IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-2135
[2013] NZHC 387

IN THE MATTER OF	AN APPEAL BY WAY OF CASE STATED FROM THE DETERMINATION OF THE SOCIAL SECURITY APPEAL AUTHORITY AT WELLINGTON UNDER S 12Q OF THE SOCIAL SECURITY ACT 1964
BETWEEN	**JONATHON VAN KLEEF** Appellant
AND	**THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT** Respondent

Hearing: 08 February 2013

Counsel: Mr Van Kleef in person
T I Hallett-Hook for Respondent

Judgment: 1 March 2013

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 4:30pm on the 1 March 2013.

JUDGMENT OF WILLIAMS J

Solicitors:
Crown Law, Wellington

[1] For most of the period from February 2010 to February 2011 Mr Van Kleef received a sickness benefit and an accommodation supplement. He also received temporary GST assistance – special assistance reflecting the then recent increase in GST from 12½ per cent to 15 per cent – from the period October 2010 to February 2011.

[2] In February 2011, ACC advised WINZ that Mr Van Kleef was entitled to backdated weekly compensation from ACC covering the period during which Mr Van Kleef was in receipt of his various WINZ benefits. I understand that the backdated ACC payments amounted to $17,501.50. For the same period $8,400.50 was paid to him by way of sickness benefit, $1,954.29 by way of accommodation supplement and $66 in GST assistance.

[3] WINZ reviewed Mr Van Kleef's entitlements and found that all overpayments should be recovered. WINZ recovered directly from ACC the amount of the sickness benefit paid but there is no statutory basis upon which it can retrieve directly from ACC the accommodation supplement and GST assistance payments. The accommodation supplement and GST assistance could not be recovered under s 252 because, unlike the sickness benefit, they are not income tested benefits.

[4] The Chief Executive then decided to review those two benefits pursuant to the general review power contained in s 81 of the Social Security Act 1964. The review was undertaken and because the Chief Executive took the view that Mr Van Kleef's combined income from benefits and ACC back-payment for the relevant period exceeded the ceiling for entitlement to accommodation supplement and GST assistance, the amounts paid over the relevant period should also be repaid dollar for dollar. Mr Van Kleef was asked to sign a form authorising ACC to repay this remaining money directly to WINZ but he declined to so sign.

[5] Instead he took the matter to an internal review where the Chief Executive's decision was upheld, then a formal review before the Benefits Review Committee (BRC) which again upheld the Chief Executive's decision on 12 April 2012. The matter then went to the Social Security Appeal Authority (SSAA). The Authority also upheld the Chief Executive's decision. The Authority concluded that:

(a) section 81 of the Social Security Act entitled WINZ to review retrospectively the payments to Mr Van Kleef by way of accommodation supplement and GST assistance;

(b) the ACC payments made were income for the purpose of assessing his entitlements to the accommodation supplement;

(c) there had been overpayment as a matter of fact; and

(d) there were no facts upon which the Chief Executive should grant Mr Van Kleef relief from recovery.

[6] Mr Van Kleef now appeals pursuant to s 12Q of the Social Security Act. The Authority has posed the following four questions of law:

(a) Did the Authority err in law in its interpretation of s 81 of the Social Security Act 1964 when it concluded that the Chief Executive was entitled to conduct a hindsight review of the appellant's benefit entitlements?

(b) Did the Authority err in law when it concluded that the appellant's ACC payments should be treated as income when assessing his entitlement to the Accommodation Supplement?

(c) Was there any evidence on which the Authority concluded that there had been an overpayment of Accommodation Supplement?

(d) Did the Authority err in law when it determined that it was inappropriate to direct the Ministry not to take steps to recover overpayments of Accommodation Supplement and Temporary GST Assistance under s 86(1) or s 86A of the Social Security Act 1964?

[7] For completeness, I note that Mr Van Kleef resides in Canterbury and could not travel to Wellington for the appeal hearing. He asked that arguments be heard by way of teleconference – he was apparently too unwell even to travel to the nearest

District Court for an audiovisual link up – and with the consent of counsel of the Chief Executive, I agreed that we proceed on that basis. I turn now to the questions.

Question 1: Does s 81 allow for retrospective review?

[8] Section 81 gives the Chief Executive the power to review any benefit in order to ascertain:[1]

> (a) whether the beneficiary remains entitled to receive it; or
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> (b) whether the beneficiary may not be, or may not have been, entitled to receive that benefit …

[9] Having undertaken the review, if the Chief Executive concludes that the beneficiary "was not entitled to receive the benefit", he or she may "suspend, terminate, or vary the rate of the benefit from such date as the Chief Executive reasonably determines".[2]

[10] The answer to the question has been authoritatively resolved by the Supreme Court in *Arbuthnot v Chief Executive of Department of Work and Income*[3] in which the court held that the Chief Executive had:[4]

> … the ability to look backwards and to determine whether an overpayment has been made in the past. The Chief Executive is no longer limited to making adjustments going forward from any change of circumstances, but may "reasonably determine" the date from which any adjustment should take effect. Consistently with the scope of the enlarged review power, an adjustment to a decision taken within the Department may be effected retrospectively where appropriate.

