spouses/partner who are on a household income below £19,000. To establish if you qualify for discretionary regular payments, they will ask you to complete a yearly census form and provide supporting documentation to verify your income levels.”

Information on the website also indicates that levels of actual payment are also determined by reference to income.

[55] The Authority has also been provided with a variation of the Number 2 MacFarlane Trust made on 19 September 1991. Notably, the document records:

“If at any time from time-to-time it appears to the trustee that the trust fund will be exhausted before the trustees have made all the payments required by the trustee they shall notify the Secretary of State thereby covenanting with the trustees that he will in such an event pay to the trustees a sum sufficient to enable the trustees to discharge their obligations under the trust deed.”

This suggests the payment arrangements are not limited solely because there is a limited fund available, as suggested by Mr McGurk.

[56] The UK Department of Health report: *Infected blood: Government Response to Consultation on Reform of Financial and Other Support*⁶ refers to various proposed reforms of the system for support of persons affected by contaminated blood in the UK, including amalgamation of the five separate entities making payments to people in the appellant’s situation. The report includes the following information:

- It refers to the payments as being part of the government’s care and support for persons affected by blood contaminated products.
- The payments made by the Trust are *ex gratia* payments funded voluntarily by the government.
- The payments will continue to be additional to other income but are to be disregarded for calculating income tax and entitlement to other state benefits.
- Annual payments will continue to be linked to the Consumer Price Index.

[57] We note the following:

- (a) There is no reference in the information about the MacFarlane Trust which refers to the payments received from the Trust as compensation. They are, however, referred to as *ex gratia* payments and are viewed as a form of support for the beneficiaries by the charity making the payments.

⁶ Found at www.gov.uk.

- (b) The appellant has received lump sum payments from the Trust. The status of these payments is not in issue. The issue in this case is the periodic payments that the appellant has now received over a number of years.
- (c) The payments from the Trust are limited to persons whose income is less than £37,900 and are referred to as top-up payments. The level of the person's income determines the level of payment made.
- (d) The appellant's entitlement is derived from monthly rates and is paid quarterly because the appellant is overseas. The size and regularity of the rate payable suggests that the payments are not capital.
- (e) Payments have often been accompanied by what is in fact a winter fuel payment, ie a payment to assist with heating costs in winter. This is an income-related cost.
- (f) The inference to be drawn from the affidavit filed by the appellant is that he uses the payments for income-related purposes.
- (g) There is no evidence to suggest the payments are paid or used to produce further wealth to invest.
- (h) The Trust receives payments from the government each year to make the distributions and the Trust Deed provides for the government to allocate further funds if required.
- (i) Payments are tied to the Consumer Price Index.

[58] Taking all of these matters into account, we are satisfied that the payments received are not capital. As such, they are caught by the paragraph (a) definition of income.

[59] We are satisfied that the payments received from the MacFarlane Trust constitute income and should be taken into account when assessing the appellant's entitlement to a benefit.

The Skipton Fund

[60] The Skipton Fund is a limited liability company incorporated on 25 March 2004 by the British government. The Memorandum of Association of the company states that it is to administer a Hepatitis C *ex gratia* payment scheme on behalf of the Department of Health.

[61] Information about the company from the Skipton Fund website⁷ states that it is to make payments to people infected with Hepatitis C who were treated with NHS blood or blood clotting products prior to September 1991.

[62] The appellant received lump sum payments from the Skipton Fund in September 2004 and November 2005.

