

[2018] NZSSAA 33

Reference No. SSAA  
075AA/11

**IN THE MATTER**

of the Social Security Act  
1964

AND

**IN THE MATTER**

of an appeal by **XXXX** of  
**XXXX** against a decision of  
a Benefits Review  
Committee

## **BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

**Mr G Pearson** - Chairperson

**Mr K Williams** - Member

**Hearing** at Christchurch on 4 October 2017

Appearances

The Appellant: No appearance

For Chief Executive of the Ministry of Social Development: Mr R Moran

### **INTERIM DECISION**

#### **Introduction**

[1] This matter was referred back to the Authority by the High Court. For present purposes it is sufficient to record that the High Court in the decision *XXXX v Chief Executive of the Ministry of Social Development* [citation removed] issued a decision upholding a number of elements of the Authority's decision but finding that it had proceeded on a wrong principle in relation to one issue. The Authority reconsidered that issue, and issued a decision, there was a further appeal and the parties agreed that the Authority should hear the matter again. The High Court issued a consent order to that effect. We are now dealing with the matter under the consent order.

- [2] The background is that the appellant had been overpaid benefit entitlements due to receipts from ACC payments. The key point in contention is set out in the High Court's judgment in this way:

[25] The appellant's complaint stems from the different treatment of his ACC backpayment by the IRD and WINZ. WINZ spread his ACC payment across the years in which the entitlement arose. WINZ then found that his entitlement for the relevant period exceeded the eligibility threshold for the accommodation supplement and GST supplement resulting in a finding of overpayment. The IRD took a different approach to dealing with this payment for tax purposes. Rather than spread the income across the period of entitlement, that agency taxed the lump sum in the tax year in which it was actually received. This placed the appellant in a higher tax bracket for that year. As a result, the appellant claims to have suffered a monetary loss he would not have suffered were it not for the differential treatment. In other words, overall, his net income as a result of this reconciliation between WINZ and ACC was less than if ACC had been paying him his entitlement from the outset.

- [3] The High Court found that issue must be properly explored, and the Authority was required to determine whether there had in fact been "financial prejudice", if so, what the extent of it was, could a dollar figure be placed on it, and the extent of relief available to the appellant following those findings.
- [4] The question is now before the Authority pursuant to the consent order of the High Court dated 5 May 2016. That order followed a joint memorandum filed by the parties, and the joint memorandum is referred to in the order. This order of the High Court formulated the issues for the Authority in the following way:

46.2 The matter is remitted to the Authority under High Court Rule 21.14(b) and (d) for reconsideration of the question of law in accordance with Williams J's decision outlined above in relation to the exercise of discretion under s 86(1)/s 86A, making an assessment on the individual merits of [XXX]'s case, and in particular considering:

46.1.1 Is the appellant right in claiming financial prejudice?

46.1.2 What is the extent of the disadvantage?

46.1.3 Is the appellant right in claiming financial prejudice?

46.1.4 If so, what was the extent of the disadvantage?

46.1.5 Can a dollar figure be placed on it?

46.1.6 It is sufficient to amount to material unfairness when seen against the acknowledged overpayment to the appellant that WINZ has had to carry?

46.3 The Authority must reconsider the matter taking into account the following tax information now available, attached as an appendix to th[e] memorandum:

46.3.1 A copy of his IRD summary of earnings for the tax year 1 April 2011 – 31 March 2012<sup>1</sup>

46.3.2 A letter from IRD to [XXXX] regarding a late payment of income tax and related print-out of IRD account information showing assessment of tax for 2007 to 2013, noting in particular the income tax for the tax year 1 April 2011 – 31 March 2012; and

46.3.3 IRD information sheet setting out the applicable income tax rates.

[5] Reading the High Court’s original decision and the more recent order, it is evident that the question the Authority must determine now arises out of the following circumstances:

