[2017] NZSSAA 040

Reference No.SSA 172/16

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

Hearing at Wellington on 19 June 2017

Appearances

The appellant in person

Ms Luxton (lawyer) and Ms Singh (agent), for Chief Executive of the Ministry of Social Development

Preliminary

[1] This appeal concerns a family, parents who care for their 22 year old daughter who is affected by Autism Spectrum Disorder. She is non-verbal, and providing care is difficult.

[2] The care arrangements included a modest payment from the health system that indirectly paid the father (the appellant) to help care for his daughter; he did not work outside the home so he could provide fulltime care. Of course the payment did not meet the real cost of providing care, but it did enable the appellant to be available fulltime. The father earned this money as income like any other worker, and he and the mother received social security benefits.

[3] As the father only earned a relatively small amount of money it did not affect his benefit. The family had just enough to live on. It was important to the parents to provide for their daughter's care, as they believed they best understood her needs and could relate to her in a way that was not possible or appropriate for a professional caregiver. They are her parents, and that could not be replaced.

[4] The appellant broke his arm; this dramatically altered the fragile balance in the family. Until he recovered, he could not drive or manage caring for his daughter. He did receive 80% of the what he earned for providing care from ACC. The family asked for support from the Ministry of Social Development so they could get through this difficult period.

[5] When the staff at the Ministry of Social Development were told of the situation they told the appellant that he would not get any benefit from the ACC payments. Even though his small income did not affect his benefit, the ACC payments would be taken off his benefit. They offered no other assistance, or possibility of assistance.

[6] The family had no alternative, so approached the health system to provide support. The result was the daughter at great cost to the health system was taken into fulltime care, and she remains in fulltime care.

[7] The appellant brought this appeal to challenge what he sees as the unfairness of depriving him of the benefit of the ACC payments, and the failure to provide the assistance that could have prevented the costly and unsatisfactory result of his daughter going into fulltime care at the cost of the health system.

Background

The ACC anomaly

[8] This appeal involves a situation where the Social Security Act 1964 (the Act), due to an apparently unintended consequence, is unfair. It arises from the apparently uncomplicated principle that benefit entitlements are reduced to the full extent of earnings related Accident Compensation Corporation (ACC payments) received by the person entitled to a benefit.

[9] This appeal is against the Ministry's decision, which a Benefits Review Committee upheld, that the appellant is subject to that principle.

[10] The essential problem concerning the ACC payments is this:

a. Some people are in paid employment in addition to receiving a benefit.

b. Typically, some earnings are allowed without it affecting their benefit, but beyond that amount the benefit reduces.

c. If such a person is injured and receives compensation payments from ACC because they cannot work, they would be expected to continue to receive the benefit with the ACC payments reducing the benefit in the same way as their employment income.

d. Instead, in practical terms they lose their work income and get no benefit from the ACC payments.

[11] The anomaly is the result of the legislation apparently not taking account of persons who are in work while receiving a benefit. The appellant brought this appeal to highlight the anomaly. He is also concerned that the Ministry failed to recognise the serious effects this had for his family and, consequentially, the heavy and long-term costs imposed on the health system.

[12] Before considering the appellant's personal circumstances, we first describe the problem giving rise to this appeal.

[13] The Act, for obvious reasons, provides that when a person is receiving earnings related ACC payments, any entitlement they have to a benefit will be reduced to the extent of those ACC payments. This is founded on the principle that where a person is unable to earn income, they should not be compensated for one loss by both a benefit payment and an ACC payment. The principle and application are simple when a person is working without a benefit, and has an injury. Any benefit is properly reduced dollar for dollar by any earnings related ACC payments received. The gross (before deduction of income tax) amount of the benefit is reduced by the gross amount of the ACC payment in the relevant period. The effect is that the recipient receives a full entitlement to a benefit or ACC payments, whichever is the greater. Effectively, one or other income support regime applies.

