IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-485-002736

UNDER	the Injury Prevention, Rehabilitation and Compensation Act 2001
IN THE MATTER OF	an appeal pursuant to s 162 of the Act
BETWEEN	DAVID REDDELL Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: 17 June 2009

Appearances: Appellant in person
D Tuiqereqere for the respondent

Judgment: 24 June 2009

JUDGMENT OF STEVENS J

This judgment was delivered by me on Wednesday, 24 June 2009 at 11am pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

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Introduction

[1] On 11 November 2008, Judge Cadenhead in the Auckland District Court granted leave to Mr David Reddell (the appellant) to appeal to the High Court. Section 162 of the Injury Prevention, Rehabilitation and Compensation Act 2001 (the Act) permits leave to be granted on questions of law only. The question of law in this case involves whether it is the Accident Compensation Corporation (the respondent) or the Inland Revenue Department (IRD) that fixes the amount of taxation payable on the backdated payment of weekly compensation. This appeal arises from a decision of the respondent regarding an amount of backdated weekly compensation paid to the appellant for the period of 22 February 2001 to 12 May 2003.

[2] In summary, the appellant was paid weekly compensation by the respondent after he suffered a back injury in a motor vehicle accident in 1998. The appellant's weekly compensation ceased on 3 December 1999 after he was assessed as having capacity for work. However, in February 2001, the appellant presented an ARC18 medical certificate showing that he was unable to work. In August 2003, the appellant was found by a review decision to no longer have capacity for work and to be entitled to weekly compensation from the date of the medical certificate. On 30 January 2004, the respondent advised the appellant that the net payment of backdated compensation to be paid was $32,868.31. The appellant disputed that this was the correct amount.

[3] At a hearing before Judge Beattie at the Auckland District Court, the appellant challenged the deductions made by the respondent from the lump sum of backdated weekly compensation resulting in the net payment made to him. The deductions comprised a refund to Work and Income New Zealand (WINZ) and the refund of tax paid to the IRD by way of PAYE tax. The appellant's argument was twofold. First, that the way in which the reimbursement to WINZ was paid meant that he had effectively paid PAYE twice on sums received, and secondly that the lump sum paid to him attracted a higher tax rate than would have been applied if his entitlement was paid at the correct time.

[4] On 20 May 2008, Judge Beattie dismissed the appeal. The Judge held that the IRD had reimbursed WINZ the tax paid and that the appellant had only paid tax once on his backdated weekly compensation. In relation to the second issue, the Judge held that there was no provision in the Act for reimbursement of the difference in tax codes applicable when an amount of backdated compensation was paid. The appeal was therefore dismissed.

Background facts

[5] The appellant suffered a back injury in a motor vehicle accident on 11 April 1998. The appellant's injuries included a compression fracture of T12. The appellant was entitled to cover under the Act and was paid weekly compensation.

[6] After a period of rehabilitation, the appellant was assessed as having capacity for work and his weekly compensation ceased on 3 December 1999. In February 2001, the appellant presented to the respondent an ARC18 medical certificate dated 22 February 2001, indicating that the appellant was unable to work due to back dysfunction.

[7] After some delay, the respondent agreed to re-assess the appellant's capacity for work. The appellant sought a review of this decision, but a review hearing was not convened within the statutory time limit. However, by a review decision dated 12 August 2003, the appellant was found to be entitled to a deemed decision that he no longer had a capacity for work and that his entitlement to weekly compensation should be reinstated as from the date of the medical certificate.

[8] The respondent accepted this decision and proceeded to calculate the appellant's entitlement. The respondent was advised that, for a considerable period that the appellant had not been receiving weekly compensation, he had been receiving a WINZ benefit. Thus, WINZ advised the respondent of the amount for which it required reimbursement. On receipt of that advice, the respondent then made the calculation that resulted in its decision of 30 January 2004.