[5.1] The Ministry of Social Development is required to take into account ACC payments in certain circumstances. That applies to the appellant. In this case the appellant was successful in establishing that he had been underpaid by ACC, he accordingly received a lump sum payment in the tax year ending 31 March 2012. That payment related to the appellant’s entitlements that had been underpaid by ACC in the two earlier years. The appellant is a “cash basis” taxpayer; accordingly, he was required to pay tax on the money he received from ACC when he in fact received it. That year was the tax year ending 31 March 2012. He received a lump sum payment, covering earlier periods, and he paid tax on a higher marginal rate of tax than he might have if he received it at the time he was in fact entitled to it. Potentially his income in the earlier periods placed him into a band with a lower tax rate.

[5.2] When the Ministry of Social Development took the payment of ACC arrears into account, it did not operate in the way Inland Revenue was obliged to deal with the ACC payment. Rather than accounting for the ACC arrears in 2012 when the appellant received them, the Ministry of Social Development treated the payments as affecting benefits at the time the ACC payments should have been made.

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<sup>1</sup> See documents annexed as appendix to th[e] memorandum dated 28 January 2016.

[5.3] These particular ACC payments are liable for income tax, as indeed were the social security benefits the appellant received. The High Court has accordingly determined that there is potential unfairness to the appellant because:

[3.1.1] The tax imposition on the ACC payments he received in 2012 may be different from what the tax imposition would have been had he received it in the two preceding years, the years for which his benefit payments have been adjusted.

[3.2.1] If the appellant's tax assessments had been reopened for the two previous years and the ACC assessments allocated to them, and adjustments made to his benefit entitlement then of course the issue would not arise.

[3.3.1] However, reopening prior tax periods is not how tax law functions and accordingly there is the possibility that the appellant paid a higher rate of tax in 2012. He received only the net amount, and has had his social security benefit adjusted as though he received the money in the preceding two years when the tax rate was potentially lower for him.

[6] It is the task of the Authority now to ascertain whether the appellant paid more tax in 2012 than he would have in the tax years ending 2010 and 2011 (in all cases the years end 31 March). If so, to then determine how much. Then we must ascertain the impact in terms of the establishment and recovery of benefit payments.

[7] As can be seen from the section of the order referring the matter back of 29 January 2016 the information provided for the Authority to consider is the appellant's summary of earnings for the tax year ending 2012, the other information does not provide particulars of what income the appellant earned in the years ending 2010 and 2011.

[8] Given that the essential task the Authority has is to determine how much tax was imposed on the appellant in the 2012 year and compare it with the 2010 and 2011 years there is plainly a need to obtain further information. In the absence of that, it is not possible to complete the task.

**Procedure**

- [9] Given the difficulties identified in relation to undertaking a comparison without the information relating to the 2010 and 2011 years the Authority indicated to the parties that the factual matters needed to be resolved and it arranged to set the matter down for an oral hearing to ensure that both parties could fully address the issues. Unfortunately, the appellant did not attend the hearing. The Authority made several attempts to ensure that the appellant did attend, despite sending written material, and telephone calls that was not possible. The appellant did not attend a telephone conference, and when a telephone call was made by the case manager to follow up, a member of the household indicated that the appellant was not in a position to come to the telephone.
- [10] The High Court order referring the matter back for decision was made on 29 January 2016. The point has been reached where the Authority must deal with the matter relying on the information that it does have before it. Accordingly, it proceeded with an oral hearing where the Ministry attended in person but the appellant was not present. The High Court's judgment indicates that the appellant has had difficulty attending hearings, we draw no adverse inference from the appellant's inability to attend. To ensure that the appellant has had a full opportunity to participate to the extent he can, this decision will be an interim decision and the appellant will have a calendar month to provide any further input if he wishes to do so.

