

[2018] NZSSAA 44

Reference No. SSAA 162/16

**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**

**S Pezaro** - Deputy Chair

**C Joe** - Member

**Hearings** at Whangarei on 23 May 2018 and Auckland on 22 June 2018

### **Appearances**

The appellant and XXXX, the appellant's wife and agent (both in person at the first hearing; by audio visual link from Whangarei for the second hearing)

P Siueva, agent for the Ministry of Social Development

## **DECISION**

### **Background**

- [1] On 28 May 2018, following the first hearing, we issued an interim decision which reinstated the scope of this appeal and set a timetable for the parties to provide further evidence and submissions. This timetable was subsequently amended.
- [2] As recorded in the interim decision, the appeal was reinstated as an appeal against the Ministry's decision to deduct the appellant's wife's entitlement to a United Kingdom State Pension (UKP) from the appellant's entitlement to a

Supported Living Payment (SLP/carer), paid to him as carer of their son, XXXX. XXXX is 30 years old and suffers from significant medical and developmental issues. Developmentally, he is around three to four years old; he experiences seizures and all his personal needs must be taken care of by others. He requires constant monitoring of his health and behaviour during the day and night. XXXX has care outside of home for part of each day but, if the appellant did not provide the balance of the care, XXXX would be in full time residential care. Each day it is the appellant who provides most of the care for XXXX, day and night. For doing so, the appellant receives SLP/carer at the rate of \$218.86 per week.

- [3] We directed the parties to make submissions on the application of s 70 of the Social Security Act 1964 (the Act), and, in particular, on s 70(2) which provides the Chief Executive with a discretion to set the date of deduction of an overseas pension.
- [4] We also directed the appellant to provide evidence of his household assets and liabilities because he challenged the Ministry's entitlement to recover an overpayment established in relation to his SLP/carer.
- [5] Before the second hearing, the appellant advised the Authority that the Ministry's agent had told him that the Ministry intended to reverse the decision under appeal. The appellant therefore sought clarification as to whether he needed to comply with the directions issued on 28 May 2018.
- [6] A telephone conference was convened on 13 June 2018. Prior to the conference, both parties filed further submissions. At this conference, Ms Siueva confirmed that the Ministry had decided to defer the date of deduction of the appellant's wife's UKP from the appellant's SLP/carer to 17 May 2017 and disestablish the debt of \$7,696.81, calculated as an overpayment of SLP.
- [7] The parties agreed that, as the appellant's financial position was no longer in issue because the Ministry was no longer claiming an overpayment, the appellant was not required to produce evidence of income or assets.
- [8] Ms Siueva confirmed that the submissions the Ministry filed before the conference were final and reflected its current position. The Ministry submitted that, although it deferred the date of deduction, s 70(1) of the Act required it to deduct the appellant's wife's UKP from the appellant's SLP/carer entitlement.

- [9] In the direction following the telephone conference, two issues were identified for the hearing:
- [9.1] whether s 70(1) requires the appellant's wife's UKP to be deducted from the appellant's SLP; and, if so,
- [9.2] whether the discretion in s 70(2) should be exercised to set the date of deduction of UKP from SLP/carer after 17 May 2017.
- [10] However, after this direction was issued, it became clear that when the appellant's wife became eligible for New Zealand Superannuation (NZS) on 17 May 2017, her UKP was deducted from her NZS, and not from the appellant's SLP/carer.
- [11] Therefore, the only issue that remained to be determined on appeal was the first one. Even though the Ministry's decision on the date of deduction meant the appellant no longer owed a debt, he maintained his appeal against the Ministry's decision that s 70 required his wife's UKP to be deducted from his entitlement to SLP/carer.
- [12] Two further issues arose at the second hearing. The first was the current status of the appellant's SLP/carer. The appellant considers that it is suspended. He said he asked the Ministry to suspend his SLP/carer pending the outcome of this appeal. However, the Ministry says it cancelled it because he did not complete the form confirming his circumstances.
- [13] At the second hearing, Ms Siueva agreed to review the circumstances surrounding the suspension/cancellation of the appellant's SLP and, if the appellant's entitlement to SLP had not changed, reinstate his SLP backdated to February 2017. As we have not been advised that this has occurred, we have proceeded to determine this issue.
- [14] The second issue that arose was whether, when the appellant reaches the age of 65 and becomes eligible for NZS, he will be entitled to NZS in addition to SLP/carer (if required at that time) or whether ss 70 and 72 of the Act prevent him from receiving both benefits simultaneously.