[9] The respondent advised the appellant of the calculations as follows:

Total gross entitlement:	**$83,887.61**
Less WINZ earnings reimbursement:	-$27,711.61
Subtotal:	**$56,176.00**
Less PAYE: = 30.2% x $56176	-$16,964.84
Less Student Loan = 9% x $56176	-$5,055.75
Subtotal:	**$34,155.41**
Less WINZ accommodation reimbursement	$1,287.10
Nett payment deposited to your account	**$32,868.31**

Statutory scheme

[10] Section 162 of the Act deals with appeals on a question of law:

> **162 Appeal to High Court on question of law**
>
> (1) A party to an appeal who is dissatisfied with the decision of a District Court as being wrong in law may, with the leave of the District Court, appeal to the High Court.
>
> (2) The leave of the District Court must be sought within 21 days after the District Court's decision.
>
> (3) If the District Court refuses to grant leave, the High Court may grant special leave to appeal.
>
> (4) The special leave of the High Court must be sought within 21 days after the District Court refused leave.
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> (5) The High Court Rules and sections 74 to 78 of the District Courts Act 1947, with all necessary modifications, apply to an appeal under this section as if it were an appeal under section 72 of that Act.

[11] The appeal turns on an interpretation of s 252 of the Act:

> **252 Relationship with social security benefits: reimbursement by Corporation**
>
> (1) This section applies if a person—
> (a) receives a payment of an income-tested benefit under the Social Security Act 1964 in respect of a period; and
> (b) establishes a claim to an entitlement from the Corporation in respect of all or part of the same period.
>
> (2) An excess benefit payment is regarded as having been paid in respect of that entitlement.

> (3) An excess benefit payment is the part of the benefit payment (up to the amount of the entitlement) that is in excess of the amount of benefit properly payable, having regard to the entitlement under this Act.
>
> (4) The Corporation must refund the excess benefit payment to the department responsible for the administration of the Social Security Act 1964—
> (a) if the Corporation knows that this section applies; or
> (b) if requested to do so by that department.
>
> (5) For the purposes of this section, an excess benefit payment includes a payment of any part of a married rate of benefit that is paid to the spouse [or partner] of the person who established the claim to the benefit.
>
> (6) Any amount that is treated under this section as having been paid in respect of any treatment, service, rehabilitation, related transport, compensation, grant, or allowance is deemed for all purposes to have been so paid.

The decision of the District Court

[12] The appeal was heard by Judge Beattie on 22 April 2008. The appellant was self-represented at this hearing. The Judge reserved his decision and delivered his decision on 30 May 2008.

[13] The Judge carefully set out the facts as summarised above and analysed the two issues that the appeal raised. The appellant's first argument was that the way in which the reimbursement to WINZ was paid effectively amounted to him having paid PAYE tax twice on sums received. The Judge rejected this argument, as the evidence was that there was no double taxation. He found that the system operated so that the net amount of the benefit is reimbursed to WINZ and the taxable portion paid to the IRD. The IRD then reimbursed WINZ the tax portion. The Judge stated:

> [14] That being the explanation, in respect of which I am satisfied, it is clearly the case that the appellant has only paid tax on his weekly compensation/benefit once, and I find there is no error in the manner of the respondent's calculation of reimbursement to WINZ or the payment of tax to IRD in respect of his weekly compensation.

[14] The appellant's second argument was that the lump sum paid to him by way of backdated weekly compensation attracted a far higher tax rate than would have been the case had the respondent accepted the ARC18 certificate in the first place.

The appellant argued that he should have been taxed at 19.5% rather than 30.2%. The Judge also rejected this argument:

> [20] The Court has considerable sympathy with the appellant, but the fact is that there is no provision in the Act for any reimbursement to him from ACC coffers of that greater tax paid.
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> …
>
> [23] The Accident Compensation Corporation is required to comply with statutory provisions relating to entitlements, but equally it is not permitted, as a matter of law, to go outside the statutory regime and make payment of any amount that is not authorised by statute. The claim for the excess tax paid in the present case, is a claim not authorised for reimbursement by the Act, and therefore, as a matter of law, it cannot be paid or claimed within the context of the Injury, Prevention, Rehabilitation and Compensation Insurance Act 2001.

[15] The appeal was therefore dismissed.

The decision to grant leave

[16] Leave was granted by Judge Cadenhead to appeal to the High Court on a point of law. The Judge summarised the facts and Judge Beattie's decision and stated:

> [8] The appellant submits that this decision is incorrect and that the appellant has the right to have his proper tax fixed by the respondent and that any funds deducted first have to meet the criteria that such funds have been correctly calculated.
>
> **DECISION**
>
> [9] The answer to this question is that section 252 of the Act provides that in the case of an excess payment the Corporation must refund that payment to the department responsible for the administration of the Social Security Act 1964. The Act by virtue of section 252(3) defines the excess payment as part of the benefit payment that is in excess of the amount properly payable, having regard to the entitlement under the Act.
>
> …
>
> [11] I agree with Judge Beattie that the Corporation has merely a responsive role in this case and that should be the end of this appeal, however, it is an important question who fixes that amount and on that issue I grant leave to appeal to the High Court. The reason for this decision is that the legislation is silent on that particular point, and that conclusion is arrived at by implication.