[11] See also the earlier decision of this court in *M v Chief Executive of Department of Work and Income* to the same effect but directly in respect of ACC payments.[5]

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1 Social Security Act 1964, s 81(1).
2 Social Security Act 1964, s 81(2).
3 *Arbuthnot v Chief Executive of Department of Work and Income* [2008] 1 NZLR 13.
4 At [34].
5 *M v Chief Executive of Department of Work and Income* HC Wellington AP335/01, 27 August 2002.

[12] Mr Van Kleef seems also to argue that the ACC backdated payments are not income to which s 64 of the Act should apply. Although not strictly within the terms of Question 1, Mr Hallett-Hook has raised the matter in this context and I simply record that I agree. I rely on the Court of Appeal authority in *Goh v Chief Executive of Ministry of Social Development*[6] referring to the High Court decision in that appeal to the effect that the date upon which payment is made is not relevant under the section. What is relevant is the date or dates during which the income was earned.

[13] The answer to Question 1 is yes.

Question 2: Were the ACC payments income?

[14] Income, understandably, is very broadly defined in the Social Security Act. Section 3, the definition section, defines income in these terms:

> (a) means any money received or the value in money's worth of any interest acquired, before income tax, by the person which is not capital (except as hereinafter set out) and;
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> (b) includes, whether capital or not and as calculated before the deduction (where applicable) of income tax, any periodical payments made, and the value of any credits or services provided periodically, from any source for income-related purposes and used by the person for income-related purposes.

[15] Clearly ACC weekly payments are both money received which is not capital under paragraph (a) and periodical payments for income-related purposes in terms of paragraph (b).

[16] The answer to Question 2 is yes.

Question 3: Was there an evidential basis upon which the Appeal Authority could conclude there has been an overpayment of the accommodation supplement?

[17] A no answer to this question requires the relevant finding of fact by the Authority to have no basis in evidence, to represent conclusions entirely inconsistent

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6 *Goh v Chief Executive of Ministry of Social Development* [2010] NZCA 110.

with findings of fact or to be contradictory of the only true and reasonable conclusion of fact available on the evidence.[7] These principles are confirmed in New Zealand in the Supreme Court decision in *Bryson v Three Foot Six*.[8]

[18] There is no basis upon which the Chief Executive's calculations can be or indeed were challenged in fact by Mr Van Kleef. Since his ACC backdated payment was applied to the period during which it was properly payable, his entitlement to the accommodation supplement was necessarily reduced to zero. His combined income (including the backdated amounts) equalled $688 per week – $352 of that was sufficient to abate the sickness benefit to zero.

[19] If the remaining income – $330 – was applied at the statutory abatement rate of 25 cents per dollar earned, the accommodation supplement would also be reduced to zero. In fact, the $330 was sufficient to abate $80 of accommodation supplement but Mr Van Kleef's supplement was only $45.

[20] The answer to Question 3 is necessarily yes.

Question 4: Did the Authority err in law when it determined that it was inappropriate to direct the Ministry not to take steps to recover overpayments of Accommodation Supplement and Temporary GST Assistance under s 86(1) or s 86A of the Social Security Act?

The section

[21] Section 86(1) gives the Chief Executive the power to recover overpayments either by proceedings or by deductions from benefits. The relevant part of the section provides:

> (1) The chief executive, in order to recover a debt referred to in section 85A, may –
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> (a) bring proceedings in the name of the chief executive; or

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7 *Edwards v Bairstow* [1956] AC 14 (HL) at 36.
8 *Bryson v Three Foot Six* [2005] 3 NZLR 721, 733 at 25 & 26.

(b) deduct all or part of that debt from any amount payable to that person by the department as a benefit or a student allowance; or

(c) in the case of a debt referred to in s 85A(d), deduct all or part of that debt from any payment of a grant of special assistance under a welfare programme approved under section 124(1)(d).

The nature and scope of the discretion

[22] Section 86(1) has been interpreted as conferring a discretionary authority on the Chief Executive to decide whether, in any particular case, recovery should be undertaken at all.[9]

[23] Case law has produced divergent views as to the nature and scope of this discretion.[10] However, it is generally agreed that the discretion must be exercised lawfully, reasonably, and in accordance with procedural fairness[11] and that each case must be considered on its individual merits.