*The scope of this appeal*

- [15] The question of whether the appellant's SLP/carer is currently suspended or cancelled and the effect on his SLP/carer when he becomes entitled to NZS were not issues that the appellant raised in his application to review the Ministry's decision or in his notice of appeal. However, for the reasons that follow, we consider it is appropriate to address these matters.
- [16] The appellant has attempted to get a comprehensive, accurate answer to his queries about his entitlement for several years. The attempts by him and his wife to get clear explanations for the Ministry's decision and its treatment of his entitlement, and the progress of this appeal, have been frustrating and confusing.
- [17] In the course of the hearing, the appellant's undisputed evidence was that he received different information from several different offices and people representing the Ministry. In a six-week period in 2016, five people wrote to him about the Ministry's position on s 70.
- [18] As we recorded in our interim decision, the Ministry "advised" the appellant that his appeal against its s 70 decision had no prospect of success and inappropriately persuaded him to limit the scope of his appeal. As far as the status of his benefit is concerned, the appellant was not aware until after he had filed his appeal that the Ministry's view of the status of his benefit differed to his.
- [19] In these circumstances, we consider that we are bound to examine all issues arising from the decision under appeal and this includes properly establishing the appellant's entitlement. This approach is supported by the authorities on the scope of an appeal under the Act. In *Margison v Chief Executive of the Department of Work and Income* Justice Laurenson observed that:<sup>1</sup>

On an appeal to an Authority I am satisfied that once the Authority is faced with an appeal it is empowered by the inquisitorial nature of its function, its original power of decision and its full range of remedies, to seek out the issues raised by the appellant's case and determine these

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<sup>1</sup> *Margison v Chief Executive of the Department of Work and Income* HC Auckland AP 141-SW00, 6 August 2001 at [27].

afresh and establish whether the appellant can provide the justification for doing so or not.

- [20] The Supreme Court considered the nature of proceedings before the Authority in *Arbuthnot v Chief Executive of the Department of Work and Income*.<sup>2</sup> The Court was resolute in requiring the Authority to reach the correct view on the facts, rather than being constrained by the earlier processes:

... There is nothing in s 12M to prevent the Chief Executive from then asking the Authority to consider any matter which may support the decision which is under appeal. Indeed, the thrust of the section is quite the other way: that the Authority is to consider all relevant matters.

...

The duty of the Authority was to reach the legally correct conclusion on the question before it, applying the law to the facts as it found them upon the rehearing without concerning itself about the conclusion reached by the BRC ...

- [21] We are also mindful of the observations of Williams J in *Chief Executive of the Ministry of Social Development v Genet*.<sup>3</sup> He recognised the design elements in the Act that are sensitive to the difficulty many beneficiaries have in challenging decisions affecting them. He described this Authority as the “paradigm case”, where accessible justice is essential. While that cannot provide jurisdiction where the Act does not confer it, it is no doubt the reason for the approach taken in *Margison* and *Arbuthnot*. It is our duty to identify the correct outcome on the facts that gave rise to the appeal.

- [22] For these reasons, we consider the issues that arose at the second hearing as part of this appeal.

### Relevant legislation

- [22] Section 40A of the Act states that the purpose of the SLP benefit is to provide income support to people who cannot support themselves as a result of injury

<sup>2</sup> *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13 at [20] and [26].

<sup>3</sup> *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541 at [18]–[19], [26].

or disability, are totally blind, or provide full-time care at home to a person who is not their spouse or partner. The appellant is in the third category.

- [23] Section 40A(2) states that the context of s 40A(1) is the expectation that people of working age support themselves, and other measures are available for people who are temporarily unable to support themselves.
- [24] Section 40H requires a person receiving SLP/carer to meet certain employment preparation obligations. Regulations made under s 105 of the Act allow a person to be exempt from these obligations in certain circumstances, including caring full-time for another person whose sickness, injury or disability requires full-time care. Although the appellant stated that the Ministry has exempted him from employment obligations, he still receives letters referring to the need for him to develop a plan for employment and attend job interviews.
- [25] Section 70(1) of the Social Security Act 1964 requires overseas pensions that meet certain criteria to be deducted from entitlements under the Act:

