[2017] NZSSAA 063

Reference No. SSA 140/13 and SSA 055/16

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

This decision is subject to an order directing that the location where the hearing took place, the names of witnesses, counsel, and the parties and where they live are not to be published, as that information may allow some persons to infer the identity of the Appellant, and others.

Mr G Pearson - Chairperson

Mr C Joe - Member

Hearing at **XXXX** on 20 and 21 March, 2017.

Appearances

For Chief Executive of the Ministry of Social Development: Mr XXXX, lawyer, MSD, XXXX.

For the Appellant: Ms XXXX, XXXX.

DECISION

(COSTS AND ANCILLARY ORDERS)

Background

[1] The Authority issued its substantive decision in this matter on 5 May 2017 in SSAA Decision [2017] NZSSAA 20. The Authority allowed the appeal, determining that the Chief Executive's decision that the appellant had been in a relationship in the nature of marriage was wrong. It followed that an overpayment of $103,838.06 founded on such a relationship is

also wrong and the Authority reversed the Chief Executive's determination regarding the alleged overpayment.

[2] In that decision the Authority expressly reserved leave for the parties to address the net quantum of a residual element of the overpayment, if there was any dispute. That residual element was independent of whether or not the appellant had lived in a relationship in the nature of marriage.

[3] The Authority also reserved leave to address issues relating to costs.

The quantum of the residual debt

[4] The Section 12K Report submitted by the Chief Executive identified the subject matter of the appeal. The Ministry stated that the total overpayment that is subject to the appeal was $103,838.06. The report explained how the calculation has been determined for the period from 17 January 2007 until 6 October 2013. Any contentious element in the calculation of the overpayment was the subject of the appeal.

[5] However, the report also explained that there were two components to the overpayment:

[5.1] The first part related to non-disclosure that had been the subject of a conviction entered against the appellant after a jury trial in the District Court. The District Court determined that part of the overpayment amounted to $6,483.28. A reparation order was made to that effect.

[5.1] The second part related to the claim that the appellant was in a relationship in the nature of marriage. The District Court did not find the appellant guilty of charges she faced regarding that element. The District Court said whether that element was correctly established, and the quantum of it was a matter for this Authority.

[6] At the hearing before this Authority both parties accepted the $6,483.28 was part of the total of $103,838.06 that was subject to this appeal. They also accepted the District Court had already determined the figure of $6,483.28 as the quantum that was not dependent on there being a relationship in the nature of marriage.

[7] This Authority dealt with the total overpayment, and expressly reserved the issue of what order it should make, if any regarding the residual balance the District Court had already determined. It reserved the issue, as it did not appear necessary given both parties agreed there was already a District Court order in place.

[8] However, the Ministry wrote to the appellant and said it had increased the sum of $6,483.28 determined the District Court by $16,274.85. The letter stated:

> The Ministry accepts you would expect the final debt to be $6,483.28 for which you were sentenced. However it cannot be ignored that the overpayment of $22,758.13 is based on facts that have been accepted as proven beyond all reasonable doubt by the District Court. Therefore the Ministry does not consider this matter is open to further review or appeal.

[9] Plainly the Ministry had no authority to either countermand the District Court, or to misinform the appellant that its decision was not open to further review or appeal. That issue was live before this Authority to the extent it was not finally determined by the District Court; and the Authority had expressly reserved the issue to the extent it was live.

[10] Since this unfortunate incident the Chief Executive's counsel has said that the Chief Executive consents to not seeking to recover any overpayment beyond the $6,483.28. There will be a consent order to that effect. However, it appears that the District Court has since discharged the reparation order, after part payment. We will accordingly reserve the issue to ensure that if there are any outstanding issues they can be addressed. It is not simply an issue of not recovering the balance. The balance is the amount the District Court determined, and if that is in dispute, this Authority or the District Court can issue an order as to the correct balance.

Costs

The appellant's position

[11] The appellant is in receipt of legal aid. On the basis of legal aid rates the work to 29 March 2017 had a value of $13,894.21, plus 5 hours of unbilled work.

[12] If the work is costed as private client work with disbursements the total value was $34,148 (inclusive of GST).

[13] If District Court scale costs applied the total would be $34,087.

[14] The award sought was $27,000.

The Chief Executive's position

[15] The Chief Executive through his counsel expressed concern that the costs relating to the criminal proceedings, and the Benefits Review Committee hearing were included in the costs claimed.

