

[2018] NZSSAA 008

Reference No. SSA 086/15
and SSA062/16

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of
Christchurch against a decision
of a Benefits Review
Committee

COSTS DECISION

Introduction

- [1] XXXX (the appellant) filed two related appeals which were scheduled for hearing at the same time. The first appeal, SSAA 086/15 was against the decision to stop her benefit payments on the basis that she was in a relationship in the nature of marriage. SSAA 062/16 (the second appeal) was against the decision to establish the overpayment against her alone and not as a relationship debt. Accordingly, the subject of the second appeal was derivative from the first appeal, with the determinative issues and consequences in the two appeals being intertwined.
- [2] At the commencement of the hearing, the parties agreed that, in light of the decision in *S v Chief Executive of the Ministry of Social Development*¹ the hearing of the second appeal should be deferred until the first appeal was determined, allowing the appellant's alleged partner to be added as a party if the first appeal was not upheld.
- [3] As we upheld the first appeal the appellant has no reason to pursue her second appeal, she succeeded in the second appeal due to the determination in the first appeal. She now applies for the costs incurred in prosecuting both appeals.

¹ *S v Chief Executive of the Ministry of Social Development* [2017] NZHC 414.

Relevant law

- [4] Section 120 of the Social Security Act 1964 provides that when an appeal is allowed, either in whole or part, the Authority may allow the appellant the costs of bringing the appeal or any part thereof.

- [5] The High Court in *Chief Executive of the Ministry of Social Development v Genet*² held that an advocate who has not charged a client is entitled to a costs award, provided a calculation of costs is provided by either the appellant or the advocate. It is not appropriate for the Authority to estimate costs.

The application for costs

- [6] The decision in *Genet* is relevant to this appeal because the appellant was represented by Community Law Canterbury, a not-for-profit organisation funded primarily by the Ministry of Justice, donations and voluntary work. Community Law provides free legal services which it allocates on the basis of the vulnerability of the client and public interest considerations. Although it does not invoice for its services, Community Law keeps a record of the time spent on client files.

- [7] For the appellant, Ms Boele filed a full record of all time spent on the file and a calculation of time spent at each stage of the proceedings. She separately itemised the time spent in relation to the two appeals and she has also itemised the time spent on the Benefit Review Committee hearing for the second appeal. She based the application for costs on the legal aid provider grade 3 rate of \$124 per hour although the appellant was not granted legal as counsel did not have legal aid lead provider status at the time.

- [8] After the submissions were filed we sought clarification of the costs incurred in relation to preparation and appearance at the Benefits Review Committee hearings and the second appeal. Counsel then provided a copy of an email dated 19 October 2015 from Ray Signal, Appeals Officer for the Ministry, which raised the question of jurisdiction to hear the second appeal.

- [9] The total time charged on both files, based on the updated schedule of costs filed on 14 December 2017, is 97.9 hours in addition to 1½ days' hearing time.

² *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541.

The position of the Chief Executive

- [10] For the Ministry, Ms North accepts the 60 hours claimed for preparing the first appeal and the 1½ days hearing time.

- [11] The Ministry does not accept the costs relating to the Benefits Review Committee hearing and preparing the second appeal. The Ministry submits that s 12O allows only the costs of an appeal to be awarded and that there is no provision to award the costs of a review by a Benefits Review Committee.

- [12] In relation to the second appeal, the Ministry contends that there is no jurisdiction to award costs because the criteria in s 12O(1) of an appeal that has been allowed in whole or in part are not met. The Ministry further submits that costs should not be awarded on this appeal because, if the appellant had pursued both appeals, she would have had to adopt inconsistent positions in relation to the question of whether she was in a relationship in the nature of marriage.

Discussion

Can the Authority award the costs of the Benefits Review Committee hearing?

- [13] The clear meaning of s 12O(1) of the Act is that the Authority has jurisdiction to award the costs of bringing an appeal. There is nothing in this provision to indicate that such costs include the prior review by a Benefits Review Committee.

- [14] The right of appeal is restricted to the circumstances prescribed in s 12J of the Act which are that a decision must either have been confirmed or varied by a Benefits Review Committee under s 10A, or have been made by the Chief Executive other than pursuant to a delegation.

- [15] Because an appeal is unable to be brought, in circumstances where a Benefits Review Committee is relevant, unless a Benefits Review Committee has confirmed or varied the decision of the Chief Executive which is intended to be appealed, the costs associated with preparing or attending a Benefits Review Committee review arise before there is a right to appeal. As a result, those costs are not costs which have resulted from bringing the appeal.

