

**IN THE MATTER** of the Social Security Act 2018

**AND**

**IN THE MATTER** of an Appeal by **XXXX** of Dunedin  
against a decision of the Chief Executive  
that has been confirmed or varied by 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 21 May 2019

**Appearances**

For XXXX: Mr G Howell (agent)

For Chief Executive of the Ministry of Social Development: Mr C A Buchan and Mr  
P A Frost (counsel)

**DECISION**

**Background**

[1] The appeal relates to a decision to establish and seek recovery of an overpayment of \$4,213.05. The foundation of the dispute is receipts in bank accounts, XXXX says they were not income, the Ministry of Social Development says they were income. XXXX receives a benefit and his income affects the level of his benefit.

[2] The period in issue is from 16 February 2015 to 24 August 2018. Mr Howell indicated, for XXXX, he challenged both:

- [2.1] The admissibility or legitimacy of information relating to claimed overpayments before 1 January 2018. He says the information relied on involved a breach of privacy and potentially other breaches of XXXX's rights.
- [2.2] If the Authority could consider evidence that XXXX received income, then he disputed that the money deposited into his bank account was income, so he says it did not affect his benefit entitlements.
- [3] The Ministry filed a report, which appeared to contain a record of XXXX's benefit status, his entitlements, the income he potentially received and calculations concerning the calculation of an overpayment. It was only contentious in the respects identified.
- [4] In advance of the hearing, the Authority notified XXXX that:
- [4.1] To the extent he disputed the Ministry's claim it overpaid his benefit, it would be important for him to produce records and identify why the Ministry's claims are incorrect.
- [4.2] It appeared the question of whether we can consider the information relating to receipts before 1 January 2018 is primarily a legal issue. However, potentially, what occurred during an interview with the Ministry of Social Development may be relevant.
- [4.3] If the evidence of the receipts was accepted, then because XXXX said they were not income, he needed to give his explanation and support it as far as he could with documentary material. He could call third parties to provide evidence if appropriate.
- [5] The appeal proceeded to a hearing, which XXXX attended. However, he felt indisposed during the hearing and indicated he could not continue. Accordingly, the Authority gave him the opportunity to participate by a telephone link after he recovered. XXXX declined to engage further with the Authority. Accordingly, XXXX did not give evidence and elected not to take the opportunity to do so.
- [6] In these circumstances, we will determine the appeal based on the material we have but take account of XXXX's decision not to give evidence.
- [7] It is a factual issue as to whether receipts were income affecting XXXX's benefit. He did not raise any legal issues relating to what amounts to income

that abates benefit entitlements. Generally, he claimed he allowed other people to use his bank account for deposits, and he paid that money out to them in cash or transferred the money on their direction. If true, there could be no dispute the receipts were not XXXX's income, and he was merely assisting people who did not have a bank account.

#### **The evidence for the Ministry**

- [8] As XXXX did not give evidence, our starting point must be the evidence the Ministry of Social Development produced. Otherwise, the appeal would fail for lack of any evidential base.
- [9] The Ministry of Social Development filed its report and attachments under reg 249(1) of the Social Security Regulations 2018. The key details in the report were:
- [9.1] XXXX's benefit entitlements, and the amount of income the Ministry of Social Development considered he had received, but not reported.
- [9.2] Why the Ministry considered XXXX received \$4,213.05 more than he was entitled to, given the Ministry of Social Development's evaluation of his unreported income.
- [9.3] The money received in XXXX's bank account, and XXXX's explanations. The report then identified the extent to which the Ministry accepted XXXX's explanations. The Ministry generally accepted explanations when they were consistent with the bank records.
- [9.4] The Ministry did not accept explanations that XXXX deposited money saved in a large piggy bank, he deposited money for his daughter who was in prison, he collected money for a friend who lost her bank card and paid it to her in cash; and treated transactions as income when he could not recall the reason for them.
- [10] Mr Anderson, an investigator who works for the Ministry of Social Development gave evidence. He said he had investigated XXXX's bank account. He requested copies of statements from the Bank, which responded with statements for a wider period than he requested. Mr Anderson considered all the bank records he identified as relevant to XXXX's benefit level. He interviewed XXXX regarding the bank receipts, and he produced a transcript of that interview. Mr Anderson set out details of the explanations

accepted and rejected, and some minor errors he had detected in his analysis (they increased the liability).

#### **XXXX's case**

[11] XXXX contended that the bank statements provided by his bank outside of the period requested should be disregarded. He effectively claimed immunity for any income disclosed in those bank statements. He says that applies to all bank statements that relate to the period earlier than 1 January 2018.

[12] He says if only the receipts in the period within the Ministry of Social Development's request are considered, there is no overpayment and he relies on the explanations he gave to Mr Anderson.