**Discussion****The 2012 year**

- [11] The joint memorandum discussed in the High Court's order referring the matter back to the Authority fully documents the 2012 year when the appellant received his backdated ACC payment. In a letter dated 27 May 2011 ACC stated that the amount of backdated compensation was a gross sum of \$30,106.32. The appellant has produced a statement from his Inland Revenue records that shows for the 2012 year his gross income was \$72,843.96. Using the basic tax rates,

which does not include the ACC earner's levy the total amount of tax that the appellant would have paid on \$30,106.32 is:

<b>2012 Income Year</b>	
Total taxable Income	\$72,843.96
Less ACC Back payment	\$30,106.32
Ordinary Income	<b>\$42,737.64</b>
Tax on Ordinary Income \$42,737.64	
Up to \$14,000 @ 10.5 cents	\$1,470.00
\$14,001 to \$48,000 @ 17.5 cents	\$5,029.09
	<b>\$6,499.09</b>
Tax on ACC Back payment of \$30,106.32	
\$42,737.65 to \$48,000 @ 17.5 cents	\$920.91
\$48,001 to \$72,843.96 @ 30 cents	\$7,453.19
<b>Total income tax paid on \$30,106.32 ACC back payment</b>	<b>\$8,374.10</b>
<b>Total tax on income of \$72,843.96</b>	<b>\$14,873.19</b>
<b>ACC earners levy</b>	<b>\$1,483.62</b>

[12] The information contained in the table relies on the information provided with the order from the High Court. The information is in the form of a joint memorandum from the parties, but it is not in a form that simply allows the Authority to reproduce it. The information does include the gross amount of income in the form of a printout from the appellant's Inland Revenue account. However, it does not include a calculation of the total tax liability. The printout does include details of PAYE deductions. We have taken the ACC earner's levy from the printout provided, then calculated the amount of tax applying in the various tax bands using the information included with the joint memorandum. Subject to rounding errors the total amount of income tax paid on the \$30,106.32 ACC back payment amounts to \$8,374.10. The question is whether or not that is more than the tax that would have been imposed if the receipt was taxed in the 2010 and 2011 years in which it arose.

[13] There is no doubt that the appellant had to pay tax arrears after receiving the ACC back payment. A letter of 27 February 2013 to the appellant from Inland Revenue said that including interest he owed arrears of \$4,769.63. However, the primary reason for that is not because of different tax rates. The primary reason is that the appellant had elected to use a special tax code. To obtain a special tax code it is necessary to make an application to Inland Revenue and it is based on the person's individual circumstances. In a letter dated 27 May

2011 the amount of \$30,106.32 was subject to a special tax code deduction of 15%. That was less than half of the tax rate for most of the payment. Inevitably, due to the appellant's special tax code, he owed a substantial amount of arrears on the payment. That is a matter that is entirely different from the tax rates that applied in the respective years.

- [14] We lack direct information relating to the appellant's income in the 2010 and 2011 years. Without that we cannot definitely determine what the difference is between receiving the ACC back payments in 2012, compared with the time they accrued in 2010 and 2011. We need that information to be able to make a comparison with the tax paid in the 2012 year. The appellant has not supplied this information, and did not attend the hearing, so we are in a position where we must use the information that we do have before us.
- [15] The first information we have relates to the 2010 year. In a letter from ACC dated 27 November 2009 notified the appellant that he was entitled to a backdated compensation payment. The letter explains that the total payment was in excess of \$148,500, but the net payment was going to be in excess of \$89,000. The letter said the payment would be forwarded shortly. That is direct evidence that during the 2010 year the appellant would have been taxed at the highest marginal tax rate of 33% during the income year ending 2010. That exceeds the highest level of tax that was imposed when he received the backdated payment in the year ended 2012, in that year the rate was no more than 30%, and some of it at 17.5%.
- [16] The best information we have as to the allocation of the ACC backpayments is contained in a schedule apparently produced by ACC. This schedule (page 32 exhibit 11 of the original Section 12K report) indicates that the total gross ACC back payments for the year ending 2010 were \$5,502.72. For the tax year ending 2011 it was broken down into three payments of \$8,745.39, \$4,036.51 and \$11,768.98. We will accordingly use that allocation. There is a minor discrepancy between and the apparent actual payment of \$30,106.32 as the total for the two years in the schedule was \$30,053.61. It would appear likely that the figure accrued additional interest. We will accordingly allocate the amounts based on the relative proportions. The results are set out in the following table.