[24] The courts have not exhaustively defined or prescribed the factors to be considered when exercising the discretion. However, factors may include:

(a) whether it would be appropriate, economical or practical to attempt recovery;[12]

(b) whether the beneficiary is at fault;[13]

(c) the Chief Executive's obligation to discharge responsibilities under s 32 of the State Sector Act 1988 for the efficient, effective and economic management of the Ministry; and

(d) the purpose of the Social Security Act 1964 to enable the provision of financial support to help people to support themselves and their

[9] *Osborne v Chief Executive of the Ministry of Social Development* [2010] 1 NZLR 559 (HC) at [50].
[10] *Harlen v Ministry of Social Development* [2012] NZHC 669, [2012] NZAR 491 at [28].
[11] *Beer v Ministry of Social Development* [2012] NZAR 264 at [56].
[12] *Harlen v Ministry of Social Development*, above n 10, at [35].
[13] *Owens v Chief Executive of the Ministry of Social Development* [2007] NZAR 185 (CA) at [30].

dependants while not in paid employment and to enable the provision of financial support to help people alleviate hardship.[14]

The appellant's complaint

[25] The appellant's complaint stems from the different treatment of his ACC back payment by the IRD and WINZ. WINZ spread his ACC payment across the years in which the entitlement arose. WINZ then found that his entitlement for the relevant period exceeded the eligibility threshold for the accommodation supplement and GST supplement, resulting in a finding of overpayment. The IRD took a different approach to dealing with this payment for tax purposes. Rather than spread the income across the period of entitlement, that agency taxed the lump sum in the tax year in which it was actually received. This placed the appellant in a higher tax bracket for that year. As a result, the appellant claims to have suffered a monetary loss he would not have suffered were it not for this differential treatment. In other words, overall, his net income as a result of this reconciliation between WINZ and ACC was less than if ACC had been paying him his entitlement from the outset.

The Authority's decision

[26] In gauging the breadth of the discretion available to it under s 86(1) the Authority cited several cases which considered that the circumstances in which the discretion should be exercised must be "extraordinary",[15] "unusual",[16] or "rare and unusual."[17] It then addressed each of the circumstances put forward by the appellant in turn. In relation to the alleged prejudice the appellant suffered the Authority found that the appellant's circumstances were no different from every other beneficiary receiving lump sum backdated payment of weekly earnings related compensation. As a result, reasoned the Authority, the appellant's particular situation could not be described as rare or unusual and it declined to direct the Chief Executive to take no steps to recover the overpayments.

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14 Social Security Act 1964, s 1A.

15 *McConkey v Director-General of Work and Income New Zealand* HC Wellington, AP277/00, 20 August 2002 at [26]

16 *Cowley v Chief Executive of the Ministry of Social Development* HC Wellington CIV 2008-485-381, 1 September 2008 at [46].

17 *Osborne v Chief Executive of the Ministry of Social Development* above n 9 at [63].

Discussion

[27] The overall test here is whether the Authority "acted on a wrong principle, ... failed to take into account some relevant matter ... took account of some irrelevant matter or ... was plainly wrong".[18]

[28] In my view, the Authority did proceed on a wrong principle. As far as I can ascertain, the key factor considered by the Authority in assessing the appellant's complaint, was that all ACC back payments to WINZ beneficiaries were caught by the differential tax treatment the appellant described. That meant his circumstance was not "rare and unusual" as required by the cases.

[29] In my view, this is to elevate "rare and unusual" to the status of a legal test when it cannot properly be so described. The cases do say that relief under s 86(1) should not be a common occurrence, but that is not the test. It is no more than the court's expectation of the practical result if the section is properly applied. The Authority must still act within the purpose of the Act and s 86, consider relevant factors, disregard irrelevant ones and so on. It must still exercise the discretion.

[30] One can see why the Authority has mistakenly treated rare and unusual as the test: the discretion is broadly stated in s 86 and the courts have not tried to map it in any comprehensive way. Instead, the courts have been content to treat each case on its merits taking proper account of legislative purpose, practicality, fault, the payee's personal circumstances and need, and the obligation on WINZ to manage efficiently its limited funds. Guidance has, in short, been limited. Bearing all of that in mind, it seems to me that considerations of fairness to the payee must be said to go to the individual merits of this case. If, through no fault of the payee, he or she has received less in a back payment than would have been received if the payments had been made at the time the entitlement had arisen, then that circumstance must be relevant to the individual merits of the case. Prejudice of this kind is a relevant factor.

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[18] *Beer v Ministry of Social Development* [2012] NZAR 264 at [57].

[31] It follows that the issue must be properly explored: is the appellant right in claiming financial prejudice? If so, what was the extent of the disadvantage? Can a dollar figure be placed on it? Is it sufficient to amount to material unfairness when seen against the acknowledged overpayment to the appellant that WINZ has had to carry? In the end, the final judgment will be a matter of degree and balance, but that judgment cannot be avoided by invoking the refrain that it happens all the time. Individual circumstances must be properly understood if their merits are to be assessed in accordance with the section.

[32] As a side note, the Authority's conclusion that the appellant's circumstances are common appears to be based on a contention by the Ministry that there have been a number of appeals to the Authority where appellants have commented on the tax implications of receiving the ACC payment as a lump sum. This may be so, however, I have been unable to find any cases where a beneficiary has requested that the Chief Executive exercise the s 86(1) discretion not to recover a debt arising from GST assistance and accommodation supplement payments because the lump sum payment received from ACC increased his tax liability and created a loss. Does this really happen all the time?

[33] Accordingly, I remit the matter to the Authority for reconsideration in accordance with the principles I have articulated so that a proper inquiry can be made into the merits of this appeal.

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Williams J