

[2020] NZSSAA 7

Reference No. SSA 64/19

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an appeal by **XXXX** of **MARTON** against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee.

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

C Joe - Member

Hearing at WELLINGTON on 12 March 2020

Appearances

The appellant by AVL from the Palmerston North District Court

R Signal, agent for the Ministry of Social Development

DECISION

Background

[1] XXXX (the appellant) appeals the decision of the Ministry of Social Development (the Ministry) to establish an overpayment of his Jobseeker Support after his then partner received weekly compensation from ACC for the period 19 December 2016 to 29 January 2017. This is an unusual appeal because the Ministry supports and agrees with the appellant's claim that the result of applying the relevant law to his situation is unfair. The appellant understands that we have no power to change the law but has brought this appeal because he hopes to see changes in the legislation so that others do not experience the same hardship.

- [2] At the time that his partner was injured, she was working almost full time, the appellant was receiving Jobseeker Support, and they had two children in their household. Jobseeker Support, an income-tested benefit, was paid at the half de facto rate with children and the appellant received an accommodation supplement.
- [3] On 29 December 2016, the appellant's partner advised that she had applied for ACC after being injured on 12 December 2016. On 10 January 2017, she declared that she had no income from 19 December 2016 to 8 January 2017, and the appellant's Jobseeker Support was paid at the full weekly rate during this period on the basis that his partner was not earning. He did not know his now ex-partner was receiving ACC payments.
- [4] On 13 March 2017, data matching between the Ministry and ACC identified that the appellant's partner had received ACC compensation payments during this period. There was initially an error by the Ministry in calculating the amount of the overpayment and it told the appellant he owed \$6,830.98; this amount was subsequently amended to \$967.37.

The issue

- [5] The sole issue in this appeal is the effect of the mandatory provision in s 71A of the Social Security Act 1964 which requires any weekly compensation to be directly deducted, at a dollar for dollar rate, from income-tested benefits.¹ While there is a regime for calculating an abatement of benefit when income exceeds a certain level, s 71A requires the full amount of loss of earnings compensation paid to either a beneficiary or their partner to be deducted dollar for dollar from an income-tested benefit.
- [6] The result is that when a beneficiary, or their partner and therefore their household, lose work income through injury they get no assistance from the ACC payments. This anomaly is the result of the legislation not taking account of people who are in work while they or their partner receive an income tested benefit.
- [7] The appellant understands that the decision against which he appeals is the result of an anomaly in the legislation, but he wanted to highlight the situation which he says is very unfair and put him in a significantly worse situation than before his partner's accident.

¹ The Act in force at the time, now replaced by the Social Security Act 2018 which contains the equivalent provision in s 198.

Relevant law

[8] Section 71A provides:

71A Deduction of weekly compensation from income-tested benefits

(1) Subject to subsection (4), this section applies to a person who is qualified to receive an income-tested benefit (other than New Zealand superannuation or a veteran's pension unless the veteran's pension would be subject to abatement under section 171 of the Veterans' Support Act 2014) where—

(a) the person is entitled to receive or receives weekly compensation in respect of the person or his or her spouse or partner or a dependent child; or

(b) the person's spouse or partner receives weekly compensation.

[9] Section 71A(2) provides that the rate of the benefit payable to a person must be reduced by the amount of weekly compensation payable to the person. Section 71A(3) provides that "weekly compensation" means accident compensation for loss of earnings or loss of potential earning capacity. There is no dispute that the payments in issue come within that category.

The ACC anomaly

[10] If a person or their partner is injured and receives compensation payments from ACC because they cannot work, they would be expected to continue to receive the benefit, with ACC payments reducing the benefit to the same extent as employment income. However, the effect of s 71A is that any person who receives an income-tested benefit when they or their partner or spouse receives earnings-related compensation under the ACC Act has their benefit abated by 100% of the weekly compensation.

[11] The provision that when a person is receiving earnings related ACC payments, any entitlement they have to a benefit will be reduced to the extent of those ACC payments, is founded on the principle that where a person is unable to earn income, they should not be compensated for one loss by both a benefit payment and an ACC payment. The principle and application are simple when a person is working without any social welfare benefit and has an injury. That person receives a full entitlement to a benefit or ACC payments, whichever is the greater. Effectively, one or other income support regime applies.

