

[2019] NZSSAA 009

Reference No. SSA 075B/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 Timaru on 4 December 2018

Appearances

The Appellant: In person

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

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*¹ upheld part of the Authority's decision but found 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] However, following the consent order in the High Court the issues have already been addressed in an interim decision of 9 January 2018 [2018]

¹ *XXXX v Chief Executive of the Ministry of Social Development* [citation removed].

NZSSAA 1, and a final decision of 18 July 2018 [2018] NZSSAA 33. Those decisions should be read with this decision, and are referred to as the interim and final decision respectively. After the interim and final decision, the appellant sought to commence a third appeal in the High Court, it became apparent the main ground for appeal was the appellant said he did not receive notice of either the hearing or interim decision. The Authority considered whether a rehearing application was the appropriate approach. The appellant had been using a smartphone for his email communications, and there were issues arising from changes to his email address. The Ministry did not challenge the factual claims the appellant made regarding not knowing of the hearing or the interim decision, accordingly we granted a rehearing. The rehearing took the form of an oral hearing.

- [3] For convenience, and to avoid unnecessary reproduction of material, we attach the following documents:
- [3.1] The Authority's original decision dated 18 May 2012.
 - [3.2] The High Court's decision on appeal dated 1 March 2013.
 - [3.3] The Authority's second decision dated 19 February 2014.
 - [3.4] The High Court's order for further consideration dated 5 May 2016.
 - [3.5] The Authority's interim decision dated 9 January 2018.
 - [3.6] The Authority's final decision dated 18 July 2018.
- [4] We have not attached the documents relating to the third appeal, as that has been overtaken by the rehearing.
- [5] We take the interim and final decision as a starting point regarding the facts, but now have additional information from the recent oral rehearing, and some further material the appellant provided after that hearing.

The facts

- [6] In the interim and final decision, we set out why we could not reach positive factual findings for the appellant relating to financial prejudice, unless he provided further information. We identified the information gaps in the material that made it impossible to find the appellant probably suffered financial prejudice or disadvantage. After the most recent rehearing we now have the information we need to make positive findings. This is the first point in the

proceedings where the appellant has provided the information to evaluate his circumstances accurately, and quantify any financial prejudice. The new evidence is:

[6.1] We find as a fact that the tax invoice of 1 August 2011 from the appellant's lawyer was exclusively related to the cost of pursuing his ACC claim. The appellant gave evidence to that effect, and the Ministry did not challenge his evidence. Accordingly, we find the appellant paid the sum of \$5,408.67 for legal services in or about August 2011 to recover additional money from ACC.

[6.2] We now have Inland Revenue documents (return acknowledgements) showing the appellant's taxable income in the tax years 2010 to 2012. They show the appellant had:

[6.2.1] A taxable income of \$31,148.07 in the year ending 31 March 2010.

[6.2.2] A taxable income of \$119,908.86 in the year ending 31 March 2011.

[6.2.3] A taxable income of \$72,613.96 in the year ending 31 March 2011.

[7] We can now review the analysis at [11] to [24] of the interim decision. The appellant did not challenge the allocation of backdated ACC payments (18 per cent in 2010, and the balance related to the 2011 tax year). Accordingly:

[7.1] We can confirm the finding in [12] of the interim decision that the appellant paid tax of \$8,374.10 on the ACC back payment of \$30,106.32. That tax liability was due in the 2012 tax year.

[7.2] We turn to the counterfactual and determine the tax liability if the ACC back payments were received as they arose and not in arrears (18 per cent of the total in the year ending 31 March 2010, and 82 per cent in the year ending 2011):

[7.2.1] The appellant's taxable income without the ACC back payments in the year ending 2010 was \$31,148.07. He would have received an additional \$5,512.37 from ACC, the rate of tax in the bracket between \$14,001 and \$48,000 was 21 per

cent, accordingly the tax on the ACC payments received when due would have been \$1,157.60.

[7.2.2] The appellant's taxable income without the ACC back payments in the year ending 2011 was \$119,908.86. He would have received an additional \$24,593.95 if the ACC payments were paid as they arose. The rate of tax on income above \$70,001 was 35.5 per cent, accordingly the tax would have been \$8,730.85.

[7.2.3] It follows the appellant would have paid tax of \$9,888.45 if he received the payments in 2010 and 2011, the time when his entitlements arose. Whereas, he in fact paid \$8,374.10 when the payments were received as a backdated lump sum. The delay improved his situation by paying \$1,514.35 less tax.

[8] The appellant paid less tax because in the 2012 tax year the maximum rates of income tax had been reduced. The rates were higher in the 2011 year, and higher again in the 2010 year. The appellant's back payment of ACC mainly related to the 2011 year, in that year he was on the top marginal rate with an income of \$119,908.86. It follows the appellant's claim he paid more tax as he received a lump sum payment of arrears is not correct, on the contrary it advantaged him as his tax rate was lower in the 2012 year.

Applying facts to the order of the High Court

[9] The matter is currently before us under an order of the High Court dated 29 January 2016. We now apply the directions in that order.

[10] The order required the Authority to reconsider its decision in accordance with Williams J's decision in *Van Kleef v Chief Executive of the Ministry of Social Development* (the High Court decision).² That is the original appeal from the Authority's original decision. It concerns the discretion in s 86(1) and s 86A of the Social Security Act 1964. Those discretions relate to recovery of overpayments. We note it is necessary to apply the legislation in the form it was in February 2011 when the Chief Executive made the decision to recover overpayments. However, no analysis is required as to the application of the sections beyond those set out in the High Court decision.

