

[2016] NZSSAA 082

Reference No. SSA 165/15

**IN THE MATTER**

of the Social Security Act 1964

**AND**

**IN THE MATTER**

of an appeal by **XXXX** of Auckland  
against a decision of a Benefits  
Review Committee

**BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

Ms M Wallace - Chairperson  
Mr K Williams - Member  
Lady Tureiti Moxon - Member

**HEARING** at AUCKLAND on 12 May 2016

**APPEARANCES**

P Blair for the appellant  
N Jaura for the 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, declining her request to have her income from employment exempted in the calculation of the rate of Supported Living Payment to be paid to her, pursuant to the provisions of s 66A of the Social Security Act 1964.

**Background**

[2] The appellant is aged XX years. She is in receipt of Supported Living Payment (formerly Invalid's Benefit). On 16 February 2015, the appellant made a request that any

income she earned from a job which she had commenced, be exempt when calculating her entitlement to benefit, pursuant to the provisions of s 66A of the Social Security Act 1964.

[3] The appellant's application that her income be exempt from being taken into account in calculating her benefit entitlement, on this occasion, was declined on the basis that she was not severely disabled as she did not need assistance with day-to-day living tasks and did not incur additional costs in working that an able-bodied person would not incur.

[4] 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 this Authority.

[5] The appellant suffers from cerebral palsy. This presents two particular problems for her. The first is that she has poor muscle tone. This means that it takes more time and effort for her to undertake physical activities. She also gets fatigued more quickly than most people. Her second major disability is that her speech is impaired and can be difficult to understand. Again, the effort involved in speaking causes her to tire more quickly. Fatigue is particularly problematic because as she gets tired her speech and fine co-ordination are affected and this affects her performance in employment.

[6] Despite these disabilities, the appellant is able to live alone. She does not require assistance with personal care or the day-to-day tasks of living such as cooking and cleaning. She is able to drive an automatic car unaided. She holds a number of university degrees including a Master of Arts degree in Sociology and two graduate diplomas. She primarily uses email to communicate but at times uses the telephone using the National Relay Service.

[7] The appellant says it is difficult for her to fit into a regular employment environment. Employers have trouble seeing past her communication impairment, even though she has successfully worked around this time and again. She has many skills and can create her own employment but this takes time and effort and thinking outside the box. She works differently to other people in organising how she will do things, because she gets tired more quickly than the average person and extra effort is needed to be put into everything. The Authority understands that the appellant primarily works from home as a self-employed person doing contract work in the disability sector. Contract work gives her more control over her work environment and allows her to work in a way which is most efficient for her.

[8] In listing her strengths, the appellant says that:

Even though I do have good people skills my speech impairment requires a supportive environment for these skills to be realised, e.g. use of Power Point/support person or

people willing to listen. Often her best skills are used in less pressurised situations where people are willing to be flexible.

[9] The appellant was in full time employment with the Anglican Church for a period of two years, however, the Anglican Church have advised her that they cannot appoint her to a parish full-time because of her speech impairment.

[10] The appellant says that if she worked 20 to 30 hours a week then she would need home help as it would be difficult for her to keep up with household tasks, as well as work. However, if her Supported Living Payment were reduced because of her income, taking into account the cost of home help, it would be questionable as to whether the effort of employment was really worthwhile.

[11] The appellant says that it is difficult to overcome all of the barriers to engage in the employment market when the incentives are only marginal. It can be tempting to disengage from employment.

[12] Ministry records indicate that while the appellant was granted income exemptions in 1999 and 2000, in fact, in each of those years the appellant's earnings were less than the threshold and did not impact on her benefit entitlement in any event.

### **Relevant Legislation**

[13] Section 66A of the Social Security Act 1964 gives the Chief Executive discretion to disregard all or part of the income of a severely disabled person earned as a result of personal effort in the following terms:

For the purposes of computing any benefit payable, the chief executive may in the chief executive's discretion, as an incentive to personal effort, disregard all or part of the income of any severely disabled person derived from such effort.

### **Decision**

[14] The central issue in this case is whether the appellant can be considered to be severely disabled for the purposes of s 66A of the Act.

[15] The Social Security Act 1964 does not define the term "severely disabled".

[16] At the time of her application for exemption the appellant was in receipt of Supported Living Payment. To pay a Supported Living Payment the Chief Executive needed to be satisfied that the appellant was permanently and severely restricted in her capacity for work because of sickness, injury or disability arising (in either case) from accident or existing from birth.<sup>1</sup> A person is said to be severely restricted in his or her

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<sup>1</sup> Section 40B of the Social Security Act 1964.

capacity for work if the Chief Executive is satisfied that the person is incapable of regularly working 15 or more hours a week in open employment.

