

(2022) NZSSAA 06

Reference No. SSA 86/21

IN THE MATTER of the Social Security Act 2018

AND

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

DECISION ON COSTS

Background

- [1] This Decision replaces the decision dated 2 September 2022. Due to an administrative error the total amount of costs awarded to XXXX was calculated as \$555.61 in paragraphs [23] and [24], when it should have been \$585.61. This decision corrects that error. The Decision is otherwise unchanged.

- [2] XXXX appealed two decisions made by the Ministry concerning his entitlement to New Zealand superannuation (NZS) while he was in the UK and absent from New Zealand between November 2020 to June 2021. The first decision is the Ministry's decision to suspend XXXX's NZS when it became apparent that XXXX was unable to return to New Zealand within 30 weeks from his departure. The second concerns the Ministry's decision following a Benefit Review Committee review of the first decision, to establish an overpayment and recover the NZS paid to XXXX during his absence from New Zealand of \$6,516.29.

- [3] The appeal was filed in December 2021 and was scheduled to be heard on 7 June 2022. Several days before the hearing the Ministry reversed its decisions. A short hearing was held by phone to discuss the residual issue of XXXX's claim for costs and compensation for general stress. XXXX attended and Mr Buchan and Mr Engels attended for the Ministry.

Relevant law

- [4] Clause 255 of the Social Security Regulations 2018 (the Regulations) 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.
- [5] In *Chief Executive of the Ministry of Social Development v Genet*¹ the High Court considered whether costs can be awarded to a lay advocate who represented the appellant in a situation where the lay advocate has not charged the appellant. Although, the situation in this appeal is different as XXXX represented himself, aspects of the decision in *Genet* are relevant. In finding that the costs of the lay advocate could be awarded, the High Court also held that such costs needed to be based on an identifiable figure provided by either the appellant or advocate rather than an estimate by the Authority.² The High Court also confirmed that an award of costs is made at the discretion of the decision maker.³

The submissions for the appellant

- [6] XXXX has claimed costs totalling \$5,000. This includes \$605 for legal fees associated with legal advice taken in relation to the appeal. The costs sought also include XXXX's time spent dealing with the Ministry's decision, including answering emails, printing off paperwork, phone calls, booking and attending meetings at the Levin Service Centre, driving from Levin to Wellington to personally deliver a letter to the Ministry on 28 January 2022, seeking legal advice and advice from Aged Care and investigating elderly abuse. XXXX said he has collated 750 pages of documents. He has also referred to the time taken by the Ministry to reach the final outcome.
- [7] XXXX has also referred to the stress and misery he said he suffered as a result of the Ministry's decision and its subsequent approach which included delays processing his review, the time taken by the Ministry in reaching the final outcome, and deductions of the disputed debt without his approval. XXXX said that the experience caused him unprecedented worry and stress, poor sleep patterns, increased blood pressure and frequent disagreements with his wife. XXXX had also sought compensation for stress.

¹ [2016] NZHC 2541

² *Genet* at [26] to [27].

³ At [21].

The submissions for the Ministry

- [8] The Ministry agrees that \$405.19 of the costs claimed appear to be reasonable costs associated with bringing the appeal. This covers solicitor fees of \$402.50 which the Ministry considers are verified and a cost of \$2.69 for return travel to the Levin Service Centre on 18 January 2022, based on IRD mileage rates of \$0.79 per kilometre.

- [9] The Ministry considers that there is no specific financial cost associated with calling its 0800 number or sending or receiving emails. It considers that XXXX's trip to Wellington concerned his overseas pension and its impact on his New Zealand superannuation and was unrelated to the appeal. The Ministry was unable to assess XXXX's claim for printing costs without a breakdown or invoice for printing costs.

- [10] The Ministry submits that the search for advice with Aged Care would not have incurred a financial cost to XXXX and there is no cost to be reimbursed.

- [11] The Ministry considers that XXXX's other claims fall in the realm of a claim for damages or compensation, which the Authority has no jurisdiction to pay.

Discussion

- [12] The Authority has awarded costs when an appeal that has been prosecuted up until the date of hearing has been resolved without being fully heard.⁴

- [13] We accept that legal costs associated with taking legal advice in relation to the appeal is a cost associated with bringing an appeal. Legal costs of \$402.50 are verified by an invoice. XXXX has also advised that this was the actual sum paid as additional legal costs were waived. This cost is payable to XXXX.

- [14] We are also satisfied that the cost of travel to meet with the Ministry after the appeal was filed was also a cost related to the appeal. We accept that the cost of travel to the Levin Service Centre is reflected in the IRD mileage rate of \$0.79 per km and was \$2.69. This cost is also payable to XXXX.