[16] He also referred to *Brandon v Chief Executive of the Department of Corrections* [2015] NZHC 1827. In that case the plaintiff had a grant of civil legal aid for the proceeding, which was withdrawn at the plaintiff's request part way through the proceeding. The case is authority for the proposition that actual costs reflect the amount incurred having regard to the Legal Aid Services grant. He said the case cannot be applied in the present case.

[17] However, counsel for the Chief Executive nonetheless contended that the actual costs were measured by the amount of the Legal Aid Services grant. He referred to *Marino v Chief Executive of the Department of Corrections* [2016] NZSC 148, a decision of the Supreme Court. It accepted the principle that a costs award should not exceed the amount incurred, and for a legally aided person that was the amount approved for payment (ss 99(2)(a) and 105 of the Legal Services Act 2011).

[18] Essentially, the position was that the costs should be up to the amount of the Legal Aid Services grant, and only to the extent it related to the appeal to the Authority. It was envisaged that the sum of around $15,000 was anticipated.

[19] The Chief Executive did not oppose costs of $1,144.23 claimed by the Unwaged Workers Trust for its role in preparation for the appeal.

[20] In relation to the costs of the Authority, counsel for the Chief Executive generally sought to contend that the Chief Executive was justified in pursuing the appeal, attempting to lead evidence from a witness that a lawyer attempted to pervert the course of justice, and failing to call witnesses who were required for cross-examination.

[21] In essence, the justifications were:

[21.1] While the Crown did not proceed with a second trial after a jury did not agree, the prosecution had merit as it was not dismissed before going to the jury to decide.

[21.1] The Ministry "had no real evidence that a lawyer had made such an approach"; that is an approach to persuade a witness to give perjured evidence before the Authority. However, it was appropriate to attempt to lead the evidence (which the witness did not give). Counsel said the witness might have been confused over whether the person was a lawyer.

[21.1] The Authority should expect appeals relying on affidavits without the deponents being present for cross-examination, whether or not the deponents were requested to attend for cross-examination.

[21] The Ministry had fully considered the case before it was heard, so costs should not be awarded.

[22] In relation to GST, the Chief Executive accepted that a GST inclusive award is appropriate.

[23] The submissions also discussed the quantum of costs if the Authority did not consider it was constrained by the grant of legal aid.

[24] The conclusion was:

> It is therefore submitted that the appropriate approach is an order for the payment of the sum sought by Beneficiaries and Unwaged Workers Trust and an order for indemnity costs in regards to the full costs incurred by the Legal Services Commissioner in this matter.

The appellant's reply to the Chief Executive

[25] The appellant replied to the Chief Executive's submissions. The key points were:

[25.1] She accepted that costs should not exceed the costs incurred, referring to *Health Waikato Ltd v Elmsly* (2004) 17 PRNZ 16 (CA).

[25.2] The Appellant has addressed the issue of the costs of the legal aid grant by applying for top up funding, under section 105 of the Legal Services Act 2011.

[25.3] Costs of $27,000 for counsel and $1,144.23 (both GST inclusive), were the proper costs.

[25.4] If the top up request is refused, then the amount would be $13,894.21 for legal aid.

Discussion

The quantum of the overpayment

[26] While the quantum of the overpayment has been resolved by consent, it is appropriate to make some observations regarding the attempt to increase the amount of the overpayment.

[27] We have grave concerns that the Ministry apparently failed to engage with the counsel responsible for conducting this appeal. It is wholly unacceptable for officers in the Ministry to engage in this way with issues that are currently subject to a judicial process. In this case we had already made observations regarding the appellant's vulnerability. It is important that staff know they must engage with the Chief Executive's counsel when matters are before the Authority. It was clear from the letter written altering the amount that the staff member was well aware of the proceedings before this Authority, we can only suppose she lacked the training to understand she needed to take the elementary precaution of engaging with the Ministry's counsel rather than purport to countermand decisions of the District Court and this Tribunal.

[28] The conduct is a factor we consider in relation to making an order that the Chief Executive is required to pay the Tribunal's cost of hearing.

Costs

[29] The High Court in C*hief Executive of the Ministry of Social Welfare v Genet* [2016] NZHC 2541 established exceptionally favourable principles relating to awards of cost for successful appellants in this jurisdiction. In the *Genet* case, the Authority awarded costs of $500; the Chief Executive sought to have the High Court give directions that would assist in future

cases, and an *amicus* was appointed to ensure the issues were fully traversed.

[30] The Court considered section 12O(1) of the Act, which allows this Authority to award the costs of the appeal or any parts thereof, where the appeal is allowed. The section allows the award to be for all the costs of bringing the appeal or part of the costs. The Authority is also allowed to recover its own costs against the Ministry pursuant to section 12OA.