[17] The Authority has previously found that not all recipients of Invalid's Benefit (now Supported Living Payment) can be considered severely disabled and therefore eligible for the exemption in s 66A.<sup>2</sup> Section 40B of the Act in effect provides a definition of what amounts to being severely restricted in one's capacity for work, namely the criteria that the person be unable to work 15 or more hours per week in open employment and have a condition likely to last for more than two years.

[18] The s 66A exemption on the other hand is available to all beneficiaries. It is conceivable that a severely disabled person may be capable of working more than 15 hours per week. Conversely a person might be considered to be moderately disabled but may be severely restricted in their capacity for work.

[19] If it were intended that all persons qualifying for Supported Living Payment on medical grounds should receive the s 66A exemption, there would be no need for the specific limited income exemption of \$20 a week provided for in the sixth schedule of the Act. If all Invalid's Beneficiaries were to be eligible for the exemption then the Authority considers it would be likely that the provision would have said so.

[20] The New Zealand Oxford Dictionary defines "severe" as:

1. rigorous, strict and harsh in attitude or treatment.
2. serious, critical.
3. vehement or forceful.
4. extreme.
5. arduous or exactly, making great demands on energy, skill etc.

[21] The term "severely disabled" is a very strong statement. Whether someone is severely disabled will turn on the facts in each case.

[22] Section 66A needs to be interpreted with the purpose of the section and its context in the Social Security Act 1964 in mind. The provision is intended to incentivise disabled persons to participate in employment.

[23] The conundrum that arises in assessing what might constitute severe disability was highlighted by a Judge in the United States of America in *McCruter v Bowen*.<sup>3</sup> While the decision must be seen in the context of the particular legislation relating to disability

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<sup>2</sup> [2004] NZSSAA 146.

<sup>3</sup> 791(f) 2D 1544 (11<sup>th</sup> circuit 1986).

payments in the United States, the comments of the senior Judge who considered the case highlight the issues that can arise in determining who is and is not severely disabled, particularly in the context of paid employment. It highlights the importance of considering each individual case on its merits. The court observed:

“Severity” of a medically ascertainable disability must be measured in terms of its effect on ability to work, and not simply in terms of deviation from purely medical standards of bodily perfection or normality. For example, suppose a person’s job consists in selecting by means of a computer a set of stocks with appropriate price to earnings ratio for inclusion in a market letter to investors. Suppose then that by reason of an automobile accident the financial forecaster has both her legs amputated, but can still operate the computer. If medical factors alone are considered, this would certainly be a severe impairment; but when vocational factors are taken into account, the victim can still perform the work pertaining to his job and cannot be considered as having a disability qualifying him for benefits.

A converse example might be a slight deformity resulting from surgery, which would not be considered as severe in the case of an ordinary person, but which would prove extremely disabling vocationally in the case of a baseball pitcher, a surgeon, or a singer.

[24] A household disability survey carried out in New Zealand in 2001 called “Living with Disability in New Zealand”,<sup>4</sup> made distinctions between severe, moderate and mild disability. Severe disability was defined with reference to needing help with activities such as preparing meals, shopping, housework, bathing and dressing. Moderate disability was defined as a person needing some type of assistive device and/or equipment and/or help with certain heavier or more difficult household tasks.

[25] Ministry policy guidelines suggest that a person will be considered severely disabled if the effects of their disability extremely limit their ability to:

- participate in employment;
- take care of themselves; and
- participate in the community.

[26] These three considerations constitute a reasonable basis for determining severe disability. However, the guidelines go on to state:

Indications of severe disablement are as follows:

Where the effects of your client’s disability are extremely limiting, generally they will require assistance from another person to carry out at least some of the daily routines of life. Consider whether your client:

- Requires another person to assist them with the daily personal support such as washing, dressing, cooking or eating.
- Is unable to travel without assistance from another person.

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<sup>4</sup> Caroline Maskill & Others *Living with Disability in New Zealand* A descriptive analysis of results from the 2001 Household Disability Survey and the 2001 Disability Survey of Residential Facilities (Ministry of Health, Wellington, 2004).

- Requires the presence of another person or persons to ensure their safety.

If one or more of these situations apply your client is likely to be considered severely disabled.

[27] While the guidelines are not expressed in absolutes and the emphasis is on taking into account all the information available this particular part of the guideline has the potential to focus the decision maker a set of considerations which is too narrow.

