

[2018] NZSSAA 007

Reference No. SSA 001/17  
SSA 002/17

**IN THE MATTER** of the Social Security Act  
1964

**AND**

**IN THE MATTER** of an appeal by **XXXX** and  
**XXXX** of Invercargill 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 INVERCARGILL on 3 October 2017

### **Appearances**

The Appellant in person

For Chief Executive of the Ministry of Social Development: M Wilson

## **INTERIM DECISION**

### **Introduction**

[1] In essence, the two appeals are relatively uncomplicated. The appellants are a wife and husband. The husband will be referred to as the male appellant, and the wife as the female appellant. They both received various types of support from the Ministry during two periods; the first being from 18 May 2009 to 21 February 2010, and the second from 22 November 2010 to 19 May 2013. The Ministry's case is that, during the respective periods of time, each appellant was overpaid a total of \$21,039.22. The basis for the Ministry's claim that there were

overpayments arises from its claim that the appellants were engaged in a trading operation that produced profits, which had not been notified to the Ministry. In addition the male appellant was paid for services he provided commercially. The Ministry says that, had it been notified of the profits, each appellant would have been entitled to \$21,039.22 less support than they in fact received.

- [2] The trading operation was a home-based activity through which items were primarily disposed of using internet based auctions. The Ministry has only included income verified in bank statements and records of the company providing the online auction service.
- [3] There has been no issue taken with the allocation of the alleged profits, or the way in which that flows through to altering the amount of the benefit entitlement that each of the appellants had. The female and male appellants are in a situation where their entitlements are determined jointly.
- [4] Aside from appellants claims of irregularity in the procedure and dishonesty on the part of Ministry officials, the nature of the challenge the appellants have presented to the Ministry's position is that they do not accept that the Ministry has correctly identified the amount of income. There have been no technical legal issues; it is essentially a simple factual issue as to whether the Ministry's evaluation of the quantum of income is correct. Accordingly, this decision will discuss that issue.

### **The Ministry's Case**

- [5] The Ministry's case is uncomplicated. Officials obtained records of bank accounts held by the appellant during the material periods of time. They analysed receipts shown in the bank accounts during the periods in issue and treated those receipts as income. The Ministry also obtained records from the online auction company that the appellants used to make sales, and analysed those records (some of which showed up in bank accounts, and others which were apparently settled in some other way, presumably in cash).
- [6] The officials investigating the online activity sought to have the appellants provide evidence of any costs they had relating to generating the income. Due to lack of cooperation from the appellants, the officials could not

determine what, if any, costs the appellants had to acquire the stock that they sold. The Ministry officials have been frank throughout, and stated they are very willing to allow costs of the sales if there is evidence there were costs. The difficulty is that there is a complete absence of evidence to show any costs related to the sales. The expenditure recorded in the bank accounts is mostly obviously personal expenditure and none of it definitively related to the online sales. However, if there were evidence to the contrary, then the officials say they would have taken the expenditure into account.

- [7] Aside from the general issues relating to quantification, the Ministry had to deal with a particular issue. A third party who will be referred to in this decision as “the dealer” was involved in some of the transactions in question; he paid money to the appellants and they paid money to him in a significant number of transactions.
- [8] The appellants say they became involved with the dealer when he was prohibited from selling goods on an online auction site, apparently due to irregularities on his part. Following that development, the appellants would sell items on behalf of the dealer. The bank accounts show a series of transactions through which the dealer would pay money to the appellants and the appellants would pay money to the dealer, apparently related to that activity. In the absence of evidence to establish what lay behind these transactions, the Ministry chose to take the approach that it would ignore the money coming from the dealer and not treat it as income and not take account of the money going to the dealer. Accordingly, rather than offsetting the transactions with the dealer the Ministry ignored those transactions. Whether or not that was favourable to the appellants depends on whether more went out to the dealer than came back in, or otherwise.

### **The Appellant’s Case**

#### *The evidence to answer and the general response from the appellants*

- [9] The essential issue on which the two appeals turn is the conduct of the appellants. The Ministry has provided evidence based on bank accounts, and some statements from the appellants that demonstrate they engaged in activity that produced a total income of some \$85,000. It is the appellants who know what they did and where they could find records relating to that activity. The essence of their response has been to say

they cannot provide answers because other people have their records. They have, however, not provided a coherent account of the activity in question or any sensible explanation as to why they cannot access records or partial records relating to the activity.