Allocation of back payments to the 2010 and 2011 Years		
		% of payment
Estimated payment from ACC for 2010	<b>\$5,502.72</b>	18%
Estimated payment from ACC for 2011	\$8,745.39	
	\$4,036.51	
	<b>\$11,768.98</b>	
	<b>\$24,550.88</b>	82%
<b>Total of Estimated Arrears</b>	<b>\$30,053.60</b>	
<b>\$30,106.32 allocated to 2010 Year (18% of total)</b>	<b>\$5,512.37</b>	
<b>\$30,106.32 allocated to 2011 Year (82% of total)</b>	<b>\$24,593.95</b>	
	<b>\$30,106.32</b>	
<b>Tax on back payment of \$24,593.95 if received in 2011</b>		
Inferred income exclusive of the back payment	\$35,767.68	
Additional income allocated to 2011	<b>\$24,593.95</b>	
	<b>\$60,361.63</b>	
Tax on \$35,767.58 to \$48,000 @ 17.5 cents	\$2,140.66	
Tax on \$48,000 to \$60,361.63 @ 30 cents	<b>\$3,708.49</b>	
	<b>\$5,849.14</b>	

[17] It can be seen that using the best information we have for the allocation, \$5,512.37 of the total accrued in 2010 and should have been allocated to that year. The balance of \$24,593.95 accrued in the 2011 year.

[18] We now turn to the implications.

#### **The 2010 year**

[19] The best information we have relating to the 2010 year is that the appellant's income was at the top marginal of 33 cents in the dollar due to a substantial ACC backpayment received in that year. The appellant has chosen not to provide tax information relating to that year. Unless and until he does we cannot be satisfied that there is any disadvantage in receiving the payment in the 2012 year, on the contrary, he received the benefit of having to pay a lower rate of tax. He paid 30 cents in the dollar for most of it, 17.5 cents for the balance and would have paid 33 cents in the dollar on the whole amount had he received it in the 2010 year.

#### **The 2011 year**

[20] We lack any direct information as what the appellant's income was for the 2011 year. However, we do have some information relating to the gross weekly ACC payments that the appellant received. The best



information we have is in a letter from ACC indicating that he was entitled to receive gross ACC payments of \$687.84 per week. That related to March 2010. There are some small variations after that. We do not know if the appellant has other income so the best we can do is make an assumption that he was receiving weekly payments from ACC of \$687.84. If that is correct then he was receiving a taxable income of \$35,767.68 per annum.

- [21] If that is the only income received by the appellant and if it were taxed in the 2011 year, the total tax imposition would have been \$5,849.14 on that ACC back payment. The calculation is in the table following paragraph [16] above.
- [22] The answer would be different if, like the 2010 year there is other income. For the 2011 year, there would be a \$2,524.96 benefit if the money was allocated to the 2011 year. However, that would need to have the benefit in the 2010 year offset against it.

#### **Conclusion relating to the year in which the ACC payment was received**

- [23] Our conclusion is that potentially the appellant suffered a detriment of somewhat more than \$2,000 because he received all of the ACC arrears in the 2012 year rather than receiving them as they accrued in the 2010 and 2011 years, and the benefit adjustments have not reflected that. However, that conclusion is entirely dependent on knowing what the appellant's actual income was. The appellant has provided information relating to the 2012 year but not the 2010 and 2011 years. Unless and until he does provide that information from Inland Revenue's records, we can only speculate.
- [24] We have demonstrated the method by which we can determine the amount of any benefit or detriment but we require facts that are wholly within the control of the appellant. He has been able to provide information for the 2012 year, there appears to be no reason why he cannot do so for the 2010 and 2011 years. As we have indicated, the information we do have shows that had he provided the information related to the 2010 year it would have shown he paid less tax because he received the money in 2012. In these circumstances on the information before us we are not in a position to determine on the balance of probabilities that the appellant did suffer any detriment due

to the year in which he received the ACC backpayments. However, we will provide him an opportunity to produce the information that is required.