[28] The appellant says that the definition of “severe disability” for the purposes of s 66A needs to recognise that the barriers to employment lie both with a need for extra personal support in order to maintain employment and the employment environment itself. Not only the personal support required but also the barriers to fitting into a standard work environment should be considered as grounds for severe disability. The appellant says that when she enters into an employment environment she is severely disabled because generally employment environments require quick verbal communication and many people find it either difficult to understand her speech or to take the time needed to listen.

[29] There can be no doubt that how a particular disability impacts on the degree of difficulty a person might have in participating in employment is a relevant consideration in determining whether a person is seriously disabled for the purposes of a s 66A exemption.

[30] Despite the specific reference in the policy guidelines to the need to consider the ability of the person to participate in employment, the decision-makers in this case appear to have focused primarily on whether or not the appellant required assistance in her day-to-day activities. They do not seem to have considered the effect of the combination of her disabilities and the impact on her ability to participate in employment. The principal disability adviser gave evidence to the Authority of a surgeon with a severe speech impediment to support her view that the appellant should not be regarded as severely disabled. It seems unlikely that the surgeon had poor muscle tone or the appellant's particular aptitudes.

[31] We had the opportunity to hear from the appellant. While we acknowledge that there will be people with more severe barriers to communication than the appellant, we considered her speech impediment was severe and we have no doubt that it is a significant barrier to employment on its own.

[32] The appellant has not just one, but two disabilities which impact on her ability to participate in employment. There can be no doubt that a combination of both of these disabilities is that they have an impact on her ability to work and the effort that she must therefore make to work.

[33] We take the following matters into account in assessing whether the appellant can be said to be severely disabled:

1. The appellant has the ability to care for herself and participate in the community but takes longer to do some tasks.
2. There is no suggestion that the appellant has extra costs in undertaking employment which an able-bodied person might not have, but there is a non-monetary cost to her in terms of time and effort. The appellant has worked full-time for a period in the past. She said that if she worked 20 to 30 hours per week she would need assistance with housekeeping. (She would not of course be eligible for her current benefit if she was capable of work 15 hours or more per week in open employment).
3. The appellant says it is easier for her to be self-employed and create her own employment rather than to work as an employee.
4. The appellant's particular training and aptitude need to be taken into account. Her communication impairment is a particular barrier for the appellant for the type of work she is able to do. It is a barrier which significantly restricts job opportunities.
5. The appellant has physical limitations. She would not be able to participate in manual labour type jobs which may require less communication. Nor would her physical difficulties allow her to be a surgeon. On the other hand, she has computer skills which may offer opportunities for work where verbal communication is not so important. The appellant notes, however, that her fine co-ordination impairment causes her to perform tasks at a slower speed. The combination of her disabilities indicates that the appellant has a greater degree of impairment than had she to contend with either speech impairment or poor muscle tone on their own.
6. At the time of her application the appellant had a contract which was to pay her \$35 per hour for 130 hours. The maximum cost of the project was to be \$4,725. The appellant's income tax return for the year ending 31 March 2015 suggests that she earned a total of \$7,030 in consultancy fees and made a profit of \$3,583. This is a modest level of income. It is a level of income which reflects the effect her disabilities have on her ability to work.

[34] Overall, we conclude that the appellant's particular combination of disabilities creates for much greater barriers for her in employment and participation in the community than if she had simply one impairment. Taking into account all of the matters outlined, we conclude that the appellant is severely disabled and it would therefore be appropriate to consider whether she should be granted an income exemption under s 66A.

[35] The Chief Executive then has a discretion as to the amount of any exemption granted. An exemption under s 66A may be for all of the income earned but it may also be for only part of the income earned.

[36] In this case, at the time of the appellant's application, she had one contract which was not going to exceed the income threshold. We were unclear as to whether she expected to carry out further work or did in fact carry out further work in the financial years ending 31 March 2015, or 31 March 2016. The Chief Executive will need to consider this issue. It is possible that ultimately there was no need to consider the actual amount of any exemption in any event.

[37] We would expect that once a decision was made that a person was severely disabled for the purposes of s 66A, that assessment would not need to be made again unless there was a significant change in the person's circumstances. In relation to the amount of any income exemption itself, that matter will need to be assessed each year. The level of exemption may well depend on the level of income received and any extra costs involved in earning that income. That the payment is to act as an incentive to employment is also to be borne in mind.

[38] The appeal is allowed to the extent indicated.

**DATED** at WELLINGTON this 29<sup>th</sup> day of August 2016

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Ms M Wallace  
Chairperson

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Mr K Williams  
Member

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Lady Tureiti Moxon  
Member