[10] The central element of the appellants' explanation is that they became involved in a police investigation. The police prosecuted the male appellant, who was charged with the theft of goods among the kind that the appellants sold in the online auctions. However, the "charging documents" were dismissed, according to a letter from the police which the male appellant produced. The appellants claim that the police had relevant records acquired in the course of their investigation. The appellants say that the police handed over their records to the Ministry, and the Ministry failed to disclose that they hold that material. However, the Ministry says that it received no such material and, instead, the Police only provided a very modest amount of information, which has minimal importance in relation to the appeals. The appellants adjusted their position during the hearing to accept that potentially the police may still have the documents. Either way, the appellants say they do not have documents, and cannot be expected to explain their situation.

[11] The Ministry's evidence includes bank statements, and records from the company that operates the internet auction site. The appellants have not responded specifically to this information; they claim they cannot do so without the information the police or the ministry hold.

*Allegation of official dishonesty*

[12] The appellants' only specific response to the evidence of their income is that they say Ministry officials have engaged in dishonest conduct and falsified records relating to them.

*Effect of the male appellant's bankruptcy*

[13] The second element of the appellants' response arises because the male appellant is an undischarged bankrupt. It is his second bankruptcy. He had debts to the Ministry which were discharged in his first bankruptcy. Accordingly, he says that the liability in issue in this appeal should be discharged by his present bankruptcy.

*The essential issue*

- [14] The appellants have not articulated any specific response to the real substance of the appeal, namely whether they had income that disentitled them to receive benefits from the Ministry, and if so, how much. They face records obtained from independent third parties that indicate their activities potentially produced income. On their face, the records appear to show how much income was produced. Some information regarding the activity was elicited from the male appellant when he gave evidence, but the appellants have not at any point directly addressed the income that the bank statements and online auction records appear to show.

**The Hearing**

- [15] The male appellant suffers ill health. For that reason, the Authority convened a hearing in the city where the appellants live. The Authority set a timetable for the exchange of briefs of evidence. There were some irregularities concerning the service of documents. As matters transpired, it was relatively late before the Ministry's briefs of evidence reached the appellants. However, the information in those briefs of evidence was not new. The same information is in the documents lodged in the appeal, though in a different form. The appellants agreed that they would proceed with the scheduled hearing date but elected not to provide briefs of evidence for the hearing. They did, however, provide written material that set out their position. That material indicates they were not proposing to address the contents of the Ministry's briefs of evidence, their primary response was to allege Ministry officials falsified records to dishonestly support the Ministry's case.
- [16] The hearing commenced and the appellants took the position that the appeal should not proceed because of their allegations of misconduct on the part of Ministry officials. Ultimately, the male appellant provided sworn evidence, although he was never willing to simply engage in the process of providing evidence in relation to all of the issues. The female appellant, despite the Authority inviting her to do so, refused to give any evidence. Due to the ill health of the male appellant, the appellants decided not to attend the whole of the hearing, despite the Authority being willing to provide what accommodation it could to allow the female appellant to remain during the hearing.

**Discussion***The appellants' application to stay the appeal on grounds of official misconduct*

- [17] The appellants provided submissions and the male appellant gave evidence regarding what they claimed to be official misconduct and falsification of records produced as evidence by the Ministry.
- [18] In reality, all that they pointed to in support of that proposition were issues such as apparent discrepancies between the date of documents and the date that document was archived. There was no evidence that the discrepancy had any substance; it seemed entirely plausible that the document management system worked properly and produced that result. Nonetheless, the appellants made and persisted with these serious allegations, saying they were going to refer the matter to the police. However, they provided no sensible evidence to support their grave allegations. We are satisfied that the allegations have no support on the evidence before us, and we reject them. On the contrary, we find that the officials have undertaken a careful investigation, and been at pains to seek input from the appellant's so that they can provide the most accurate evaluation of the appellants' entitlements.

*Bankruptcy*

- [19] The appellant produced evidence that his most recent bankruptcy commenced on 2 February 2015. Accordingly, if the debts are part of his estate in bankruptcy, the usual course is that the debt will be discharged.
- [20] The Ministry said that this particular bankruptcy and debt were not the same as the situation that arose with the male appellants' previous bankruptcy. The Ministry takes the position that the debt arose from fraud, because the male appellant was a party to falsely claiming the assistance that he and the female appellant obtained from the Ministry. The Ministry says the evidence establishes the male appellant knew the appellants had income that disentitled them to the benefits they claimed from the Ministry.
- [21] Counsel for the Ministry referred to the Insolvency Amendment Act 2009. That Act provided for certain changes to the cancellation of fraudulent debts under the no asset procedure. However, the evidence indicates that the male appellant was bankrupted on 24 February 2015 under the

standard procedure. Section 363(1)(c) of the Insolvency Act 2006 excludes persons who have previously been adjudicated bankrupt from the no asset procedure. Accordingly, the relevant provision is s 304 of the Insolvency Act 2006. Section 304(2) provides:

**304 Debts from which bankrupt is released on discharge**

...