² *XXXX v Chief Executive of the Ministry of Social Development* [citation removed].

- [11] It is common ground that the extent of the overpayments is \$2,013.93 in respect of the period from 4 February 2010 to 13 February 2011. The details are set out in the Authority's second decision, and at the recent oral rehearing the parties accepted that was the only matter in issue.
- [12] First, we apply the direction from the High Court of 5 May 2016, using the step by step directions. Those directions required us to consider the matter taking into account tax information attached to that direction. We did that in the interim and final decision of the Authority, and those decisions accurately record we could not make positive findings due to lack of information and explained why. We necessarily concluded that was then the end of the matter without further information in the interim decision, we had invited the appellant to provide further information, but he had not done so and we confirmed the outcome in the final decision.
- [13] Now we have completed the rehearing and the appellant has provided further information, we can now make completely accurate findings regarding both the appellant's legal expenses and his tax situation. We find that:
- [13.1] The appellant expended \$5,408.67 on legal expenses and recovered ACC arrears of \$31,106.32. In fact, the appellant did not specifically relate the expenses to that particular recovery of ACC arrears; but on the balance of probabilities we take that as the position, it is the most favourable position for him.
- [13.2] We conclude there was no financial prejudice from receiving ACC arrears of \$31,106.32 in the 2012 tax year, on the contrary the appellant paid less tax than if he would have received the money in the 2010 and 2011 tax years when the entitlements arose. We make that finding as a firm conclusion because the appellant has now supplied details of his income for each of the relevant years.³
- [14] We now consider each of the questions raised by the direction from the High Court of 29 January 2016. We first consider the specific questions:

³

There is a minor discrepancy in that on the information we had for the interim decision the appellant's taxable income was \$72,843.96 (derived from information accompanying the High Court's directions of 29 January 2016). The information he most recently supplied shows returned income of \$72,613.96. The difference is not apparently material; however, we provide an opportunity below at [17] for the appellant to respond if he has a different view.

Is the appellant right in claiming financial prejudice?

[14.1] We conclude he was not right to claim a tax consequence caused financial prejudice, as he paid less tax than he would have otherwise have paid. We cannot identify any financial prejudice from meeting legal expenses to recover a sum of money from ACC. The appellant received a substantial sum after the expense. With reference to ACC, the legal expense could be seen as a financial prejudice. However, in relation to whether or not the appellant should repay benefit overpayments, in our view the net receipt of \$24,697.65 in ACC arrears is the relevant item. Receipt of the net ACC arrears was a benefit, not a financial prejudice. We can see no justification for isolating the cost of recovery as a financial prejudice without regard to the beneficial receipt of \$30,106.32.

What is the extent of the disadvantage?

[14.2] For the reasons stated, there was no disadvantage material to the recovery of overpaid benefit.

Is the appellant right in claiming financial prejudice?

[14.3] For the reasons stated, we have concluded the facts do not support his claim of financial prejudice.

If so, what was the extent of the disadvantage?

[14.4] There was no financial disadvantage.

Can a dollar figure be placed on it?

[14.5] The figure is the extent of advantage, not disadvantage.

Is it sufficient to amount to material unfairness when seen against the acknowledged overpayment to the appellant that WINZ has to carry?

[14.6] We find there is no material unfairness, as the appellant has been advantaged in terms of the tax liability he had to meet. Further, he received a net sum of money after legal expenses as ACC arrears, and had those funds to deal with overpayments of benefit he received before being paid the ACC arrears. His receipts were greater than the overpaid benefit.

- [15] Those specific questions and the answers are determinative. The broad legal issue identified by the High Court decision that required further consideration was whether “the appellant [was] right in claiming financial prejudice?”⁴ We find there was no financial prejudice on the facts before us, after considering the tax issues referred to in the High Court decision, legal expenses identified by the appellant; and after a rehearing and opportunity for a full overview of the circumstances.

Opportunity to respond

- [16] We are conscious and concerned by the history of this matter, the amount of money in contention is very modest compared with the cost of the appeals, and when compared with the appellant’s taxable income in 2011 and the ACC arrears he received. The point has been reached where factual conclusions must be final. For that reason, the appellant will have the opportunity of providing any further evidence regarding his income, the analysis we have undertaken, and facts that bear on whether in fact he suffered any financial prejudice material to the recovery of his benefit overpayments.

- [17] The appellant may submit further written material within 10 working days of this decision. If he provides nothing, this decision will then be final. If he provides further material the Authority will consider it, and only if it establishes any conclusion in this decision is wrong will the Authority address the matter further (which would involve giving the Chief Executive an opportunity to respond). If not, the Authority will issue a decision dealing with the further material, and make a final order confirming the outcome of the appeal.

Conclusion and order

- [18] The appeal will be dismissed, as there is no financial prejudice that could alter the outcome of the Authority’s decisions dated 18 May 2012 and 19 February 2014, which dismissed the appeal and did not direct non-recovery of benefit overpayments.

⁴ *XXXX v Chief Executive of the Ministry of Social Development*, above n 4, at [31].

[19] This order is conditional on [17], and accordingly does not take effect for 10 working days from the date of this decision with no response from the appellant, or until a further order of the Authority, if the appellant does respond.

Dated at Wellington this 21st day of February 2019

G Pearson
Chairperson

K Williams
Member