**70 Rate of benefits if overseas pension payable**

(1) For the purposes of this Act, if—

- (a) any person qualified to receive a benefit under this Act or Part 6 of the Veterans' Support Act 2014 or under the New Zealand Superannuation and Retirement Income Act 2001 is entitled to receive or receives, in respect of that person or of that person's spouse or partner or of that person's dependants, or if that person's spouse or partner or any of that person's dependants is entitled to receive or receives, a benefit, pension, or periodical allowance granted elsewhere than in New Zealand; and
- (b) the benefit, pension, or periodical allowance, or any part of it, is in the nature of a payment which, in the opinion of the chief executive, forms part of a programme providing benefits, pensions, or periodical allowances for any of the contingencies for which benefits, pensions, or allowances may be paid under this Act or under the New Zealand Superannuation and Retirement Income Act 2001 or under the Veterans' Support Act 2014 which is administered by or on behalf of the Government of the country from which the benefit, pension, or periodical allowance is received—

the rate of the benefit or benefits that would otherwise be payable under this Act or Part 6 of the Veterans' Support Act 2014 or under the New Zealand Superannuation and Retirement Income Act 2001 shall, subject to subsection (3), be reduced by the amount of such overseas benefit, pension,

or periodical allowance, or part thereof, as the case may be, being an amount determined by the chief executive in accordance with regulations made under this Act: ...

[26] Certain benefits or pensions payable for injury, disability, death or war pensions are exempt but these exemptions do not assist the appellant.

[27] Section 72(a) of the Act provides that a person is entitled to only one benefit:

**72 Limitation where applicant receiving another benefit or pension**

Notwithstanding anything to the contrary in this Act,—

(a) no person is entitled to receive more than 1 benefit in his or her own right, except as provided in sections 39D, 61EA, 61FG, 61G, 61GA, and 69C, and section 23 of the Social Security (Working for Families) Amendment Act 2004:

[28] The exceptions in this section do not apply to the appellant.

*Section 81 — power to review benefit*

[29] Prior to an amendment to the Act in 1991, the power in s 81 was limited to reviewing entitlement in the event of a change of circumstances. Section 81(1)(b) now extends this power to include an assessment of past entitlement and whether there has been any overpayment.

[30] Section 81(1) states:

(1) The chief executive may from time to time review any benefit in order to ascertain—

(a) whether the beneficiary remains entitled to receive it; or

(b) whether the beneficiary may not be, or may not have been, entitled to receive that benefit or the rate of benefit that is or was payable to the beneficiary—

and for that purpose may require the beneficiary or his or her spouse or partner to provide any information or to answer any relevant question orally or in writing, and in the manner specified by the chief executive. If the beneficiary or his or her spouse or partner fails to comply with such a requirement within such reasonable period as the chief executive specifies, the chief executive

may suspend, terminate, or vary the rate of benefit from such date as the chief executive determines.

### **Relevant case law**

#### *Section 70 — deduction of overseas pensions*

[31] The law on the application of s 70 to the deduction of overseas pensions from an entitlement to a benefit under the Act is clear. Provided that overseas pensions meet the criteria in s 70(1), the deduction regime in that section applies. We are not aware that there is any authority for distinguishing SLP/carer from other benefits under the s 70 deduction regime. The definition of benefit in s 3 of the Act includes all benefits paid under Parts 1A to 1P of the Act and therefore covers SLP/carer.

#### *Section 72(a) — one benefit entitlement*

[32] The limitation of entitlement to one benefit in s 72(a) of the Act applies to a person receiving a benefit *in his or her own right* (the one benefit principle). The Ministry did not make any submissions on the purpose or interpretation of these qualifying words.

[33] However, the appellant argued that SLP/carer is different from SLP and other main benefits because SLP/carer is paid as a result of the need of a third person. The appellant's submissions raise the question of what is meant by a person receiving a benefit in his or her own right and the purpose of the qualifying words in s 72(a).

[34] We are not aware of any authority on the application of the one benefit principle. The only jurisdiction in which this principle has been discussed is the Human Rights Review Tribunal (HRRT) in *Heads v Attorney-General*.<sup>4</sup> In *Heads*, the HRRT considered a provision in the Accident Compensation Act 2001 (ACC Act) that weekly compensation payable for five years to a surviving spouse is limited to a 12-month period if the surviving spouse is, or becomes, entitled to NZS.

[35] The Crown asserted that the accident compensation scheme must be considered in the context of state funded assistance and the need for the Government to allocate resources on a "one pension principle". It submitted that the policy behind the ACC Act and the New Zealand Superannuation

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<sup>4</sup> *Heads v Attorney-General* [2015] NZHRRT 12.



and Retirement Income Act (NZSRI) was that a person can only receive one form of public assistance at a time.