[14] For persons who have a benefit and some work and are injured the situation is more complicated. Instead of reducing dollar for dollar, to achieve a fair result, it should be necessary to take account of the statutory scheme that allows some earnings without abating the benefit. There is no reason to abate the benefit for ACC payments compensating for loss of earnings that would not themselves abate a benefit. However, the legislation does not provide for that.

[15] To use illustrative figures, the appellant's concern is that the mechanism works in the following way:

Pre Accident	
	Received
Benefit	$200.00
Wages	$80.00
	$280.00
Post Accident	
	Received
Benefit	$200.00
Less ACC	-$64.00
	$136.00
ACC	$64.00
Wages	$0.00
	$200.00

[16] Instead of retaining the benefit of the $64 from ACC after contributions to the scheme like any other worker, the beneficiary loses the compensation entirely; despite it being for work income that would not abate the benefit.

[17] Accordingly, instead of preventing double compensation, in this particular situation the dollar for dollar abatement provided in the Act entirely deprives a person of any benefit from ACC cover. That is not because the benefit and the ACC are, in this case, compensating for the same thing. In the pre-accident situation, the wages had no effect on the benefit. The ACC payments are a partial compensation for the lost wages so the ACC payments should not affect the entitlement to the benefit.

Discussion

The appellant's situation

[18] The appellant and his wife lived with their daughter, who was 22 years of age, affected by Autism Spectrum Disorder, and non-verbal. The appellant's wife had part-time employment. The particulars are not disputed; it is sufficient to note that the appellant and his wife were entitled to benefit payments.

[19] For present purposes, the critical element of the family structure was that the Ministry of Health provided payments to the appellant's daughter. She used that money to engage the appellant to provide care for her. It was in a formal employment structure, as the ACC payments in issue are relevant only where they are for "loss of earnings or loss of potential earning".[1] Accordingly, the principles in this case apply generally to persons receiving benefits who also work and receive ACC payments relating to that work.

[20] The appellant's daughter is a physically strong woman; it was difficult to provide care for her; due to her condition she could cause significant physical harm to a carer. The appellant and his wife were determined to provide care for their daughter. Their financial circumstances were relatively precarious; the household income comprised the appellant's wife's income from independent work, benefit payments to the appellant and his wife, and the appellant's employment as his daughter's carer.

[21] On 5 May 2016, the appellant suffered an accident, breaking his arm. He was entitled to an ACC payment at the level of 80% of what he was previously receiving.

[22] When released from hospital he went into the local office of the Ministry of Social Development and explained the predicament. Given his broken arm, he could not drive and was unable to care for his daughter in the manner required. The appellant asked what assistance could be given to him. Personnel at the Ministry of Social Development office identified he had lost his income from working, and he would also lose the ACC

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1 Section 71A(3) of the Social Security Act 1964.

payments in the manner described. They did not explore any other options.

[23] The appellant and his wife did not have the means to engage someone else to provide care to their daughter. The cost of care was obviously greater than the modest payments the appellant received, and he had lost even those payments. Accordingly, they asked the Ministry of Health to make an assessment of their daughter's circumstances. The result was that she was taken into full-time care in a residential facility, and she remains there to the present time. That care is very costly for the health system, and the cost is the result of a lack of financial support when the appellant had his accident.

[24] The appellant was the only witness, and the facts were largely uncontentious. We accept the appellant was a reliable witness.

Whether the benefit is rebated dollar for dollar due to ACC payments

[25] The Chief Executive's position is quite simply that s 71A of the Act has an unambiguous effect, which allows no alternative to the outcome previously described. Section 71A(2) provides that the rate of the benefit payable to a person must be reduced by the amount of weekly compensation payable to the person. Section 71A(3) provides that "weekly compensation" means accident compensation for loss of earnings or loss of potential earning capacity. There is no dispute that the payments in issue come within that category.

