

Decision No. [2017] NZSAAA 05

Reference No. SAA 2/17

IN THE MATTER

of the Education Act 1989 and the
Student Allowances Regulations
1998

AND

IN THE MATTER

of an appeal by **XXXX** of
Queenstown against a decision of
the Chief Executive, Ministry of
Social Development

BEFORE THE STUDENT ALLOWANCE APPEAL AUTHORITY

Neil Cameron

HEARING on the papers

DECISION

The appeal is dismissed

REASONS

Overview

[1] This is an appeal against the decision of the Secretary on review to confirm the decision by StudyLink to reassess the appellant's eligibility for a Student Allowance for the period 2010-2015 due to his receipt of backdated earnings related compensation payments covering the whole period, and to establish an overpayment against him of \$44,606.65 in consequence.

The issue on appeal

[2] The only issue is whether the backdated earnings related compensation paid to the appellant in a series of consolidated payments in 2015 constitute "*income*" under the Student Allowances Regulations 1998; or whether they fall under the "*lump sum payment*" exception to the definition of "*personal income*" in reg (2)(1).

Factual background

[3] The facts in this case are straightforward and are not in dispute. In late 2008 the appellant was injured. He applied for ACC compensation. Considerable delays ensued and although he received a lump sum impairment payment in 2013, he was not finally approved earnings related compensation until 2015. In the meantime, he embarked on a six year period of tertiary study between 2010 and 2015 for which he applied for and received a Student Allowance. Over this period he earned no other income.

[4] In 2015 ACC finally approved earnings related compensation backdated to the date of his initial injury (2008). This compensation was paid out in a small number of

instalments between October and December 2015. (The precise number of payments made is unclear from the papers – the Ministry says 12, the Secretary could only identify 6 from the file.)

[5] On becoming aware of his receipt of this compensation, StudyLink moved to reassess the appellant's allowance entitlement over the period in question. Unfortunately for him, calculated on a weekly basis the compensation payments were significantly in excess of the personal income threshold governing allowance eligibility, rendering him ineligible for an Allowance over the whole period. As a result, an overpayment of \$44,606.65 was established. The appellant has not at any stage disputed the calculation of this overpayment or that, if the payments he has received from ACC are indeed "*personal income*", that he was ineligible for an Allowance and will now have to repay it.

[6] In mid 2016 the appellant applied to review this decision and in early 2017 a Student Allowance Review Panel hearing was held at which he made further submissions. Following this meeting, the Secretary upheld the original decision to reassess his entitlement and to establish the debt in dispute. In March 2017 the appellant appealed to this Authority.

Relevant law and legislation

[7] Regulation 2 defines "*personal income*" simply as "... *the personal income of that student which is derived in New Zealand or overseas, whether or not taxable*". This is then limited by a list of specific exceptions including the provision that, with the exception of bursary, grant and scholarship payments, "*lump sum payments of any kind received by the student*" shall not count as personal income for Student Allowance purposes. (See para (c)(iii)).

[8] There is no question that the backdated earnings related compensation payments that the appellant received are "*income*" in terms of the wide initial definition provided by reg 2. The only question is whether the fashion in which they have been paid means that they must nevertheless be excluded from consideration as such under the "*lump sum payments of any kind*" exception provided for in para (c)(iii) of the definition.

[9] This precise issue was resolved by the Authority in [2009] NZSAAA 9 – a case which is on all fours with the present one in that the sole issue in contention was the application of the "*lump sum exception*" to backdated earnings related ACC compensation payments made to the appellant as a single consolidated payment. While the Authority accepted that such payments "*would be described by most people and in ordinary language as a lump sum payment*", it concluded that the adoption of the interpretation contended for by the appellant was not only contraindicated by a number of other provisions in the Regulations relating to the calculation of income which provided specifically for the situation where students had received backdated lump sum wage related payments, but would also lead to a number of absurd and unintended results that would seriously undermine the legislative regime governing Student Allowance eligibility: see [24]-[28]. Accordingly, the Authority concluded at [35] that:

"I have no doubt that the back payment by ACC in this case must be classified as "personal income" for the purposes of the Student Allowances Regulations 1998. Although the payment took the form of a lump sum it is not a lump sum of the sort contemplated by para (c)(iii) of the definition. It is in fact a retrospective earnings

related compensation payment that would clearly count as weekly income if it had been paid to the appellant in a timely manner and it must equally be regarded as weekly income when it is paid retrospectively in the way in which it has been done here.”