[12] For persons who have a benefit and some work, when they are injured, it should be necessary to take account of the statutory scheme that allows some earnings without abating the benefit.

There is no reason to abate the benefit for ACC payments which are intended to compensate for loss of earnings that would not themselves abate a benefit.

[13] Accordingly, instead of preventing double compensation, the dollar for dollar abatement provided in the Act entirely deprives a person of any benefit from ACC cover. That is not because the benefit and the ACC are, in this case, compensating for the same thing. In the pre-accident situation, the wages only affected the benefit to the extent required by the income threshold relevant to that benefit. As the ACC payments are a partial compensation for the lost wages, these payments should not affect the entitlement to the benefit. If weekly earnings-related compensation were treated as income for the purpose of assessing the rate of an income-tested benefit, the outcome would be significantly different.

[14] The High Court's decision in *M v Chief Executive of the Department of Work and Income* HC WN AP 335–01, 27 August 2002 confirms that the provision operates in the way the wording indicates. However, the appellant's situation does not fit within the principles expressed in that case. The Court observed:

... applicants should have access to only one stream of 'state insurance' and that a beneficiary cannot expect to receive both benefit and periodic earnings-related compensation for the same period of time. (paragraph [29])

[15] Similarly, in *Goh v Chief Executive of the Ministry of Social Development* [2010] NZCA 110 the Court of Appeal said:

The applicant's argument is that she should retain both the full amount of her benefit and some of the accident compensation calculated on a weekly basis in respect of exactly the same period. Such duplication resulting in an unjustified windfall would entail a preposterous result.

[16] The facts of those cases were quite different. They did not concern a situation where an appellant was deprived of ACC payments to compensate his partner for loss of an income that did not abate his benefit to the same extent prior to the accident. Accordingly, while these authorities affirm the application of s 71A they do not consider the situation in issue in the present case.

[17] *Hennessy v Chief Executive of the Ministry of Social Development* [2012] NZHC 3104 concerned a person who worked while earning a benefit and received ACC payments relating to that work. The appellant sought to have the ACC payments treated as though they were the additional income which they replaced. Accordingly, she sought to have the same abatement regime apply to the ACC payments as would apply to her wages that she lost.

[18] The court described the nature of the legal argument for the appellant:

In effect, Ms Hennessy's challenge is to the nature of the existing statutory scheme, as opposed to the way in which the sections should be interpreted. Any change in policy is for Parliament. The points raised by Ms Hennessy cannot be remedied by a decision of this Court.

[19] Ms Hennessy took her case to the Human Rights Review Tribunal which issued a declaration that s 71A and its equivalent provision in s 198 of the 2018 Act are inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990 because it discriminates against persons on the grounds of their employment status.² Significantly, this declaration was issued after the plaintiff and the Ministry filed a joint memorandum seeking a declaration that these provisions of the social security legislation constituted a breach of Part 1A of the Human Rights Act 1993.

[20] In the view of the HRRT, s 71A of the 1964 Act and s 198 of the 2018 Act were "misplaced because the weekly earnings-related compensation cannot be characterised as a benefit. Rather, it is compensation paid under a no-fault statutory scheme that stands in the place of wages or other income".³

[21] Consistent with its approach in the HRRT, the Ministry supports the appellant's position in this appeal and agrees that the outcome of applying the legislation, as required, is unfair. The Ministry's position is that s 71A of the Act has an unambiguous effect which allows no alternative to the outcome previously described.

Discussion

[22] The wording of section 71A(2) is clear and the words cannot bear a meaning other than what they say. The provision requires a dollar for dollar reduction in the benefit payable. Not to apply the words would go beyond interpretation of the provision. Inevitably, the court in *Hennessy* concluded, "The points raised by Ms Hennessy cannot be remedied by a decision of this Court". The same must apply in the present case.

[23] However, the inappropriateness of the result is obvious, and an example of the potential social harm is provided by the facts of this case.

² *Hennessy v Attorney-General* [2019] NZHRRT 4.

³ At [14].

Recommendation

[24] We request that the Chief Executive consider the effect of section 71A on persons who are entitled to ACC payments received for loss of work or work opportunities they had while receiving a benefit. We request that the Chief Executive notify the Minister of any policy concerns arising.

Decision

[25] We dismiss the appeal, as the legislation allows no alternative outcome.

Dated at Wellington this 30th day of April 2020

S Pezaro
Deputy Chair

C Joe
Member