- [16] There are strong policy reasons against costs being awarded in relation to the Benefits Review Committee process. The review at this level is intended to be relatively efficient and not onerously costly on either party. It is intended as an administrative step, although with quasi-judicial elements, rather than a judicial forum which normally gives rise to costs.
- [17] For these reasons, we are satisfied that the costs provision in s12O is not intended to include the cost of a review by a Benefit Review Committee. Accordingly, we conclude that the Authority has no power to award any costs in relation to either preparing for or attending a review by a Benefits Review Committee.

Costs of second appeal

- [18] The second appeal formed part of the original notice of appeal which was filed on 14 July 2015. The Authority asked the Ministry to file its s 12K report by 20 October 2015. On 19 October 2015 Mr Signal sent an email to counsel for the appellant stating that the Ministry challenged the Authority's jurisdiction to determine this aspect of her appeal. Mr Signal said that as the decision to establish an overpayment had not been made when the appellant sought a review of the decision to cancel her benefit, the question of debt sharing had not been decided by a BRC. Mr Signal therefore advised Ms Boele that the appellant should seek a review by the BRC of the decision to establish an overpayment and have the scheduled hearing of the appeal adjourned to allow this review to occur.
- [19] When the Ministry filed its s 12K report it stated that 'there are two decisions being appealed...the decisions are clearly related but also separate in their own right'. The Ministry's submissions on the second appeal addressed the reasons for its decision not to apply debt sharing.
- [20] Up until the first day of hearing on 29 March 2017, the appellant prepared to prosecute both appeals. The decision of the High Court which led to the deferral of the second appeal was issued on 10 March 2017.³ It was not until this decision was issued that there was any question of the second appeal not proceeding.

³ *S v Chief Executive of the Ministry of Social Development* [2017] NZHC 414.

- [21] As the Ministry accepted in its report, the two appeals are clearly related. If the Ministry had not decided to cancel the appellant's benefit, the second appeal would not have been brought. According to the reports of the two Benefit Committee Review hearings, the Ministry made the two decisions that are under appeal only two days apart – on 26 November 2014 and 28 November 2014 - although the second report records that the amount of the overpayment was established in January 2015.
- [22] The appellant was not represented by counsel at the first BRC hearing on 13 April 2015. In these circumstances, it would have been appropriate for the Ministry to establish at this time whether the appellant intended to seek a review of both decisions and, if it considered it necessary, seek to adjourn the BRC hearing for the appropriate documents to be filed rather than question jurisdiction the day before it was due to file its s 12K report.
- [23] Section 12O(1) provides that costs can be awarded to an appellant whether an appeal is allowed in whole or in part, or whether the Authority refers the matter back to the Chief Executive. The clear intention of this provision is that where an appeal has merit, the appellant is entitled to costs. A strict interpretation of this provision, requiring the appeal to be fully argued, is inconsistent with the purpose of a costs award in this legislation which must be to ensure that there is no cost barrier to meritorious challenges to benefit decisions.
- [24] Had the two appeals been advanced together, the costs incurred were obviously recoverable. The fact that the second appeal was rendered moot by the decision on the first appeal does not alter the fact that the appellant was required to fully prepare to prosecute the second appeal at the hearing in March 2017. All the justiciable issues have been addressed in the appeal which we have determined and the costs award should reflect this situation.
- [25] For these reasons, we are satisfied that the appellant is entitled to the costs incurred in prosecuting both appeals. It is usual for costs to be awarded when a proceeding concludes. However, it would appear to be a unique requirement for a costs regime to be contingent on completion of a hearing and a determination by the Court or Tribunal. There is nothing in the Act that does appear to establish such a regime, and nothing that suggests it would be a sound policy approach.

Quantum*SSA 086/15*

- [26] The Ministry's assertion that some of the costs claimed for this appeal must relate to the Benefit Review Committee is not accepted. The appellant did not engage counsel for the Benefits Review Committee process, and was not represented at the hearing. We therefore find that the appellant is entitled to the 16.9 hours claimed for preparation in the updated scheduled and the 60 hours preparation, a total of 76.9 hours at \$124 per hour = \$9,535.60.

SSA 062/16

- [27] According to the updated schedule, 8 hours is claimed for preparation for the Benefit Review Committee hearing and appearance at that hearing. For the reasons given, these costs are not awarded.
- [28] The appellant is entitled to the balance of the costs claimed for this appeal, being 13 hours at \$124 = \$1,612.00.
- [29] The hearing time of 1 ½ days was not disputed and is awarded – 12 hours at \$124 = \$1,488.

Orders

- [30] Pursuant to s 12(1) of the Act, the Chief Executive of the Ministry of Social Development is to pay the appellant the sum of \$12,665.60 immediately.
- [31] The second appeal is determined by the decision in the first appeal, and is accordingly concluded. However, leave is reserved for the parties to apply for orders in the second appeal, to the extent there are any unresolved issues.

Dated at Wellington this 5th day of February 2018

S Pezaro
Deputy chair

C Joe JP
Member