[26] The High Court's decision in *M v Chief Executive of the Department of Work and Income* HC WN AP 335–01, 27 August 2002 confirms that the provision operates in the way the wording indicates. However, the appellant's situation does not fit within the principles expressed in that case. The Court observed:

> … applicants should have access to only one stream of 'state insurance' and that a beneficiary cannot expect to receive both benefit and periodic earnings related compensation for the same period of time. (paragraph [29])

[27] Similarly in *Goh v Chief Executive of the Ministry of Social Development* [2010] NZCA 110 the Court of Appeal said:

> The applicant's argument is that she should retain both the full amount of her benefit and some of the accident compensation calculated on a weekly basis in respect of exactly the same period. Such duplication resulting in an unjustified windfall would entail a preposterous result.

[28] The facts of those cases were quite different. They did not concern a situation where an appellant was deprived of ACC payments to compensate for loss of income that did not abate their benefit. The observations regarding an unjustified or preposterous result in the present case can just as well be applied to failing to treat ACC payments in the same way as the income they replace.

[29] Accordingly, while these authorities affirm the application of s 71A they do not consider the situation in issue in the present case. The closest authority is *Hennessy v Chief Executive of the Ministry of Social Development* [2012] NZHC 3104. The facts were not dissimilar to this case, in that the case concerned a person who worked while earning a benefit, and received ACC payments relating to that work. In the *Hennesy* case, the appellant sought to have the ACC payments treated as though they were the additional income which they replaced. Accordingly, she sought to have the same abatement regime apply to the ACC payments as would apply to her wages that she lost.

[30] The court in the *Hennessy* case described the nature of the legal argument for the appellant:

> In effect, Ms Hennessy's challenge is to the nature of the existing statutory scheme, as opposed to the way in which the sections should be interpreted. Any change in policy is for Parliament. The points raised by Ms Hennessy cannot be remedied by a decision of this Court.

[31] The wording of section 71A(2) is clear and the words cannot bear a meaning other than what they say. The provision requires a dollar for dollar reduction in the benefit payable. Not to apply the words would go beyond interpretation of the provision. Inevitably the Court in the *Hennessy* case concluded "The points raised by Ms Hennessy cannot be remedied by a decision of this Court." The same must apply in the present case.

[32] However, the inappropriateness of the result is obvious, and an example of the potential social harm is provided by the facts of this case.

[33] For completeness we note we have considered the statutory provisions governing the amount of additional income that can be earned without detrimentally affecting a benefit, and thereafter rebating it. Section 40D provides for a Supported Living Payment, s 40I and schedule 6 provide rates for the Supported Living Payment, and Schedule 6 of the Act mandates that "income test 1" is applicable. The effect is that the definition of "income test 1" in s 3 provides the amount of income that can be earned without detrimentally affecting the Supported Living Payment. An examination of those provisions demonstrates that they have no effect on the application of s 71A.

Alternative assistance

[34] The circumstances of this case illustrate how disruption to the fragile financial balance of a family coping with difficult circumstances can lead to serious outcomes. In this case, a couple who were managing to care for their adult daughter ceased to have that capacity, and high costs have been imposed on the health system which now provides fulltime care.

[35] Given the potential to avoid such a costly outcome for the State, we requested that counsel for the Chief Executive report on whether there were any alternatives to provide alternative support.

The Chief Executive's duty

[36] The Chief Executive provided submissions claiming that this appeal could not determine whether the appellant was eligible for support other than the issue relating to ACC. We do not accept the submission. The appellant went to his local MSD office and sought assistance with his situation. Specifically, his inability to work and look after his adult daughter. These were the circumstances that led to her going into fulltime care. The Chief Executive seeks to characterise this as a situation where the appellant did not lodge an application, so was not entitled to any support. The claim is contrary to fundamental and obvious principles relating to the administration of the Act. The Chief Executive's delegates were required to provide the assistance the social welfare regime provided. They had an obligation to inform the appellant what assistance might be available. The Chief Executive cannot absolve himself from

responsibility to deliver assistance on the basis that a person requesting assistance did not know what they were entitled to have, so did not specifically ask for it. Of course, a person who has not approached the Ministry is in a different position. The appellant in this case attended his local office, explained his compelling humanitarian circumstances, and asked for assistance; that is enough.