(2) The bankrupt is not released from the following debts:

(a) any debt or liability incurred by fraud or fraudulent breach of trust to which the bankrupt was a party:

...

[22] The effect of s 304(2)(a) is discussed in *The Fish man Limited (in liquidation) v Hadfield*<sup>1</sup>, and *F E Investments Limited v Klisser*<sup>2</sup>. It is sufficient to note that the Ministry's position in relation to the male appellant is relatively uncomplicated. It alleges that he fraudulently procured the payment of benefits to him and the female appellant by failing to declare large amounts of income.

[23] We note that s 76 of the Insolvency Act 2006 suspends proceedings for the recovery of provable debt, and s 232 of that Act does not exclude a fraudulently incurred liability being a provable debt. However, a debt incurred by fraud is not discharged at the end of the bankruptcy and this appeal is not a recovery proceeding; it is concerned with the existence of a debt. Recovery involves different proceedings that do not involve this Authority, though it has some jurisdiction in relation to the decision to take recovery proceedings. Accordingly, this appeal is not affected by section 76.

[24] Accordingly, on the information presently provided by the Ministry and the appellants, the Authority must decide whether it is satisfied on the balance of probabilities that the male appellant did fraudulently procure the relevant payments. That is because if the debt in issue is discharged by his bankruptcy this appeal is pointless in relation to the male appellant. While the decision is on the balance of probabilities, the Authority has

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<sup>1</sup> *The Fish man Limited (in liquidation) v Hadfield* [2016] NZHC 1750, [2016] NZAR 1198.

<sup>2</sup> *FE Investments Limited v Klisser* [2010] 2 NZLR 217 (HC).

regard to the well established principle of the perhaps inaccurate, but illuminating, description that the standard of proof is on a “sliding scale”. That is to say that where an allegation is serious, such as an allegation of fraud, the decision-maker must ensure the evidence must justify the grave finding that she or he must make, even though the standard of proof is the balance of probabilities<sup>3</sup>.

- [25] In this case, the decision is not particularly difficult. Uncontroverted evidence from independent records establish that the appellants received large amounts of income, which obviously substantially affected their entitlements to benefits. There is evidence that they did obtain such benefits. It is then necessary to evaluate what the surrounding circumstances were. The quantum of income itself is a pointer to the discrepancy probably being deliberate.
- [26] We give weight to the fact that the appellants have simply provided no sensible explanation as to the circumstances in which they received the income, which is evident in their bank accounts and the records of the online auction site. This is a civil hearing where the appellants inevitably face inferences that may be drawn from their silence, unlike a criminal proceeding.
- [27] In the absence of evidence from the appellants’ bearing on this question, we are satisfied that the male appellant’s debt to the Ministry was incurred by fraud. It follows that it is appropriate for us to proceed to decide the appeal, as it does affect his interests. The debt will not be discharged by his bankruptcy.
- [28] We direct that a copy of this interim decision be forwarded to the Official Assignee and note that the male appellant will potentially incur a liability for costs in this appeal, given the unfounded allegations he has made against the Ministry. The subject of this appeal appears potentially relevant to the management of the male appellant’s estate in bankruptcy, and discharge from bankruptcy.

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<sup>3</sup> *DGSW v Ilyes* [1997] NZAR 292 discusses some of the principles relating to proof of fraud.