### **Legal expenses**

- [25] The remaining element of detriment claimed by the appellant is that he claims he had legal expenses relating to obtaining the ACC arrears. We have before us what appears to be a tax invoice dated 1 August 2011. The document is a tax invoice from a barrister and a solicitor, but it says no more than it relates to the lawyer's "professional fee for work performed from 12 January 2010 to 6 July 2011". There is no evidence the work related wholly or in part to the ACC payment. It may well be that it did, however the fact that the appellant has failed to produce evidence to support that brings that potential inference into question. The Ministry has been forthright that it expects to see some evidence to support the nature of the legal work. It is entirely possible that elements of the legal work were not related to the ACC arrears even if part of it was. The Authority is simply being asked to speculate in the absence of what should be readily available evidence.
- [26] Only when we know what the legal work involved can we reach any sensible determination on the questions posed by the High Court in its order.

### **Next steps**

- [27] This Authority is now required to issue a final decision dealing with the issues raised by the High Court. The primary issue that we are required to determine is whether the appellant was correct in claiming financial prejudice. We have identified that potentially the appellant can demonstrate that he had a higher tax imposition in the 2012 year when he received ACC payments than would have been the case had he received them in the 2010 and 2011 years in which the Ministry of Social Development made adjustments to his benefit. We are required to establish what the extent of the disadvantage is if there is a disadvantage. Readily available information will allow us to make a determination of this issue. We cannot do so without the appellant

providing us information as to his gross income in the 2010 and 2011 years. We expect that should be in the form of records kept by Inland Revenue showing the gross income assessment in those two years. It is readily available information. If the appellant does not produce the information we will the conclusion that the appellant is not correct in claiming financial prejudice, as he has been unable to demonstrate that the tax imposition would have been any lower had he received the funds in the years 2010 and 2011. The clearest evidence we have is that he in fact received a benefit in relation to the 2010 year, and we can only speculate as to the 2011 year in the absence of information disclosing his gross income in that year as assessed by Inland Revenue.

[28] The other element is legal work performed for the appellant. It is impossible for us to make any assessment as to whether that should be taken into account. The first question is whether or not it involves financial prejudice, or it is simply expenditure that cannot be put into that category. The second issue is closely related, we need to determine in fact what the nature of the work performed for the money paid was.

[29] At present, we only have a document that fails to disclose the nature of the legal work. It is essential that the appellant provide some evidence as to what work was performed, evidence such as a letter from the lawyer who performed the work giving an explanation as to the services he provided may well be sufficient. We anticipate it would be quite likely that the Ministry would accept such a letter as evidence of the nature of the services performed. If so, we can address this issue in an appropriate way (either implementing an agreement or making a factual finding).

#### **Timetable**

[30] We will allow XXXX until 1 March 2018 to provide the information we need to make a final decision. He must provide the tax information we identified and information relating to the legal services provider.

[31] If there is any dispute at that point, we will consider whether or not it is necessary to hear further evidence.

[32] **If XXXX takes no further steps**, we will issue a decision. **If we have no further information, then the answer** that we will provide to the questions will be that we have been unable to identify evidence to prove XXXX is correct in claiming financial prejudice, we cannot determine the extent of the disadvantage if there is a disadvantage, the appellant is wrong to claim he probably suffered financial prejudice, on the evidence before us; and, accordingly there is no evidence to establish material unfairness.

**Dated at Wellington** this 18<sup>th</sup> day of July 2018

**G Pearson**  
Chairperson

**K Williams**  
Member