[37] Section 11D(3) – (4) allows applications for any benefit as a gateway to the grant of a benefit of a different kind. The obligation to "get it right" when a person presents seeking assistance carries through each level including the disposition of appeals before this Authority.

[38] We find the submission that there was no application and no recognition of the duty to assist concerning. The law is very clear regarding the Chief Executive's duties, and staff at all levels with the Ministry of Social Development must understand that law to perform their duties. The nature of the Chief Executive's duties is concisely summarised by Dunningham J in *Crequer v Chief Executive of the Ministry of Social Development* [2016] NZHC 943:

> [48] The role of the Chief Executive in performing his functions and powers under the Act has been considered in previous decisions. They have emphasised that, under s 12, it is for the Chief Executive and those acting with his authority, to determine what benefits should be granted to a claimant.[2] In doing that, there is a requirement for the Chief Executive, or his delegate, to ensure that the correct benefit or benefits are paid and in making that determination, to be "pro-active in seeing to welfare, and not defensive or bureaucratic".[3]

[39] In *Scoble v Chief Executive of the Ministry of Social Development* [2001] NZAR 1011 (HC) the Court acknowledged that the Act "does not specifically place a duty on the Chief Executive to invite application where no enquiry for assistance has been made." However, when a person does seek assistance, then the Chief Executive is to consider what forms of assistance the person is or may be eligible to receive[4].

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2 *Chief Executive of the Department of Work and Income v Scoble* [2001] NZAR 1011 (HC) n 12, at [29].

3 *Hall v Director-General Social Welfare* [1997] NZFLR 902 (HC) n 13, at 912.

4 Paragraph [9] to [11].

[40] These duties were reiterated in *Koroua v Chief Executive of the Ministry of Social Development* [2013] NZHC 3418 (HC). The Court observed:

> In general as McGechan J put it in *Hall v Director of Social Welfare* [1997] NZFLR 902 (HC) at 912, the Ministry should be "proactive in seeing to welfare, and not defensive or bureaucratic.

[41] The Court in the *Koroua* case also referred to *Taylor v Chief Executive of the Department of Work and Income* [2005] NZAR 371 (HC), and noted that it was a question of fact whether an approach for assistance amounted to an application. The Court in *Taylor* said that:

> Those who are in need are not to be deprived of the benefits to which the law entitles them, by an overly prescriptive and bureaucratic approach, and the Department should be proactive in ascertaining needs. But that must be viewed in the light of the statutory scheme, which involves persons who are in need being required to make their needs, in a broad sense, known to the Department by way of a claim... In light of that, there must in my view be a sufficiently clear identification of the need to enable the Department to give consideration to that need, and the way in which it can best be met, before a claim or an application can be said to have been made. (paragraph [16])

[42] We note the Ministry contended that clause 19 of the Special Needs Grants Programme required an application in "such form as the chief executive from time to time prescribes". The suggestion seemed to be that if an applicant did not fill in the correct form, he would not get assistance. We do not need to decide the point in this case, however it seems unlikely the Chief Executive could mandate a specific form that had the effect of undermining section 11D, and the duties the Courts have repeatedly emphasised he carries.

[43] We find as a fact that when the appellant was released from hospital he went to the local office of the Ministry of Social Development, told them about his broken arm, and told them about his daughter and the crisis regarding her care. It follows that we find the appellant made his and his family's needs known to the Chief Executive's delegates. It was their duty to ensure that the appellant knew what assistance was available, and proactively to gather the information required to assist.

[44] We accept the appellant's evidence that the Chief Executive's delegates made no meaningful inquiries regarding potential assistance, and he accordingly turned to the health system and procured the much more costly assistance there.

The scope of this appeal

[45] As noted, counsel for the Chief Executive also submitted that the scope of this appeal is limited to rebating the ACC payments, not what type of assistance might have been provided. That is not correct. In *Margison v Chief Executive of the Department of Work and Income*[5] Justice Laurenson commented:

> On an appeal to an Authority I am satisfied that once the Authority is faced with an appeal it is empowered by the inquisitorial nature of its function, its original power of decision and its full range of remedies, to seek out the issues raised by the appellant's case and determine these afresh and establish whether the appellant can provide the justification for doing so or not.