#### **Discussion**

##### *The claim of immunity on privacy principles*

[13] For XXXX, there were multiple levels of his argument that the Ministry of Social Development could not use some of the information in his bank statements:

[13.1] The statements were released in breach of privacy principle 11 in s 6 of the Privacy Act 1993, as they were personal information.

[13.2] The Ministry of Social Development should have destroyed the statements that were outside the period requested without looking at them.

[13.3] The interview with XXXX was an improper process, including:

[13.3.1] There was no attempt to contact XXXX's advocate.

[13.3.2] The interview was unfair as XXXX lacked the legal skills to respond to the details of questions.

[13.3.3] The interview breached privacy principles 4 and 11 in s 6 of the Privacy Act 1993.

[13.4] The breach of privacy principle 11 gave XXXX immunity if he received income into his bank account outside the period for which the Ministry of Social Development requested the bank statements. The Ministry of Social Development could not re-gather the information.

- [13.5] The Ministry of Social Development could not use information obtained in the interview it conducted with XXXX.
- [14] Mr Howell primarily relied on the Supreme Court's decision in *R v Alsford*<sup>1</sup> to support the principles he advanced.
- [15] This appeal is a civil proceeding. We are not concerned with the issues that could arise if the Ministry of Social Development were prosecuting XXXX, which would engage s 28 – 30 of the Evidence Act 2006. The interview, in this case, was not subject to the Chief Justice's Practice Note — Police Questioning (s 30(6) Evidence Act 2006).<sup>2</sup> This is not a case where the Ministry of Social Development extracted information it was not entitled to have. The highest XXXX can put his complaint is that the bank gave the Ministry of Social Development more information than it requested. However, the Ministry of Social Development could have asked for that information.
- [16] We must apply the rule in s 8 of the Evidence Act 2006.<sup>3</sup> It requires that the Authority exclude evidence if its probative value is outweighed by the risk the evidence will have an unfairly prejudicial effect on the proceeding. This case lies far from the threshold for that to apply. If XXXX received income in his bank account, he was obliged to disclose it to the Ministry of Social Development.<sup>4</sup> There was no question of XXXX having a right to silence regarding income deposited into his bank account. The Ministry of Social Development had the power to investigate XXXX's income,<sup>5</sup> and he had a duty to answer all questions put to him about his income.<sup>6</sup> The probative value of bank statements potentially disclosing income XXXX had not declared is obvious. It is not evident that there is anything unfair or prejudicial. On the contrary, it is likely unfair and prejudicial to allow XXXX to withhold information he was potentially under a statutory duty to disclose. In our view, s 8 of the Evidence Act 2006 does not assist XXXX in this case.

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<sup>1</sup> *R v Alsford* [2017] NZSC 42.

<sup>2</sup> Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006) [2007] 3 NZLR 297.

<sup>3</sup> The provision appears to apply to the Authority, as a “judge” as defined in s 4 of the Evidence Act 2006 includes a tribunal.

<sup>4</sup> Social Security Act 1964 (the Act), s 80A.

<sup>5</sup> Section 12(1A) of the Act.

<sup>6</sup> Section 12(2) of the Act.

- [17] We recognise *Marwood v Police*<sup>7</sup> is an authority for potentially excluding evidence in a civil proceeding. The Court said the “real question is whether relief by way of exclusion of evidence is proportionate to the breach of rights”.<sup>8</sup> It follows we must consider what, if any, breach of rights XXXX has suffered. The fundamental difficulty XXXX faces is that the Ministry of Social Development has obtained information he should have provided. On the face of it, the deposits were income, and he has chosen not to give evidence to establish otherwise. To exclude the evidence, unless there was some serious breach of rights, may well be a capricious, rather than proportionate, response.
- [18] In *Marwood*, the Supreme Court was considering an application under the Criminal Proceeds (Recovery) Act 2009, and whether evidence excluded in an antecedent prosecution should be considered. The evidence was excluded in the prosecution due to the successful challenge of a search warrant. The Court said whether evidence could be excluded in a civil case was an “evaluative assessment”, not discretionary. It is necessary to evaluate the evidence and the breach of rights. The Authority cannot exclude the evidence unless doing so is proportionate.
- [19] The Court observed that Mr Marwood could have issued civil proceedings to seek compensation for loss of privacy or distress relating to the search warrant. The Court did note that such civil proceedings could well fail, given the prosecution failing was potentially sufficient vindication of his rights. The Court took the approach that the reasons for finding the search warrant invalid were not a serious breach and should not impede the proper resolution of the civil application.
- [20] XXXX has not established there was any breach of his rights on the part of the Ministry of Social Development. The evidence did not go into the reasons for investigation or the decision to require information from the bank. XXXX only objected to the bank giving information outside of the date range required.<sup>9</sup> When making inquiries, there will be many occasions when a third party provides more information than an investigator anticipated or realised was relevant. The investigator often has less information than the person

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<sup>7</sup> *Marwood v Police* [2016] NZSC 139.

