

[2019] NZSSAA 37

Reference No. SSA 126/18

IN THE MATTER of the Social Security Act 2018

AND

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

DECISION ON COSTS

Background

- [1] XXXX (the appellant) appeals the decision to decline to grant an Emergency Benefit for the period 19 July 2015 to 29 November 2015. Her appeal succeeded, and the parties were directed to file submissions on costs to be awarded to the appellant. The Authority noted that costs were reserved in 2016 following her earlier successful appeal and that the Ministry considered that those costs should be set after the current appeal was decided. The parties subsequently settled the matter of the 2016 costs.

Relevant law

- [2] Clause 255 of the Social Security Regulations 2018 provides that when an appeal is allowed, either in whole or part, the Authority may allow the appellant the costs of bringing all or part of the appeal.
- [3] In *Chief Executive of the Ministry of Social Development v Genet*¹ the High Court 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 submissions for the appellant

- [4] The appellant was represented in these proceedings by Ivan Sowry, a lay advocate from the organisation Auckland Action Against Poverty which, among other services, provides advocacy to beneficiaries bringing appeals to the Authority.

¹ *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541.

- [5] Mr Sowry filed submissions on costs on 8 April 2019 and the Ministry filed submissions in response. Because Mr Sowry sought costs associated with the Benefits Review Committee hearing and did not appear to be aware of the decision of the High Court in *Genet*, I directed that decision be provided to him and that the appellant and the respondent, if necessary, be given an opportunity to file further submissions which addressed *Genet*. As no further submissions were filed, this application is determined on the basis of the submissions filed before the second direction was issued.
- [6] Mr Sowry submits that the Authority should adopt the approach of the District Court in the Accident Compensation Corporation appeal *Dickson-Johansen v Accident Corporation (Costs on appeal)* [2018] NZACC 36 (16 February 2018) where the Court awarded scale costs under the District Court Rules to an appellant who was represented by an experienced advocate.
- [7] Mr Sowry submitted that as this was a proceeding of moderate complexity it raised issues of the proper exercise of statutory discretion and costs should be awarded based on a Category 2 proceeding under Schedule 5 of the District Court Rules. He submitted that a daily recovery rate of \$1,550 should apply and provided a schedule of time showing a total of 5.6 days including the time associated with Benefits Review Committee hearings.

The submissions for the Ministry

- [8] The Ministry submits that in setting an appropriate hourly rate for costs, the published legal aid hourly rates for a non-lawyer are an appropriate figure to use. These rates range from \$72 for a law clerk and non-qualified legal executives or paralegals, to \$82 for qualified legal executives.
- [9] The Ministry also says that in the last year it has been meeting costs' invoices of advocates who have had successful appeals, either prior to or at the hearing. The Ministry says that the average rate paid is \$78 per hour. The Ministry then refers to the costs of its own appeals officers and their hourly salary.
- [10] The Ministry also says that it has been preparing a policy on the payment of advocates' costs and is consulting with beneficiary advocacy groups. The setting of costs to be awarded by the Authority is not a matter of policy. It is a decision of the Authority and the discretion to award costs cannot be fettered by any policy which the Ministry purports to establish. Further, it was the Ministry which brought the appeal in *Genet* and it is bound by that decision. The High Court confirmed

that an award of costs is made at the discretion of the decision maker. The Court also confirmed that costs can be awarded in a situation where the lay advocate has not charged the appellant and can be based on a retrospective calculation. While the Ministry can negotiate directly with appellants as to costs, it cannot fetter the discretion of the Authority to award costs.

Discussion

- [11] The question of whether the Authority can award the costs of the Benefit Review Committee hearing was considered in [2018] NZSSAA 008. The Authority concluded that the clear meaning of s 12O(1) of the Social Security Act 1964² was that it has jurisdiction to award the costs of bringing an appeal but not any costs incurred in a prior review by a Benefits Review Committee.
- [12] The right of appeal is restricted to either a decision that has been either confirmed or varied by a Benefits Review Committee or made by the Chief Executive other than pursuant to a delegation. In circumstances where a Benefits Review Committee is relevant, there is no right of appeal unless a Benefits Review Committee has confirmed or varied the decision. Therefore, the costs associated with preparing or attending a Benefits Review Committee review arise before there is a right to appeal and are not the result of bringing the appeal.
- [13] 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.
- [14] We have reviewed the question of entitlement to costs for a Benefits Review Committee hearing in the circumstances of this particular case. At [40] of our decision we expressed concern at the process of the appeal, the Ministry's failure to have regard to the Authority's 2016 decision, and the delay by the Ministry in implementing the determination of the second Benefits Review Committee. We concluded that the Ministry persisted with a course of action which was contrary to the principles of the Act and referred our decision to the Chief Executive for consideration. We noted that if we had the power to award compensation, the circumstances of this appeal and the delays by the Ministry would warrant such

² Now replaced by the Social Security Act 2018. The equivalent provision is contained in cl 255 of the Social Security Regulations 2018.

an award. These observations reflected our concern that this appellant had to file two appeals and attend two Benefits Review Committee hearings to rectify a decision made in 2015.

[15] However, neither the Act nor the Regulations provide the discretion to award the costs of a Benefits Review Committee hearing. The purpose of a costs award is to cover the process of bringing an appeal only and therefore we decline to award the costs related to the Benefits Review hearings.

[16] Mr Sowry claimed a half day for communication with the Social Security Appeal Authority before the appellant's second application for a review of decision by a Benefits Review Committee. It appears this communication was an attempt by the appellant to clarify the Ministry's reasons for failing to implement the Authority's 2016 decision. The Ministry has not challenged this component of the costs claim and we accept that it was relevant to the appeal. The total amount of time for which the appellant is entitled to costs is therefore 2.95 days.

Conclusion

[17] The appellant is entitled to an award of costs based on 2.95 days of advocacy time. We accept that legal aid provider rates are relevant in this case. We consider that the most relevant scale is that applied to family or civil fees and that the appropriate level is the rate paid to employment advocates. This is because employment advocates, like the appellant's advocate, specialise in certain jurisdictions. That rate is currently \$82 per hour.

[18] Based on an eight-hour day, the appellant is entitled to 23.6 hours at \$82 per hour, a total of \$1,935.20. We note our evaluation of the hourly rate is one made on the facts of this case, and it will not be determinative in any other matter. It may well be appropriate to provide evidence of the cost of delivering services and to make comparisons with the costs recovered by other persons providing comparable professional services. We are satisfied that a rate of \$82 per hour is appropriate on the facts before us in this case.

Order

[19] Pursuant to cl 255 of the Social Security Regulations 2018, the Chief Executive of the Ministry of Social Development is to pay the appellant the sum of \$1,935.20 immediately.

Dated at Wellington this 17th day of June 2019

S Pezaro
Deputy Chair

K Williams
Member

C Joe
Member