

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an Appeal to the Social Security Appeal Authority by **XXXX** of Auckland, against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee

DECISION ON JURISDICTION

Background

- [1] XXXX filed this appeal on 24 July 2017 against the decision on 21 April 2017 by the Ministry of Social Development to decline to pay \$5068.92 being the fee for the Professional Legal Studies course which is a prerequisite for admission to the bar as a barrister and solicitor. The Ministry's decision to decline XXXX's application for assistance was upheld by a Benefits Review Committee.
- [2] XXXX applied for this assistance in the form of a Training Incentive Allowance Application in February 2016. At that time, he was a single 42-year-old, enrolled in a Master of Law degree (LLM). Since 1993 he had received Supported Living Payment or its equivalent as he has chronic fatigue syndrome. Since February 2000 he completed a Bachelor of Arts, Bachelor of Laws, and Bachelor of Science.
- [3] This appeal progressed slowly because XXXX was unwell and unable to comply with timetables. The Ministry filed its report in October 2017 and XXXX responded in October 2019. On 14 November 2019, after considering XXXX's response, the Ministry overturned its decision and paid XXXX the sum of \$5000.
- [4] However XXXX did not want to withdraw his appeal as he considers that he is entitled to a grant for work clothing and equipment, an incentive payment, the cost of his practising certificate, and exemption of income

for the purposes of calculating income under the Act. He says these forms of assistance should be considered as part of this appeal.

[5] The question we must now decide is whether the Authority has the power to consider as part of this appeal XXXX's entitlement to forms of assistance other than payment of the course fees.

[6] The parties filed submissions on jurisdiction. We have considered those submissions and the relevant law and, for the reasons that follow, we conclude that the Authority has no jurisdiction to determine the issues XXXX seeks to pursue as part of this appeal.

The relevant law

Application for a benefit

[7] Section 11D(1) of the Social Security Act 1964 (the Act) states that a benefit must not be granted until an applicant has complied with s 11D(2) which requires an application form and any supporting evidence reasonably required by the Chief Executive.¹ Section 11D(3) – (4) allowed applications for any benefit as a gateway to the grant of a benefit of a different kind.

[8] Section 11D(7) provides that, if the Ministry receives a written application and supporting evidence, it may treat the application as having been received on the date of first contact.

[9] The nature of the Chief Executive's duty is to ensure pro-actively that the correct benefit is paid. Dunningham J summarised the position in *Crequer v Chief Executive of the Ministry of Social Development*.²

Right of appeal

[10] Section 12J(16) of the Act set out restrictions on the right of appeal of the Social Security Appeal Authority.³ No decision can be appealed to the Authority unless that decision has been confirmed or varied by a Benefits Review Committee, or made personally by the Chief Executive.

¹ The 1964 Act which was in force at the time XXXX made the application subject of this appeal provided that the requirement for a form and information could only be waived if the Chief Executive was satisfied that the department already held the information required or a form relating to an application that had lapsed. The Social Security Act 2018, s 438(j) modified this requirement by permitting regulations to waive the requirements to complete an application form and provide supporting evidence.

² [2016] NZHC 943, [48]

³ The equivalent provision in the 2018 Act is in s 395.

- [11] Section 10A of the Act establishes the process for a review of a decision made under delegation:

10A Review of decisions of chief executive made under delegation by other decision makers

...

(1A) A person to whom this section applies may apply in writing for a review of the decision to the appropriate benefits review committee established under this section.

(1B) The application must be made—

(a) within 3 months after receiving notification of the decision;
or

(b) if the committee considers there is good reason for the delay, within such further period as the committee may allow on application made either before or after the expiration of that period of 3 months.

Proceedings before the Authority

- [12] Under both the Social Security Act 1964 (the Act) and the Social Security Act 2018 the Authority sits as a judicial authority⁴ and is deemed to be a commission of inquiry with the powers to gather information contained in the Commissions of Inquiry Act 1908.⁵

- [13] The obligation to “get it right” when a person presents seeking assistance carries through each level including the disposition of appeals before this Authority. In *Margison v Chief Executive of the Department of Work and Income*⁶ Laurensen J commented:

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

- [14] The Supreme Court considered the nature of proceedings before the Authority in *Arbuthnot v Chief Executive of the Department of Work and Income*⁷. It was resolute in requiring the Authority to reach the correct

⁴ Section 12I of the 1964 Act, and s 401(2) of the 2018 Act.

⁵ Section 12M(6) of the 1964 Act, and cl 12(1) of Schedule 8 of the 2018 Act.

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

⁷ [2007] NZSC 55

view on the facts, rather than being constrained by the earlier processes:⁸

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 ...

XXXX's position

[15] On 16 March 2020 XXXX sent an email to the Authority setting out what he considered to be the issues remaining to be determined after the Ministry overturned its decision:

[15.1] The Ministry's initial decision cost him more than the fees and the Authority should consider interest on these costs.

[15.2] The Ministry should have granted him a lump sum payment of \$5000 as an incentive to enter employment related training.

[15.3] He asked the Authority to order the Ministry to pay the cost of his Practising Certificate and rule that the Ministry should have considered and granted assistance for a suit, shoes, briefcase, laptop, smart phone and other necessities for work in the legal industry.

[15.4] The Ministry should have considered and granted an income exemption of any income he may make from legal work.

[16] In submissions filed 28 August 2020 and 28 September 2020 XXXX argued that it was contrary to the principles of the Act⁹ to deny assistance particularly given his needs as a disabled person. XXXX says that at the time of the application and at the Benefits Review Committee hearing he asked for any additional and alternative assistance. He argues that it was not possible to formally apply for the

⁸ Ibid at [20]–[26].