[31] Williams J observed the power is granted to the Authority in the context of meeting "the needs of poor and/or vulnerable people who, for one reason or another, are unable to provide for themselves".[1]

[32] The Chief Executive successfully contended for a departure from the usual principle where costs are awarded on a scale, or discounted basis. Examples being the scale of costs in the Courts, and the discounting of actual costs in some professional disciplinary tribunals. The Chief Executive contended the basis should be the actual costs:

> … his case is that the terms of s 12O must be strictly complied with: any costs award must be to the Appellant, not her advocate; and **the amount awarded must reflect actual costs incurred or a contribution to them**, based on actual evidence of those costs. (emphasis added)

[33] Williams J observed that it was appropriate to resolve costs after the event, in the sense that the work may have been performed on a contingency or *pro bono* basis. Regardless, the value of the work was the appropriate measure. He said:

> The phrase "… the costs of bringing the appeal …," refers, in my view, to an identifiable figure able to be calculated in the orthodox way even if the calculation is made retrospectively.

[34] Accordingly the authorities dealing with the application of scale costs where the principle that they cannot exceed actual costs does not necessarily apply in the same way. The retrospective evaluation introduces a new element.

[35] However, we of course accept and apply the consistent principle in *Brandon v Chief Executive of the Department of Corrections* [2015] NZHC 1827, *Marino v Chief Executive of the Department of Corrections* [2016]

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[1] *Chief Executive of the Ministry of Social Welfare v Genet* [2016] NZHC 2541 at [13]

NZSC 148, and *Health Waikato Ltd v Elmsly* (2004) 17 PRNZ 16. They all establish the principle that awards of costs should not exceed the party's actual costs. That must be true still when the calculation is made retrospectively. We are satisfied no authority allows an award of costs to exceed the actual costs of the appellant. Indeed, it is a central element of the *Genet* case that the costs should be the actual costs.

[36] We are also satisfied that the *Marino* decision, and the decisions of the lower courts consistently determine that the actual costs of a legally aided appellant will be the amount of the Legal Aid Services grant. However, there are two things that may affect that grant and the amount of that grant:

[36.1] The grant may be withdrawn, in which case the cost will be the solicitor/client costs;

[36.2] There may be authorisation for a higher fee under section 105 of the Legal Services Act 2011.

[37] In this case, an application to increase the fee under section 105 is the only relevant consideration. The section allows a provider (the lawyer) to take payment in respect of a person for whom legal aid services were provided, if authorised by the Commissioner.

[38] The Authority received a copy of a decision of the Legal Aid Tribunal regarding the application. The decision of 11 October 2017 notes that the Legal Service Commissioner decided on 25 July 2017 to decline approval for a higher fee. The Tribunal found the Commissioner's decision was manifestly unreasonable or wrong in law. The Commissioner must reconsider the decision.

[39] It is appropriate to issue this decision now so the Commissioner knows what the award of costs will be, subject to the Commissioner's determination. The Chief Executive, as noted, accepts the Authority should make "an order for indemnity costs in regards to the full costs incurred by the Legal Services Commissioner in this matter".

[40] It accordingly appears that the Chief Executive accepts that the actual level of costs authorised by the Legal Services Commissioner for the provider is the proper measure. This Authority does not have jurisdiction to make that decision, it lies with the Legal Services Commissioner, subject to any decision of the Legal Aid Tribunal.

[41] Accordingly, our role can only be to make a decision as to the correct level of costs, independent of the grant of legal aid. It will be a decision for the legal Services Commissioner whether or not to exercise the power under section 105 of the Legal Services Act 2011.

[42] In our view, the proper award of costs is $27,000; that is the somewhat discounted figure the appellant claims. While we would award indemnity costs as the *Genet* case allows, and the Chief Executive concedes is appropriate in this case, it is not appropriate to go beyond the costs sought. Our reasons for considering that award is correct are:

[42.1] The correct measure applying the principles in the *Genet* case is the actual costs of the work provided. The *Genet* case does not indicate there is a high threshold to award a full recovery of costs, though it is discretionary.

[42.2] There is no reason to discount the value of the work simply because there was a grant of legal aid. In the *Genet* case, Williams J made it clear that while work may have been performed on a pro bono or discounted basis, this Authority must determine the actual value of the work "calculated in the orthodox way even if the calculation is made retrospectively." The "orthodox way" must refer to the true value of the work, which is the value of the work on a solicitor/client basis.