*The evidence of overpayments*

- [29] As already observed, the Ministry's case relating to income is simple. It is also strong. The Ministry has relied on bank statements and the online auction company's records relating to sales. The information is sufficient to accurately quantify receipts. Any inaccuracy would understate the receipts as there are potentially cash or barter transactions beyond the bank accounts and the auction records. The appellants have not provided cogent evidence that raises a foundation to find the identified receipts are not income.
- [30] The Ministry has been very frank with the appellants regarding potential deductions against the income to take account of the costs of procuring the goods the appellants sold. The Ministry says that if the appellants can demonstrate that entries in the bank accounts or other expenditure relate to acquiring goods to sell, then the Ministry is willing to consider that. The issue is not the strength of the evidence; the difficulty for the appellants is that they refuse to give evidence as to whether there are costs to take into account. The female appellant refuses to give evidence, and the male appellant refuses to address that topic.
- [31] This Authority is required to decide matters on the basis of evidence; not on speculation. It is possible to speculate on a range of reasons why the appellants have not had costs in obtaining goods to sell. The male appellant provided evidence that he was charged with the theft of goods of a kind that the appellants were selling. The prosecution failed, and we have no evidence before us that any of the goods were stolen; but if they were, there may be no costs in procuring the goods. There has been a suggestion that, though unsupported by evidence, the sales were, in whole or in part, items that the appellants accumulated as personal property. Again, we are not entitled to speculate regarding that matter. Accordingly we can just as readily speculate on circumstances that would mean there are no deductions, as we can on circumstances that would result in none of the sales being income of the appellants. It is the appellants who know what the true facts were, and if they choose not to give evidence then the Authority will decide the appeal on the evidence it does have.

- [32] To put it as simply as possible; the appellants know what the transactions were. If they expect this Authority to decide they had costs they need to give evidence of what they were doing and what their costs were.
- [33] For the reasons we discuss at the conclusion of this decision, we will provide a final opportunity for the appellants to provide evidence as to the costs they may have had.

*The role of the third party*

- [34] The male appellant gave some evidence of the role of the dealer, which has already been briefly described. However, his evidence was evasive. Initially, he refused to identify who the person was, although that is plainly evident in the written record, and he did not wish to discuss the relationship that the appellants had with him. He did claim that there was nothing illicit in the transactions with the dealer that caused his reluctance.
- [35] The Ministry, in the absence of evidence, adopted the expedient approach of ignoring all transactions with the dealer, essentially making an assumption that they were private transactions that did not affect income.
- [36] In our view, the more accurate way of treating the transactions is to bring them into account. There is some risk that by bringing them into account there will be an inaccurate result because there could have been some cash or barter transactions between the appellants and the dealer. However, to the extent that the dealer supplied items for the appellants to sell, that he paid the appellants to acquire goods, and the appellants remitted the proceeds of sales to the dealer, all of that activity can be taken into account accurately. Simply treating the money received from the dealer as income and the money remitted to the dealer as a deduction from that income will account for all of those elements. So, for example, if the appellants retained a commission or profit on the sales on behalf of the dealer, it will be accounted for. Similarly, if the dealer provided items for the appellants to sell, they too will be properly accounted for. It will also account for sales where the dealer provided money to acquire goods, and receives all or part of the proceeds of resale of the same goods.

- [37] We requested that the Ministry undertake a process of analysing those transactions, and as it transpires there is a modest deduction available to the appellants. We note that the subject of the appeal concerns two periods of time where there were overpayments of benefit according to the Ministry, and there is a gap between those two periods. It is possible that transactions prior to the period during which the Ministry has records, the period in the middle and the period after the end of the second period could have transactions that relate to the correct balance as between the dealer and the appellants.
- [38] We requested that the Ministry analyse the figures for the intermediate period. The Ministry did not have figures for periods before and after the relevant period. Given that only the appellants know the true position, in our view, the best approximation on the balance of probabilities is to simply deal with transactions in the relevant time periods on a cash basis, without attempting to engage in an accrual accounting process which may produce a more accurate result. Certainly, the figures for the period between the two intervals does not indicate that any major discrepancy is likely as a result of simply allocating transactions to the relevant periods of time.
- [39] We conclude that the result of all the transactions between the appellants and dealer reduces the total income by \$1,792.15. That is a figure produced in evidence by the Ministry. As it transpires, the only type of support which it impacts on is the benefit which was initially described as a Sickness Benefit and more recently an Invalids Benefit. It is necessary to calculate the effect on benefit entitlement; it will, however, produce a more favourable result for the appellants.

#### **The Effect of this Interim Decision**

- [40] This interim decision is intended to give the appellants a final opportunity to address the evidence. The matter will proceed in the following way:

[40.1] The appellants have one calendar month to provide written statements that set out any evidence that they wish present to the Authority to consider before it issues a final decision.

[40.2] The Ministry will issue a recalculation showing the effect of the benefit overpayment on the adjustment that we have indicated we will accept in relation to transactions with the dealer.