[36] The HRRT examined the one benefit principle and its application under the Social Security Act and concluded that benefits under the Act are subject to the one benefit principle because:

[36.1] One of the purposes of the Act is to ensure that any financial support provided takes into account any other public funding received.

[36.2] No person is entitled to more than one benefit in his or her own right and, generally, it is not possible to receive a benefit under the Act at the same time as NZS.

[36.3] Income-tested benefits must be reduced by an amount of weekly compensation paid under the ACC Act.

[37] However, the HRRT observed that the one benefit principle is not absolute because there are exemptions in the Act. NZS is defined as a benefit under the Act but, as it is not income-tested, it is exempt from the requirement in s 71A for weekly compensation payable under the ACC Act to be deducted from benefits.

#### **The case for the appellant**

[38] The appellant and his wife made an admirable and thorough effort, without legal assistance, to make relevant submissions on the scope of their appeal. As noted, at the first hearing their submissions were focussed on the decision to establish an overpayment. They also addressed in writing and orally at the hearings the question of the type of SLP which the appellant receives and highlighted several anomalies in the Ministry's treatment of the appellant's SLP/carer.

[39] The appellant submitted that the Act did not anticipate the type of assistance provided by SLP/carer. He argued that this benefit did not exist when the Act came into force, and trying to fit it into legislation designed to provide direct assistance has created an anomaly.

[40] The appellant contends that the SLP/carer benefit he receives is not a main benefit. He argues that it is a benefit paid as a result of the needs of one person (his son) to a "third person" (himself). The appellant does not receive

the SLP in his own right but in order to provide care for XXXX. The appellant highlighted several differences between SLP/carer and SLP:

[40.1] SLP/carer does not allow supplementary assistance whereas the SLP does.

[40.2] A recipient of SLP/carer is not allowed to include a partner in SLP.

[40.3] SLP/carer is the only benefit paid as a result of the needs of a person who is not the recipient of the benefit.

- [41] The appellant also questioned the need for him to repeatedly provide the same details on the Ministry's annual Confirming Your Circumstances (CYC) forms and the appropriateness of the forms to a person receiving SLP/carer. While the appellant accepts that this issue has no bearing on the outcome of this appeal, he and his wife sought an opportunity to express the distress and frustration caused by the generic letters they continually receive. The letters to the appellant refer to the requirement to carry out employment related obligations. Although the Ministry is in no doubt that the appellant's son is unable to manage his personal needs, let alone his financial affairs, letters are routinely addressed to XXXX referring to annual reviews and his "obligations" under the Act.
- [42] The appellant also raised concerns about the difficulty in accessing accurate information about the assistance available for someone in XXXX's situation. He asked WINZ for assistance with the considerable cost of transporting XXXX to and from the daytime care provided by the Ministry of Health but WINZ would not consider paying such costs.
- [43] However, shortly before the first hearing, the appellant discovered from other parents of severely disabled children that XXXX was eligible for Very High Needs funding of \$15,642 per annum. XXXX received this funding through the Ministry of Education when he was at school but his parents were not advised that the Ministry of Social Development administers this funding when a student leaves school.
- [44] The appellant was understandably shocked that he and his wife were not told of this assistance despite their requests for transport costs and attempts to establish their entitlement. The appellant's wife stated that there is no information on the Ministry's website relating to the VHN funding. She also noted the BRC recommendation "that a check be completed on the [applicant's] son's financial support to ensure he is receiving his correct

entitlement” and questioned why this did not occur, even when the Ministry reviewed the file in preparation for this appeal.

- [45] By the date of the second hearing, XXXX was receiving the VHN funding but the Ministry declined to backdate his entitlement.

*The status of the appellant’s SLP/carer*

- [46] Work and Income New Zealand (WINZ) wrote to the appellant on 13 January 2017 stating that it received his CYC form but required additional information to complete the review. WINZ requested a full set of financial accounts for the appellant’s wife’s business, the family trust, and the two companies of which the appellant was a director and shareholder, as well as personal tax summaries for the appellant and his wife. The letter referred to an attached trust questionnaire which was not attached.

- [47] The appellant responded on 9 February 2017 asking for his SLP/carer to be suspended pending the hearing of this appeal. He said he did not know where he stood and did not want to owe any more money. He was left thinking “that the right hand didn’t know what the left was doing”. His letter was not acknowledged, but when his SLP/carer payments stopped he assumed his request had been actioned. When he subsequently received a letter stating that his SLP/carer was cancelled, he assumed it was in error.