[42.3] There can be no public interest factor requiring the Authority to discount costs in favour of a person who is legally aided (the Legal Services Act 2011 regulates costs against a legally aided person). On the contrary, the discipline of costs awards discourages parties pursuing meritless proceedings, knowing their risk of costs is mitigated by the grant of legal aid.

[42.4] We are satisfied that on the information before us, the value of the work performed was not less than $27,000. We accept the hourly rates identified as commercial rates for the work, and we have no basis to conclude that the hours of work identified relate to any matters beyond the appeal to this Authority.

[43] It will be a matter for the Commissioner to determine whether it is proper to decide that the correct figure for the commercial value of the services

was $27,000, and how to exercise the discretion under section 105 of the Legal Services Act 2011.

[44] Given the concession by the Chief Executive, it is not necessary for our reasoning to identify further grounds for an award of indemnity costs, as the *Genet* case has made that routine in this jurisdiction. However, we will identify factors in this case that make it appropriate not to award only part of the costs.

[45] The appellant was entirely successful, and no issues arose regarding the conduct of the appellant's case. So there is no reason to discount any of the costs on that account.

[46] For the reasons stated in the substantive decision, we are satisfied the decision that this appeal overturned should not have been pursued, given the information the Chief Executive held after the failed prosecution, and the Crown's decision not to pursue the prosecution.

[47] It follows that the appellant should never have had the imposition of having to pursue this appeal, the Legal Services Commissioner should not have borne the burden of funding counsel for the appeal, and counsel who successfully pursued the appeal should receive the standard rate of remuneration for the work.

[48] However, the grounds for awarding full indemnity costs do not simply stop with the merits of the decision in issue. We identified in the substantive decision:

[48.1] The decision to defend the appeal was predicated on disbelieving what the appellant and the other principal witness said in formal interviews. There was no objective basis for that decision.

[48.2] The Chief Executive relied on affidavits from witnesses who he did not call, despite requests to do so. Their evidence was inconsistent with other witnesses.

[48.3] The Chief Executive attempted to lead evidence that a lawyer attempted to pervert the course of justice by influencing a witness to give perjured evidence. The Chief Executive admits he "had no real evidence that a lawyer had made such an approach".

[48.4] After the decision of this Authority setting out the unfortunate elements in the conduct of the case, the Chief Executive's delegate purported to countermand a decision of the District Court, relating to the residual debt.

[49] It is necessary to make some comments on the last of those matters. As noted, the residual debt established, to the extent it was not finally determined by the District Court, was reserved in this Authority's decision. The context of the intervention following the Authority's decision was that on 9 June 2017 counsel for the Chief Executive conceded "a sum of around $15,000 is envisaged" as an award of costs. On 7 August 2017, the delegate wrote to the Appellant saying the Appellant's debt would be increased by $16,274.85, and that was not "open to further review or appeal".

[50] We draw no conclusions as to the motives of the delegate who purported to increase the debt by an amount exceeding the costs award envisioned. It is neither appropriate nor necessary to do so. However, the actions followed the findings in the substantive decision regarding the conduct of this appeal, and the Appellant's vulnerability. On any view, the delegate's conduct evidences a concerning lack of discipline in the conduct of this appeal that continued after the Authority's decision.

The Tribunal's costs

[51] Counsel for the Chief Executive is correct to say that it has been uncommon for the Authority to require the Chief Executive to pay the Authority's costs. The power is under section 120A of the Act.

[52] We consider an order is appropriate and necessary in this case, to mark the standards this Authority expects. In its substantive decision, the Authority expressed concern that the decision appealed against lacked merit, was not managed properly from an evidential point of view, and that there was an unacceptable attempt to lead evidence of a lawyer acting dishonestly.

[53] Instead of contrition, the response from the Chief Executive's counsel has been an endeavour to justify the conduct of the appeal.

[54] He generally says that the evidence supported the Chief Executive's position. He also says the appeal had merit as the appellant was not discharged under section 147 of the Criminal Procedures Act. The charges were not pursued after the trial; at that time, the information that led to our decision set out in the substantive decision was available. We need not set out the lack of merit again, the substantive decision deals with that issue. The Chief Executive's position lacked merit.

[55] In relation to producing affidavits from witness who were not called, despite requests that they present for cross-examination, the response from counsel for the Chief Executive is that the evidence should still be weighed. That entirely misses the point:

[56] Counsel referred to an affidavit from a police officer; being one of the two affidavits in this category.