[41] After one calendar month if the appellants have not provided further written evidence that justifies further examination, the Authority will issue a final decision on the basis of the reasoning in this interim decision and the amended figures provided by the Ministry.

[42] For the guidance of the appellants, we set out what appears to us are the potential areas where they might wish to provide further information. It includes the issues relating to the bankruptcy of the male appellant. As indicated, the evidence presently before us will result in the Authority finding the male appellant engaged in a dishonest process amounting to fraud. In addition, the evidence presently establishes that the appellants did receive the net income alleged by the Ministry, subject to the adjustment relating to the dealer. If the appellants wish to challenge any or all of that evidence, the following appear relevant (but only the appellants fully know their own circumstances and they must decide what information they need to provide):

[42.1] The Authority's evaluation that the amount of income was sufficiently large to make it implausible that the male appellant did not know he should have disclosed it to the Ministry when claiming a benefit. The Authority has no evidence that he did disclose the income to the Ministry, and it has information the income disentitled him and the female appellant to some \$40,000 of benefits. If the male appellant wishes to take issue with that evidence, then he needs to provide material that the Authority can consider that will potentially displace the evidence supporting its interim findings.

[42.2] In relation to the amount of income, the entitlement to claim expenses against the income, and the transactions with the dealer the Authority has indicated it is willing to consider further evidence. If the appellants do produce evidence, they should consider that they need to deal with the written material presently before the Authority. If they wish to produce evidence, it is also important for the appellants to be aware that the Authority will

expect them to produce any written records that ought to have been available, or explain why such records are not now available. They should keep in mind the importance of providing written statements from other persons who might provide support for any facts that they wish to have the Authority accept. The Authority would expect them to explain the nature of the sales of goods and services producing receipts, and explain how the process worked.

[42.3] In relation to the transactions with the dealer, the appellants should be mindful that any explanation needs to take account of the apparent effects of accounting for the bank transactions with the dealer. Unless there are external transactions not shown in the bank accounts, or the auction company's records, taking account of the bank account records should produce an accurate account of any profits and losses in the dealings they had with the dealer.

[43] If, and only if, the written material provides an evidential foundation that is sufficient to potentially answer the case against them, the Authority will consider convening an oral hearing so that any witnesses can be cross-examined.

[44] Accordingly, when the appellants have produced any information they wish to produce, the Authority will consider whether it meets the standard of being a plausible explanation that is capable of establishing that the appellants' claims are probably true. Unless that is the case, the Authority will make the final decision, in the terms we indicate below.

[45] When making the decision as to whether the information provided by the appellants is capable of establishing that the material is sufficient to defer making a final decision, the Authority will consider:

[45.1] whether the explanation is plausible;

[45.2] whether the explanation is consistent with the written record;

[45.3] why, if it turns out to be the case, the explanation was not advanced earlier;

[45.4] whether the new evidence is consistent with what the appellants have said previously; and

[45.5] whether the information is supported by written records that should be available, and if not, whether those records are not available for a plausible reason advanced by the appellants.

### **The Proposed Final Decision**

[46] If after one calendar month from the date of this interim decision the appellants have not provided information which justifies a different outcome, the Authority will issue a decision determining that the Chief Executive correctly decided to establish and seek recovery of an overpayment from the appellants amounting to \$21,039.22 in respect of each appellant; being a total of \$42,078.44 for the periods 18 May 2009 to 21 February 2010 and 22 November 2010 to 19 May 2010.

[47] That decision will be subject to an adjustment made as a result of the transactions with the dealer which will reduce the liability to some extent.

### **Timetable**

[48] Within two weeks of this decision issuing, the Chief Executive is to provide a reasoned calculation of the adjustment resulting from the transactions with the dealer in the manner we have indicated. The calculation will be on a cash basis for the reasons discussed. If the transactions are to be evaluated on an accrual rather than a cash basis, the appellants must provide evidence to enable that process.

[49] Within one calendar month from the date of the issue of this decision, the appellants may if they choose, provide written statements from themselves and any other witnesses setting out the evidence they wish to provide relating to matters in issue. They should also provide copies of any written material that they refer to. However, it will not be necessary to produce further copies of any information already before the Authority; the statements may refer to that material using the page numbers in the reports already provided to the Authority.

[50] If there is no further material from the appellants, the Authority will issue its decision after one calendar month in the terms indicated.

**Dated at Wellington** this 31<sup>st</sup> day of January 2018

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**G Pearson**  
Chairperson

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**K Williams**  
Member