⁹ Citing the Social Security Act 1964 which was in force when the decision under appeal was made. The same purpose and principles are reflected in the Social Security Act 2018 ss 3 and 4.

further assistance he now seeks as there was no appropriate form in existence or provided.

- [17] He submits it was in the Ministry's power to grant an incentive payment and a work clothing allocation payment when considering this appeal and, as the Authority has the power to make any decision that the Ministry could have made, it has the power to hear further issues in this appeal.
- [18] XXXX considers the Ministry is attempting to restrict the Authority's powers by asserting that there is no right of appeal unless a specific benefit has been sought. As the Authority has the powers of a commission of inquiry to ensure that it reaches the right decision, this power allows the Authority to hear an appeal *de novo*. Where the Ministry has prevented access to benefit entitlements, it would be a breach of natural justice to refuse an appeal. XXXX argues that the Authority's power of inquiry indicates that its purpose is to look into underlying issues and policies.

The Ministry's position

- [19] The Ministry contends that the requests for further assistance are additional issues raised by XXXX as he prosecuted this appeal. They were not factors related to his completion of the course and not identified in his application for course fees.
- [20] As these issues were not the subject of decisions which have been confirmed or varied by a Benefits Review Committee, the Authority has no jurisdiction to determine them. XXXX is asking the Authority to go beyond its jurisdiction to take the role of the primary decision maker, rather than act as the appellate body.

Discussion

- [21] On 22 February 2016, when XXXX completed his application for a Training Incentive Allowance, he applied for fees of \$5068.92 being the cost of the course with the Institute of Professional Legal Studies. There was no indication in this application that he was seeking any other financial support or assistance from the Ministry. There is nothing to indicate that when he was informed of the Ministry's decision, he asserted that the decision did not cover all aspects of his application for assistance.
- [22] On 3 July 2016 XXXX applied for a Review of Decision. In Part 11 of the form which asks an applicant to state why they disagree with the decision, XXXX stated: 'Decision based on incorrect regulations' and 'Consideration of long term risk of unemployment incorrect'.

- [23] In his Notice of Appeal XXXX referenced paragraphs [6.5] to [6.10] of the Benefits Review Committee report which contained the Committee's findings. He disagreed with the Committee's interpretation of the law. The final paragraph of his Notice of Appeal stated: *Plus additional issues with the process inc: interpretation of legislation with regard to inapplicable criterion.*
- [24] We are satisfied that XXXX did not raise any issue other than the request for fees when he applied for assistance and that his application for review of decision related only to the decision to decline his application for fees.
- [25] However, in light of the duty to reach the correct outcome, we have considered whether the Ministry should have interpreted XXXX's application as a request for assistance other than fees or whether there was any other form of assistance that it should have considered providing to him at that time. While XXXX may have a level of vulnerability as a result of his health issues, the qualifications he has attained and the submissions he has made in support of his appeal demonstrate that he is more able to understand and deal with the formalities required to apply for assistance than most beneficiaries.
- [26] We conclude that XXXX's application for payment of the course fees did not raise any other issues which the Ministry should have identified, or which were not properly addressed by the Ministry when it considered this application.
- [27] Accordingly, we find that the Authority has no jurisdiction in the context of this appeal to determine the requests for assistance now sought by XXXX as those requests have not been the subject of decisions by the Ministry which have been confirmed or varied by a Benefits Review Committee.
- [28] To put the matter in practical terms, this is not a case where XXXX seeks to advance grounds to receive further support arising from his statutory entitlements. Instead, he is seeking an order for the payment of interest, the payment of an "incentive to enter employment", work related equipment, and exemption from the statutory provisions of the income test that applies to his benefit. Neither the Chief Executive nor this Authority has power to pay or order the payment of interest, XXXX is required to enter employment if he is in a position to pursue that option. Support for employment related expenses arises in particular circumstances none of which apparently apply (and many cannot as XXXX is not employed). Income tests are set by legislation.

[29] XXXX has not identified any ground for considering that he has any basis in law for looking beyond the decision relating to the cost of his Professional Legal Studies Course.

XXXX's alternative argument

[30] In submissions XXXX proposes an alternative argument; that he appeal the Ministry's decision to award only the fees. He suggests that he do this by treating it as a new decision of the Ministry giving rise to a new right of appeal which he would then take to a Benefits Review Committee. Assuming the Ministry and the Benefits Review Committee allowed for this procedure, the same criteria would apply to a right of appeal.

[31] Further, if XXXX was not satisfied with the Benefits Review Committee determination and brought an appeal to the Authority it would determine his entitlement to the fees for the Professional Studies Course. In doing so it could potentially find that he was entitled to an amount less than that determined by the Ministry, the full fee, or had no entitlement to assistance.

[32] The only matter against which an appeal can lie is the decision that XXXX should not be paid for the fees for the Professional Studies Course. The Ministry has agreed to pay those fees. If XXXX is not satisfied with that decision, potentially he can pursue the appeal. The Authority may well decide he should not have had those fees paid, certainly the Benefits Review Committee issued a reasoned decision to that effect.

[33] We cannot identify that XXXX does in fact want to put the proposal to pay the fees in issue; and he has not identified any other matter that is justiciable before this Authority.

Conclusion

[34] Under s 12J(16) of the Act there is no right of appeal other than against the decision to grant fees for the Professional Studies Course, and XXXX has not identified any justiciable issue he is not satisfied with given the Chief Executive's decision to pay his course fees.

Decision

[35] The appeal is dismissed for lack of jurisdiction.

DATED at Wellington 04 November 2020

S Pezaro
Deputy Chairperson

Charles Joe JP
Member