[56.1] The officer's affidavit was inconsistent with core elements of the Chief Executive's case (the circumstances are set out in the substantive decision).

[56.2] When reading the affidavit, the Tribunal could only speculate as to which part of the Chief Executive's case was false. Either what the police officer said was false, or a central plank of the Chief Executive's case was false. If that was not the case, then it needed to be explained, because on the face the evidence was inconsistent.

[56.3] When counsel for the appellant sought to cross-examine the police officer, the Chief Executive neither withdrew the inconsistent affidavit, nor produced the police officer for cross-examination.

[56.4] The Chief Executive is expected only to produce evidence from witnesses he regards as witnesses of truth, or frankly produce inconsistent witnesses to have their evidence tested by cross-examination and allow the Authority to decide what evidence is true.

[56.5] It is not acceptable to call some witnesses to give oral evidence and produce inconsistent affidavits and refuse to call the deponents to face cross-examination.

[56.6] The issue is not one of weight given to evidence; it is one of elementary standards of legal advocacy.

[57] In respect of attempting to lead evidence that a lawyer assisting the appellant attempted to pervert the course of justice by coaching the witness to give false evidence, counsel sought to justify that too. He said:

> The Ministry had no real evidence that a lawyer had made such an approach. The Authority would not be aware that Ms XXXX has, at times, been assisted by agents or advocates not of the Bar and on that basis, and with only a single unsubstantiated allegation, with no further clarification forthcoming, the Ministry considered whether that verbal statement ought to trigger the professional code of conduct but could not, in good faith, raise the allegation to the level of suspicion required within the rules of professional conduct.

[58] In short, counsel had no real evidence that anybody had acted in the manner alleged. He purported to have the witness declared hostile, but could not do so on a proper basis. Counsel held no written statement from the witness that he would say such a thing, as is usual when applying to declare a witness hostile. Regardless, the Authority did permit cross-examination of this witness by counsel for the Chief Executive.

[59] There are strict prohibitions on attacking a lawyer, or anyone else under the cloak of absolute privilege; it is necessary for counsel to possess an adequate foundation to allege misconduct in cross-examination or to lead evidence of misconduct. Counsel put a leading question to a witness inviting the answer that the appellant's lawyer attempted to persuade him to give dishonest evidence to this Authority. He has admitted he lacked a foundation to ask the question.

[60] The attempt by a delegate of the Chief Executive to increase the appellant's debt, and tell the appellant she could not challenge it adds to the lack of discipline in the conduct of the Appeal.

[61] In our view, the parties should never have been put to the cost of the appeal, and the conduct identified fell far short of the standards expected by the Authority. That should be marked by requiring the Chief Executive to pay the cost of the hearing, the direct costs of the hearing exceed $6,500. The award will be of that amount. The order will not include the cost of writing the decisions, and incidental matters.

[62] The point of the order is to set standards.

Order

[63] The Authority orders that the Chief Executive pay:

[59.1] the appellant's costs in the sum of $27,000, subject to the Legal Services Commissioner determining not less than that amount may be taken by counsel for the Commissioner in relation to work on this appeal;

[59.2] costs of $1,144.23 to the Beneficiaries and Unwaged Workers Trust;

[59.3] the Tribunals costs of $6,500.

[64] The Authority directs that the quantum on which the residual debt relating to this appeal is calculated is $6,483.28 as determined by the District Court; any recovery must be based on that figure.

[65] The Authority reserves the following matters:

[65.7] Either party may apply for further orders if there is any dispute regarding the effect of the Legal Services Commissioner's determination.

[65.8] Any party or representative of the Beneficiaries and Unwaged Workers Trust may apply for directions regarding the proper recipient of the costs relating to the Trust.

[65.9] Any party may apply for orders relating to the extent of payments made in respect of the residual debt, the effect of any orders amending the amount of the residual debt made by the District Court, or any dispute over repayment (to the extend there is jurisdiction).

Prohibition on publication

[66] The Authority orders that the names of the Appellant and all witnesses, where they live, where this appeal was heard and any other information that may identify the Appellant and any witness is not to be published. There was a previous trial; for that reason, where the events occurred has the capacity to identify the appellant. However, there is a particular sensitivity regarding some of the evidence, and the Authority indicated to

a witness that it would take particular steps to ensure he was not identified. In these exceptional circumstances, the identity of counsel and all witnesses and Ministry officials will not be published as knowing where they work or where the appeal was heard may allow persons to draw inferences that compromise anonymity.

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

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G Pearson
Chairperson

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C Joe JP
Member