The Secretary’s decision

[10] In her decision the Secretary simply applies the reasoning in [2009] NZSAAA 9, emphasising that the ruling in that case applies directly here and effectively answers all the points made by the appellant in his submissions:

... the substantive issue considered by the Appeal Authority [in [2009] NZSAAA 9] aligns so closely that it would be remiss of me not to consider the decision the Authority has taken in that case. ... [The appellant] received a copy of [[2009] NZSAAA 9] prior to his Student Allowance Review Hearing which addressed the wording of the personal income definition at paras 22 to 28 and I consider that the merits of the Appeal Authority’s ruling in that case stand on their own, not requiring any further explanation from me given that [the appellant’s] concerns align so closely with the Appeal Authority’s discussion.”

Accordingly, although the Secretary accepts that the regulation is “poorly worded” and lacks clarity, there can be no question that the payments made by ACC to the appellant must be counted as income and that the original decision to reassess his eligibility over the period in question was correct.

[11] Although it was not relevant to the review and is certainly not relevant to this appeal, the Secretary also commented adversely on the lack of any formal process permitting StudyLink to deduct overpayments of the sort established in this case from ACC compensation arrears – as it can in the case of benefit overpayments under the Social Security Act 1964. Doing this would mean that “ACC payments for loss of earnings, paid to recipients, are what remains of the ACC calculated money, and the recipient need not consider repayment of debt to MSD”. In particular, in cases like the present, where the sums involved are considerable, such an option may well have significant benefits for the client and accordingly:

“I do urge MSD to consider the client experience in a situation such as this and encourage some engagement with ACC to determine if a legislated change could occur to enable a deduction in similar circumstances OR to make it clear(er) to ACC loss of earnings recipients that they should engage in a conversation with StudyLink to determine any consideration of a change in circumstances and any flow on effect as a result.”

It is difficult to disagree. It is simply anomalous to provide a set of arrangements designed to ameliorate the position of recipients of State assistance in the benefits area, and not to do so for Student Allowance recipients who are essentially in exactly the same position.

The basis for this appeal

[12] In his submissions on appeal the appellant essentially seeks clarification of the phrase “lump sum payments of any kind”, stating that to date it has not “been properly challenged in law” and accordingly that the interpretation placed on it by the Ministry is simply an “opinion”. In particular, he argues that “lump sum” should be given its

dictionary meaning of “a single payment made at a particular time, as opposed to a number of smaller payments or instalments” (Oxford Dictionary online). In support of this he says that if it had been intended to exclude payments such as earnings related compensation paid as “a single payment” the drafter of the legislation would have said so:

“If it was the intention of the writer of this phrase “lump sum” to [preserve such payments as income] then they would have defined this phrase further to state that this kind of activity is excluded from their definition ... however, in this case the writer of this phrase “lump sum” chose not to clearly define its purpose or meaning other than those listed as not including scholarships, grants and bursaries.”

[13] In passing it should perhaps be noted that as the appellant in fact received his backdated payments in at least six separate instalments in late 2015 rather than a “a single payment made at a particular time”, if the Oxford Dictionary online definition of “lump sum” that he champions were to be accepted these payments would clearly not be “lump sum” payments within the para (c)(iii) exception either. His appeal would accordingly fail on that ground alone.

[14] Although he does not directly address the reasoning in [2009] NZSAAA 9 at [24]-[28] – a copy of which he received prior to the SARP hearing in early 2017 and which he has clearly read in some detail – he appears to accept that the interpretation he is arguing for would indeed result in the sorts of unintended and/or harmful/unfair consequences suggested there, but says that he “has never asked to be treated differently” in any way, rather than simply to be provided what he is entitled to under current legislation.” This appears to be simply an assertion that the only possible interpretation of the phrase in issue is the wide one based on the generic entry for “lump sum” in the Oxford Dictionary online, with no account needing to be taken of the context in which the drafter of the provision was actually using the words and the purpose that he or she was trying to achieve. Unfortunately, at no point in his submissions does the appellant make any effort to address and/or resolve the evident problems that he seems to accept that his interpretation gives rise to. He needed to do so. Unless he is able to argue with at least a certain degree of credibility that the interpretation he favours is consistent with the objectives of the personal income regime, does not produce unfair and unjustifiable distinctions between students and is not inconsistent with other provisions in the Regulations dealing with the calculation of personal income, any appeal is unlikely to succeed.

The Ministry’s submissions

[15] First the Ministry says:

“If ACC had resolved the appellant’s entitlement in a timely fashion the appellant undoubtedly would not have been entitled to Student Allowance as the gross weekly amount payable, as per the ACC Schedule, was higher than the Student Allowance personal income threshold.”

[16] Secondly, the ACC payments received by the appellant that are the subject of this dispute were clearly *“weekly earnings related compensation and not a lump sum payment for permanent impairment under the ACC legislation”*. Such payments, however they are paid, must be considered personal income under reg 2:

“While the payments may be made in the form of a lump sum (or several lump sums as in this case), they are in fact made up of a specific number of weekly payments of earnings related compensation that replace earnings that have been “lost or foregone due to an accident.”