[46] The Supreme Court also considered the nature of proceedings before the Authority in *Arbuthnot v Chief Executive of the Department of Work and Income*[6]. It was resolute in requiring the Authority to reach the correct view on the facts, rather than being constrained by the earlier processes:[7]

> There is nothing in s 12M to prevent the Chief Executive from then asking the Authority to consider any matter which may support the decision which is under appeal. Indeed, the thrust of the section is quite the other way: that the Authority is to consider all relevant matters.
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> ..
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> In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.

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5 *Margison v Chief Executive of the Department of Work and Income* HC Auckland AP.141-SW00, 6 August 2001 at [27].

6 [2007] NZSC 55

7 Ibid at [20]–[26].

> …
>
> The duty of the Authority was to reach the legally correct conclusion on the question before it, applying the law to the facts as it found them upon the rehearing without concerning itself about the conclusion reached by the BRC …

[47] Accordingly, the only way to ameliorate the anomalous statutory effect on the ACC payments was to exercise statutory discretions intended to address exceptional circumstances. We requested that the Ministry review the options for altering the effect of the statutory anomaly in this case and generally. That was the duty the Chief Executive's delegates had when the appellant attended the Ministry of Social Development and explained his and his family's needs. Obviously, only the assistance allowed by the law can be provided to the appellant or any other person seeking assistance.

[48] The Chief Executive accepts that:

a. an accommodation supplement,

b. temporary Additional Support, and

c. special needs grant,

could all have been considered.

[49] Each of those options could have potentially allowed further support; each has various thresholds and requirements. They are generally quite stringent.

Our evaluation of entitlement to additional support

[50] The appellant is not seeking an order for the additional support that likely should have been available. He said:

> I am not seeking any financial support now as the damage has been done! My daughter is no longer with her loving family and is now at greater expense being supported by the State.

[51] There has been no real challenge to the evidence of the consequences of lack of support, or that the appellant sought assistance to prevent the outcome when he got out of hospital. Unfortunately, counsel for the Ministry contends that what assistance might have been available "is not a matter which is the subject of this appeal". For the reasons discussed. that is wrong; this appeal is about what the appellant was entitled to when he asked for assistance. The fact that the ministry told him nothing, and reduced his benefit does not limit the appeal to whether they could reduce his benefit. It appears that the Ministry failed to engage with the issue at the time, and that failure has been very costly for the State. Even now, despite the very clear law discussed above, the position adopted in this appeal is to resist the "duty to determine what benefits should be granted", to resist a duty to be "pro-active in seeing to welfare", to take a "defensive or bureaucratic" approach to which forms were completed.

[52] For the reasons the appellant has identified, we accept there is nothing we can do to change the events that have occurred. Any change from the burden currently borne by the health system, and restoration of care within the family unit will not be achieved by a retrospective examination of what could and should have happened when the appellant got out of hospital. Only prospective action, taking into account the reality that the appellant's daughter is in fulltime care, can presently assist.

Recommendation

[53] We request that the Chief Executive consider the effect of section 71A on persons who are entitled to ACC payments received for loss of work or work opportunities they had while receiving a benefit. We request that the Chief Executive notify the Minister of any policy concerns arising.

[54] We also request that the Chief Executive ensure that staff are trained to recognise their duties. In particular, to consider the "full range of remedies" and "to seek out the issues raised by [each applicant's] case". The present case is a concerning example of the Chief Executive's delegates failing to understand or failing to perform those duties down to the hearing of this appeal.

Decision

[55] The appeal is dismissed, but we endorse the concerns the appellant sought to highlight by bringing the appeal.

Dated at **Wellington** this 20th day of July 2017

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G Pearson
Chairperson

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K Williams
Member

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C Joe JP
Member