

[2018] NZSSAA 51

Reference No. SSA 118/18

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

DECISION

Declining application to extend time

The issue

1. The appellant has applied to lodge an appeal out of time pursuant to s 12K(1A)(b) of the Social Security Act 1964. The appeal was lodged on 10 September 2018 by way of a notice of appeal dated 7 September 2018. The appeal is against a decision which was upheld by a Benefits Review Committee (BRC) on 8 April 2016. The decision relates to the establishment and recovery of an overpayment of \$43,937.16 for the period 17 September 2003 to 30 June 2008.
2. The appellant's lay advocate, Mr Hoffman of Community Law Waikato, has filed a memorandum setting out the reasons for the appeal being lodged out of time. For the Ministry of Social Development, Ms Jaura opposed the application.

The grounds of appeal

3. It is submitted that the appeal relates to the finding that the appellant was in a relationship in the nature of marriage during the relevant period and that the Ministry was wrong to base this decision on the dissenting view of the Court of

Appeal in *Ruka v Department of Social Welfare*¹ rather than the majority decision. Mr Hoffman argues that the evidence did not meet the correct test for financial interdependence and the decision should be overturned and the debt disestablished.

The appellant's grounds for leave to bring the late appeal

4. The appellant's grounds in support of this application are:
 - a) At the time of the BRC hearing a Public Defence Service lawyer represented her. His submissions to the BRC did not address in the substantive issue of whether she was in a relationship in the nature of marriage, he addressed only the legality of deducting the alleged overpayment from her benefit.
 - b) The appellant did not instruct another lawyer because the inaction of the Public Defence Service lawyer made her think that lawyers were either disinterested or not suitably qualified to represent her on appeal. She therefore felt her case was hopeless and not worth appealing. She was unaware that community law existed or that there was a legal aid lawyer undertaking welfare work in the Waikato.
 - c) She was unable to find a beneficiary advocate to represent her and felt unable to represent herself due to the complexity of the case.
 - d) She is now in a relationship in the nature of marriage with a person with a sustained and serious traumatic brain injury which requires a great deal of her time and effort.
 - e) The delay is not excessive and has reasonable justification.
 - f) The substantive issue has merit because it relates to whether the Ministry understands and properly applies the correct legal test for determining a relationship in the nature of marriage.
 - g) The appeal poses a public interest beyond this case.

The Ministry's grounds for opposing leave to bring the late appeal

5. The Ministry accepts that the Authority has the discretion to extend the time for filing this notice of appeal although it is two years and two months out of time.

¹ [1997] 1 NZLR 154 (CA).

However the Ministry opposes the application because:

- a) The appellant was represented by a lawyer during the review process and the substantive issue was addressed. She was advised of the option of legal aid in September 2014.
 - b) On 2 December 2015 the appellant was advised of the recovery deductions that would be made from her benefit.
 - c) When the BRC issued its decision the appellant received a letter setting out her appeal rights.
 - d) The Ministry will be prejudiced if the application to extend time is granted because its ability to call witnesses will be affected. The appellant's father who provided an affidavit confirming his daughter was living in a relationship for 13 years he has now passed away. One of the Ministry's other key witnesses, the appellant's uncle, is elderly and may not be able to appear at hearing.
 - e) The delay in bringing the appeal was in the appellant's control.
6. The Ministry provides the background to the appellant's case. It completed an investigation on 28 May 2014 and wrote to the appellant advising that an overpayment of \$103,136.65 had been established for 13 September 2003 to 16 February 2014. The appellant then contacted the manager of the National Fraud Investigating Unit to advise that she wanted to review the decision. She submitted a review but later withdrew it.
 7. This matter was scheduled for trial in October 2015. Following negotiations between the Crown and the Defence the appellant pleaded guilty for the period 1 July 2008 to 16 February 2014. She was sentenced on 25 November 2015 to home detention and community work in relation to one charge of obtaining by deception and one charge of using a document. She was ordered to pay reparation of \$58,980.85.
 8. On 2 December 2015 a letter was sent to the appellant advising her of a remaining balance of \$43,937.16 owed to the Ministry.
 9. On 7 December 2015 the appellant's lawyer wrote to the Ministry. He referred to the order to pay reparation of \$58,980.85 and the letter from the Ministry advising her that it will be making deductions to recover \$44,155. He asked the Ministry to reverse its decision to recover the additional amount above the Court ordered reparation.

10. He noted that the appellant was sentenced on the basis that she did not declare that she was living in the nature of marriage with her partner between 1 July 2008 and 16 February 2014. He stated that XXXX did not accept being in a relationship between 1 September 2003 and 1 July 2008.
11. Ms Jaura states that the Ministry treated the letter from her lawyer as an application for review of decision. This was the matter that the BRC heard on 24 March 2016. Neither the appellant nor her lawyer attended.
12. The Ministry submits that there has been no good reason provided for granting the application for leave to extend time.

Discussion

13. For the following reasons we are satisfied that this application is without merit.
 - a) The appellant was represented in the Court proceedings and her lawyer filed submissions to the BRC. There is no evidence that she raised any concern about her representation at the time or that she would have been justified in doing so. It is concerning that the Community Law Centre suggests that the appellant's belief that all lawyers were disinterested or not suitably qualified to represent her is a genuine and justifiable ground for extending time.
 - b) While it is not easy for an appellant to represent themselves, this is the case for the majority of appellants and we do not accept that the appellant was unable to file her own notice of appeal within the time allowed.
 - c) We do not accept that her partner's head injury prevented her from filing an appeal within three months of the BRC decision. The appellant has not provided any evidence of the date of this injury but the Ministry states that the injury occurred on 18 June 2016. The BRC delivered its decision on 8 April 2016 and the appeal period expired on 8 July 2016. Had the appellant been considering an appeal when the injury occurred, but been prevented from filing it by her partner's health, an application to extend time would have been considered if filed at that time.
 - d) The period of time that has elapsed disadvantages the Ministry in presenting its evidence.
 - e) The law in relation to the meaning of a relationship in the nature of marriage is well settled. We do not accept that there is any public interest in this appeal proceeding.

14. Accordingly we conclude that the delay in filing this appeal is extreme and is not justified. The appellant has failed to demonstrate that the appeal has merit.

Decision

15. The appeal is out of time and the Authority is not satisfied that there are grounds to allow additional time pursuant to s 12K(1A)(b) of the Social Security Act 1964.

Dated at Wellington this 12th day of October 2018

S Pezaro
Deputy Chair

C Joe
Member