[17] On the meaning of the phrase *“lump sum payments of any kind”* the Ministry takes exactly the same approach as the Secretary on review, adopting the decision in [2009] NZSAAA 9 at [22]-[28], and arguing that the phrase must be given a purposive interpretation consistent with the objectives and requirements of the Student Allowance regime. The adoption of the interpretation advocated for by the appellant would *“defeat the purpose of the legislation”* by leading to students receiving income related compensation on a week by week basis being placed in a different position from those (like the appellant) who, for reasons wholly unrelated to the substance of the payment being made, receive it in the form of *“accumulated weekly payments”*. No valid justification for such a difference exists, and interpreting the provision in this way undermines the income testing regime, enabling a student’s eligibility to be *“manipulated or be the result of an irrelevant factor”*.

[18] Of the para (c)(iii) exception, the Ministry says:

“The exclusion of lump sums in regulation 2 is designed to recognise that lump sum payments are generally not payments of income, rather they are payments made for other reasons (e.g. payment of a lump sum from ACC for a permanent impairment).”

[19] Finally, the Ministry notes that the appellant has not disputed the amount of the overpayment established against him and says that in the circumstances it was fair and reasonable to reassess his entitlement once the ACC payments came to notice. As StudyLink was unaware of the ACC payments prior to the end of 2015 and did not contribute in any way to the overpayment, *“there is no evident reason not to recover a properly established debt”* in this case.

Discussion

[20] With all due respect to the appellant’s arguments and to the time and effort that he has put into taking his case through the review and appeal process, his appeal cannot succeed. The question he raises is certainly a real one in the sense that there is obviously room for argument about the precise reach of the somewhat vague and general phrase he is concerned with. However, this matter has already been dealt with exhaustively in the Authority’s earlier decision in 2009. To argue as he does in his submissions that the term *“lump sum”* and the word *“any”* have received no proper *“legal”* definition is to misunderstand the appeal process and the place in it of decisions of this Authority. These words have been considered in the context of a factual situation which was essentially identical to his own and a conclusion as to the meaning of those words has been arrived at by the Tribunal tasked with dealing with exactly these sorts of issues. While it is always open to the Authority to reconsider its previous decisions, and in appropriate circumstances it should be quick to do so, neither the

appellant's submissions in this case nor the factual circumstances that it reveals have suggested any good reason for doing so. Accordingly, I see no reason to depart from the earlier decision and am clear that, at least in relation to earnings related compensation payments of the sort in issue here, the simple fact that a series of weekly earnings related payments have been aggregated and paid by way of one or more cumulative payments, does not render them "*lump sum payments of any kind*" in terms of the definition of personal income in the Regulations. As the Ministry says in this situation the payments made to the appellant are "*in fact made up of a specific number of weekly payments of earnings related compensation*" that, purely for the convenience of both parties have been aggregated and paid in one or more instalments. Although colloquially such payments may be described as "*lump sum*", they are in fact more accurately described as "*aggregated*" or "*cumulative*" payments.

[21] Eligibility for an allowance under the Student Allowances Regulations 1998 depends in large part on the income of the applicant. Student Allowances are intended to assist those students who are most in need in the sense of lacking the available financial resources to support tertiary study. It is therefore not surprising that in looking at "*lump sum*" payments made to students the Regulations would distinguish between payments which represent earnings and those which stem from other sources. Clearly in this context the distinction drawn by the Ministry between earnings related compensation paid by ACC and impairment lump sum compensation is instructive. In the context of the Regulations the Ministry is clearly correct in its argument that the exclusion of lump sum payments in para (c)(iii) is designed to recognise this sort of substantive distinction rather than simply being about the form in which payments are made – which is what the appellant's argument would seem to suggest.

[22] Accordingly, I am satisfied that StudyLink was correct to treat the back payments of earnings related compensation received by the appellant in 2015 as income over the period on which he was receiving an allowance and to review his eligibility for that allowance and establish an overpayment in relation to it. Furthermore, even if I had the authority to do so, I see no reason to differ from the Ministry's view that it is appropriate to seek to enforce that debt, albeit no doubt in a fashion which will not cause undue hardship to the appellant.

The appeal is dismissed. The decision of the Secretary on review to uphold StudyLink's decision to reassess the appellant's entitlement and to establish and recover an overpayment of \$44,606.65 due to his receipt of earnings related compensation from ACC over the period 2010-2015 is upheld.

DATED at WELLINGTON this 18th day of October 2017

Neil Cameron
Student Allowance Appeal Authority