<sup>8</sup> At [50].

<sup>9</sup> The Authority put the parties on notice of the Privacy Commissioner's *Inquiry into the Ministry of Social Development's Exercise of Section 11 (Social Security Act 1964) and Compliance with the Code of Conduct* (May 2019).

subject to the inquiry. We can see no grounds for imposing a duty on a Ministry of Social Development investigator to inquire into whether the person providing the information breached a duty by providing information relevant to the Ministry's inquiries, which it is entitled to obtain. If XXXX thinks the bank breached his privacy rights, that is a matter for him to pursue with the bank. The Ministry of Social Development is not empowered to inquire into privacy breaches; neither is this Authority. This decision is not relevant to XXXX's rights against the bank; we can only speculate whether the bank considered it had a duty or right to disclose the additional bank statements to the Ministry of Social Development or did so in error. Those issues turn on obligations of public duty, the authority given to the bank by XXXX, and statutory provisions.

- [21] The substance of XXXX's contention is the bank by providing information about his income when it was not specifically asked for gives him immunity from having his benefit determined on the correct basis. It makes no sense for a bank through its conduct to have the power to override the statutory obligation on the Ministry of Social Development to inquire into, establish, and apply the correct rate of benefit for XXXX.
- [22] XXXX also complained about the interview. To succeed in his argument, XXXX would need to establish something like a breach of the prohibition on unreasonable search and seizure provided by s 21 of the New Zealand Bill of Rights Act 1990, or arbitrary detention under s 22. There is simply no foundation for a complaint of that kind. The main complaint appears to be that XXXX did not have the opportunity of having his agent, Mr Howell, present in person or by telephone. The record does not support that, Mr Anderson offered XXXX the opportunity to defer the interview for that purpose. XXXX did not ask for the opportunity to take legal advice.
- [23] XXXX was required to answer the questions at the interview, as s 12(2) of the Social Security Act 1964 required him to "answer all questions put to him" concerning his "means, earning capacity, and economic circumstances". He had no right to privacy in respect of those matters in respect of the Ministry of Social Development.
- [24] In our view, it is essential to put the interview in context. The interview was not a situation where the Ministry of Social Development had decided to charge XXXX with criminal offending. Accordingly, the Chief Justice's Practice Note does not apply directly or by analogy. It would be overbearing and intimidating if the Ministry of Social Development were to embark on a

process appropriate to interviews relating to criminal investigation when asking about the income of beneficiaries. We do not need to consider what is necessary when the Ministry will, or will potentially, charge a person with a criminal offence. It is a daily routine for beneficiaries to discuss their income with the Ministry of Social Development. Certainly, in this case, the interview was reasonably formal and recorded. However, a full recording, as XXXX accepted was the case at the hearing,<sup>10</sup> is generally regarded as protective of the interviewee. Furthermore, the interview is not the source of XXXX's difficulties. To a very substantial degree, the Ministry accepted the explanations he gave in that interview. As he has chosen not to give evidence, the interview is the only evidence we have of his explanations.

[25] We would have little difficulty in disregarding a mistaken explanation at the interview if XXXX had later looked into the details and found he initially made a mistake. We are fully aware that it can be very difficult to recall specific transactions without recourse to records. This is not a situation where we are placing reliance on a record to discount or reject a subsequent explanation. XXXX has elected not to give a further explanation.

[26] Accordingly, we have identified no irregularity in the interview process, and do not consider it unfairly affected XXXX. He has had every opportunity to provide further information to the Authority and chosen not to do so.

### **The quantum of income**

[27] As we have observed, the Ministry's report and Mr Anderson's evidence identify a range of receipts into XXXX's bank account and say there is no satisfactory explanation.

[28] We have considered what XXXX said by way of explanation at his interview. However, we accept the Ministry's view that there is no satisfactory explanation for the receipts the Ministry is treating as income. Also, we take account of XXXX declining to provide sworn evidence and answer questions in respect of those receipts. XXXX has presented no adequate foundation for us to conclude the receipts into his bank account were not income that affected his benefit entitlement. He did not dispute the calculation that determined the correct level of his benefit, given the income.

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<sup>10</sup> We provided the opportunity for him to review the whole of the audio record, but he was satisfied with Mr Anderson's assurance the transcript and the recording were complete.



**Decision**

[29] We are satisfied we must dismiss the appeal. The evidence we have establishes that in the absence of an explanation the contentious receipts were income. XXXX has failed to provide evidence they are anything other than income.

[30] We reserve leave to deal with any issues relating to quantum.

**Dated at Wellington** this            day of                                    21 May 2019

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**G Pearson**  
Chairperson

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**K Williams**  
Member

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**C Joe JP**  
Member