- [15] XXXX has identified that he holds 750 pages of documents and has stated that he has incurred a printing cost but has provided no other information about the

⁴ *J v Chief Executive of the Ministry of Social Development* [2018] NZSSAA 008.

cost. While there is little information provided in support of this cost, we accept that there was a printing cost incurred by XXXX. It is normal to expect a party to print out various documents through the course of an appeal or in preparation for a hearing. However, the extent, method and cost of printing is not confirmed. It is unknown if the Ministry's report of 289 pages is included in the 750 documents held by XXXX. If so, XXXX is unlikely to have incurred a printing cost as a hard copy of the report was sent out to him. On the limited information available we find that a modest contribution of \$30 should be paid to XXXX for printing costs.

- [16] Having considered the "letter" personally delivered to the Ministry on 28 January 2022 we are satisfied that it was related to XXXX's appeal. The letter stated that it concerned the deduction of funds from XXXX's pension despite the matter being under appeal with the Authority. The letter also advises that XXXX had hand delivered his letter to Wellington as he had unsuccessfully tried to contact the Ministry's office about the deduction and his overall experience with the Ministry had left him feeling that it would not be passed onto the intended person. Although, deduction of XXXX's UK pension was referred to it was not the subject of the letter. The Ministry's correspondence has also confirmed that deductions to repay the debt that was the subject of the appeal were made from XXXX's pension. The amount deducted has now been reimbursed.

- [17] As the outcome of the appeal was unknown, XXXX was entitled to ask the Ministry not to make deductions until his appeal had been determined. We also accept that XXXX felt that he wasn't being listened to. We are satisfied that the cost of return travel from Levin to Wellington is associated with XXXX's appeal. We also consider the use of a car to be reasonable. Using the same mileage rate of \$0.79 and a distance of 190.4km, we find that XXXX is entitled to \$150.42 for a return trip to Wellington.

- [18] It appears that the remaining costs relate to XXXX's time spent attending to emails, phone calls or meetings concerning the subject of his appeal. It is obvious that a party will spend personal time dealing with their appeal. We have considered whether XXXX can recover costs for the time personally spent attending to his appeal. While there is a clear personal cost to XXXX, we are not satisfied that this comes within the scope of an appellant's "costs of bringing all or part of the appeal." Generally, costs are awarded to off-set the expenses incurred by a party to take steps associated with a proceeding. Beyond the costs of advice and reasonable expenses such as travel and printing associated with the appeal, XXXX has not incurred any further expenses.

- [19] XXXX's claim also includes an element of compensation. Given the nature of appeal and the reversal of the Ministry's decision shortly before the hearing, XXXX's stress and frustration is understandable.
- [20] Prior to XXXX's departure he informed the Ministry that he intended to be in the UK for a three-month holiday. By March 2021 XXXX informed the Ministry that he had been delayed due to a lack of availability in New Zealand's managed isolation and quarantine system (MIQ) and the earliest he could return would be in June 2021. At this point XXXX's NZS was stopped. As it transpired XXXX did not return to New Zealand until 23 June 2021, which was 32 weeks and 2 days after his departure.
- [21] The appeal involved s 22(b) of the New Zealand Superannuation and Income Retirement Act 2001 (NZSIRA) and the factual issue of whether prior to XXXX's departure in November 2020 it was reasonably foreseeable that there would be difficulty returning within 30 weeks. This issue also involved consideration of whether it was reasonably foreseeable that there would be difficulty securing an MIQ booking within a reasonable timeframe of seeking to do so.
- [22] At the hearing Mr Buchan said that the Ministry had revisited its position and had looked closely at travel dates and the circumstances encountered in arranging an MIQ spot. Mr Buchan confirmed the Ministry's changed view that XXXX had no control over New Zealand border rules and the MIQ system and that his situation fitted within the exception in s 22(b) of NZSIRA.⁵
- [23] Not surprisingly, XXXX feels that the circumstances of this appeal and the approach and delay by the Ministry warrant an award of compensation. However, as discussed at the hearing the Authority does not have the power to award compensation or damages. No further amount can be awarded.
- [24] For the reasons given above, XXXX is entitled to costs totalling \$585.61.

⁵ Section 22(b) of New Zealand Superannuation and Retirement Income Act 2001 allows a person who has been absent from New Zealand for over 30 weeks, to receive New Zealand superannuation for the first 26 weeks of absence from New Zealand if their "absence beyond 30 weeks is due to circumstances beyond that person's control that he or she could not reasonably have foreseen before departure."

Order

[25] 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 \$585.61.

Dated at Wellington this 8th day of September 2022

Rachel Palu
Deputy Chair

John Ryall
Member