**The case for the Chief Executive**

*Section 70(1)*

- [48] The Ministry’s submissions were sparse considering the issues in this appeal. It stated that as the SLP is defined as a benefit in s 3 of the Act, deduction of the appellant’s wife’s UKP is mandatory under s 70(1). The only discretion provided is in s 70(2) to set the date of deduction. The Ministry has exercised this discretion, although no consideration was given to doing so before the first hearing.
- [49] The Ministry maintains that the appellant’s SLP/carer is caught by s 72 of the Act which prohibits receipt of more than one benefit. Therefore, the Ministry says that the appellant cannot receive SLP/carer and NZS. It made no reference to the qualifying words in s 72.

- [50] As far as the power and process of a s 81 review is concerned, the Ministry said that the same forms are used to review all benefits. As the SLP/carer is income tested, an annual review is required.
- [51] The Ministry's position is that the appellant's SLP/carer was cancelled on 27 February 2017 because he failed to complete the CYC form which beneficiaries are required to do annually. This form is used by all beneficiaries, regardless of the type of benefit they receive.

### **Analysis**

*Is SLP/carer subject to the deduction regime in s 70(1)?*

- [52] The SLP/carer is defined as a benefit in the Act and therefore it is subject to the deduction regime in s 70(1) of the Act. The Ministry was correct in deciding that the appellant's wife's UKP had to be deducted from his SLP/carer entitlement until she became entitled to NZS.

*Is SLP/carer subject to the limitation in s 72(a)?*

- [53] The SLP/carer is based not on the need of the recipient but on the need of a third person for care. To qualify for SLP/carer, the recipient must be caring for someone who would otherwise require residential care. However, the rate of SLP/carer does not relate in any way to the cost of residential care or to the actual loss of earnings by the recipient. The SLP/carer provides limited financial assistance to a person caring for someone else.
- [54] Applying accepted rules of statutory interpretation, the qualifying words in s 72(a), "in his or her own right", must have been inserted for a purpose. We consider that the purpose is to distinguish between benefits payable because of the circumstances of the recipient and benefits which are paid to one person because of the circumstances of another. The appellant's SLP/carer falls into the second category.
- [55] We conclude that SLP/carer is not a benefit paid to the appellant in his own right. Accordingly, we find that his entitlement to SLP/carer is not subject to the limitation in s 72(a). Therefore, provided the relevant provisions of the Act remain in force, when the appellant becomes eligible for NZS any entitlement he has at the time to SLP/carer will not be affected.

*What is the status of the appellant's SLP/carer?*

- [56] The appellant asked for his SLP/carer to be suspended before the Ministry decided to cancel it. He set out his reasons in his letter to the Ministry, and, although it was not acknowledged, the Ministry does not deny receiving this letter.
- [57] The appellant clearly set out the reasons for his request and there is no apparent reason for the Ministry failing to give effect to it.
- [58] Accordingly, we conclude that the appellant's letter dated 9 February 2017 was effective to suspend his SLP/carer.

**Observations**

- [59] The cost of living for a person with very high needs is significantly higher than the living cost for most people. The information on available funding needs to be easily accessible. It is incumbent on the provider of such funding to ensure that its officers are aware of and provide the relevant information to those eligible for assistance.
- [60] It is an anomaly that SLP/carer is income tested as it is a benefit paid as an alternative to state care. The "benefit" to the recipient is to personally provide care for his son rather than place him in an institution.

**Decision**

- [61] Prior to 17 May 2017, the appellant's wife's UKP was correctly deducted from the appellant's entitlement to SLP/carer.
- [62] The appellant's SLP/carer was suspended by a letter from the appellant dated 9 February 2017.
- [63] We reserve leave to determine any issues relating to the resumption of the appellant's SLP/carer after 9 February 2017.
- [64] For the reasons stated, we have concluded the limitation in s 72(a) of the Social Security Act 1964 will not apply to the appellant if he is receiving SLP/carer pursuant to s 40H of the Act when he becomes entitled to NZS. However, that is a decision that will need to be made when the appellant is entitled to NZS.

**Costs**

[65] The appellant is entitled to the actual and reasonable costs of preparing for and attending the first hearing in relation to the overpayment which the Ministry disestablished after the first hearing.

[66] If the parties are unable to agree on the amount of costs payable by the Ministry, they can file memoranda within 20 days of this judgment.

**Dated at Wellington** this 14<sup>th</sup> day of September 2018

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**S Pezaro**  
Deputy Chair

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**C Joe**  
Member