[63] In addition, the appellant receives the quarterly payments previously referred to. We note the following in relation to these payments:

- (a) These payments are adjusted in accordance with the Consumer Price Index.
- (b) Although the payments are made tax-free and are disregarded if the recipient is means-tested for social security benefits and for housing improvement and repair grants, or for residential care charges in the United Kingdom, it has been necessary to specifically legislate for this classification.
- (c) The appellant has been receiving the regular quarterly payments since 10 January 2011. They are paid quarterly because he lives overseas. They are calculated on the basis of a monthly payment of £1,214.50. The size of the payments and their periodic nature suggests they are paid for income-related purposes.
- (d) The inference to be drawn from the appellant's affidavit is that they are used for income-related purposes.
- (e) They do not represent an accumulation of wealth. Nor are they a source of wealth for investment purposes, but rather they are used for income-related purposes.
- (f) The appellant qualifies for these payments because of his level of disability, suggesting his ability to support himself is impacted and he therefore needs financial support to meet his living costs.

[64] Taking all of these matters into account, we are satisfied on the balance of probabilities that these payments are not capital. They are income and are therefore caught by the subparagraph (a) definition of income.

⁷ www.skiptonfund.org.

[65] In summary, we are satisfied that the Chief Executive was correct to regard the payments received by the appellant from the MacFarlane Trust and the Skipton Fund as “income” to be charged in assessing the appellant’s entitlement to benefit.

Section 71

[66] Section 71 of the Social Security Act 1964 entitles the Chief Executive to take compensation payments, including *ex gratia* payments, into account when assessing entitlement to benefit.

[67] Section 71 was part of the Social Security Act 1964 when it was first enacted. At that time claims for compensation for personal injury were common law claims and usually involved recovery of lump sum payments under a variety of categories as opposed to regular periodic payments. In addition to personal injury claims under the common law (including amounts recovered outside New Zealand) the provision will cover compensation paid in employment disputes and other matters.

[68] Compensation claims for personal injury in New Zealand are now dealt with primarily under the Accident Compensation Act 2001. This has resulted in the enactment of s 71A which relates to weekly compensation. In most other instances, periodic payments of compensation as opposed to lump sum payments are likely to fall into the definition of income in s 3. If there is any doubt about the matter however or income-related compensation is paid in a lump sum s 71 will apply.

[69] Mr McGurk submits that s 71 relates only to payments originating in New Zealand. There is no suggestion in s 71 that this is the case. The purpose of the definition of income in the Social Security Act 1964 is to take into account all of the financial resources available to a beneficiary, wherever those resources come from. We are in no doubt that if the payments were not considered to be income, they would be caught by the provisions of s 71. It would have been entirely appropriate for the Chief Executive to take the amount of the regular *ex gratia* payments received and charge those amounts against the appellant’s entitlement to benefit under this provision.

[70] We note our concern that in the United Kingdom, a special exemption has been given to these payments for both tax and benefit purposes. In New Zealand reg 30 of the Social Security (Income and Cash Assets Exemptions) Regulations 2011 specifically exempts any *ex gratia* payment made to a person who suffered a personal injury that is or was caused by Hepatitis C infection contracted through the New Zealand blood supply.

[71] The Authority is not fully aware of what the New Zealand compensation package for such persons was. It appears that a number of those affected may have been able to obtain ACC payments and that the *ex gratia* payments made were lump sum payments of up to \$70,000.⁸ There is no exemption for ACC weekly compensation payments from the deduction regime under s 71A of the Social Security Act 1964. Nevertheless, it would seem desirable that the appellant should be treated in a similar fashion to persons who have received bad blood products in New Zealand, if the *ex gratia* payments in New Zealand were periodic and would meet the definition of income. We recommend the Chief Executive inquire into whether the appellant is disadvantaged by the fact that he receives *ex gratia* payments from the United Kingdom as compared to persons who received bad blood in New Zealand and receive *ex gratia* payments from the Ministry of Health in New Zealand.

[72] If there is a significant identifiable disparity which disadvantages the appellant the Chief Executive may wish to consider whether the discretion in s 71 might be used to ameliorate the effects of such a disparity or an amendment to the regulations might be appropriate.

[73] The appeal is dismissed.

DATED at WELLINGTON this 24th day of November 2016

Ms M Wallace
Chairperson

Mr K Williams
Member

⁸ www.times.co.nz/news/30m-compensation-for-hep-c-sufferers.