Further evidence

[17] The appellant sought to introduce new evidence. This evidence comprised correspondence from WINZ to Ms Jeanette Sidon dated 22 August 2008.

[18] The respondent submitted that the appellant had not made the appropriate application under r 20.16 of the High Court Rules and that the relevance of the correspondence is tenuous. The letter from WINZ confirmed what was already known, namely, that WINZ only seeks the net amount from the respondent and the respondent pays the tax component to the IRD. Consequently, counsel for the respondent consented at the hearing to the Court receiving the new evidence.

[19] On the question of the administrative arrangements which apply to a refund of excess benefit payment, counsel for the respondent drew the Court's attention to a decision of Rodney Hansen J in *Buis v The Accident Compensation Corporation* HC AK CRI 2007-404-004703 6 March 2009. Counsel was able to obtain copies of two affidavits filed by the respondent in that case. The appellant consented to both affidavits being received for consideration in the appeal, subject to questions of weight.

Appellant's submissions

[20] The appellant submitted that the question of law on appeal relates to the reimbursement mechanism and who has the statutory authority to fix the amount of excess benefit payment reimbursement and what was the correct amount in this case.

[21] The appellant then sought to categorise the issue as whether the excess benefit payment deduction under s 252 of the Act should be the net $23,392.94 or gross $27,711.61. The appellant submitted that the respondent was only authorised to deduct the net amount from his backdated compensation but, in deducting the gross amount by paying $23,392.94 to WINZ and $4,318.67 to the IRD, the respondent had thereby breached s 252 of the Act.

[22] The appellant submitted that s 252(4)(b) gave WINZ the power to specify to the respondent the amount of excess benefit payment to be refunded. Further, the appellant submitted that as WINZ had written to the respondent on 11 December 2003 specifying the amount of $23,392.94, WINZ was only entitled to a refund of that amount. Hence, the appellant submitted that the respondent was not entitled to pay to the IRD the amount of taxation which had been deducted by WINZ and paid to the IRD on the appellant's behalf.

Respondent's submissions

[23] Mr Tuiqereqere for the respondent submitted that the appellant has misapprehended the question of law identified by Judge Cadenhead. The respondent argued that the question of law is related to who fixes the amount of taxation payable on the backdated payment of weekly compensation, namely the IRD or the respondent. Nevertheless, submissions were directed to what was seen as the key question on appeal, namely, the correct interpretation of s 252 of the Act and how administratively the respondent should carry out the refund of the excess benefit payment in this case.

[24] The respondent submitted that s 252 of the Act is determinative of the appeal. Section 252 authorises the respondent to reimburse WINZ for benefits paid where it is later established that the claimant is entitled to weekly compensation for the same period the benefit has been paid. The respondent submitted that it is required by s 252 of the Act to refund to WINZ the excess benefit payment.

[25] The respondent submitted that the appellant's argument that s 252(4)(b) of the Act provides that WINZ fixes the amount of the excess benefit payment and that the respondent is obliged to repay the amount as fixed by WINZ was incorrect. The respondent submitted that that provision simply states that the excess benefit payment must be refunded where the respondent is aware that the provision operates or where WINZ requests a refund.

[26] The respondent submitted that the only issue remaining after that point is reached under s 252 of the Act, is whether it is the gross amount or the net amount of

the excess benefit payment that is required to be reimbursed to WINZ. The respondent relied on the decision in *Buis* where Rodney Hansen J considered whether the gross amount was required to be refunded under s 373 of the Accident Insurance Act 1998. Section 252 of the current Act is the equivalent provision to s 373.

[27] The respondent submitted that the same reasoning in *Buis* applied in this appeal. Accordingly, the respondent submitted that the excess benefit payment in accordance with s 252 of the Act had been correctly identified as the part of the benefit payment that was in excess of the amount of benefit properly payable. Further, the refund of the excess benefit payment required to be paid to WINZ had been properly disbursed in accordance with the administrative protocol agreed upon by the respondent, WINZ and the IRD. This involved no breach of s 252, but rather facilitated the implementation of the provisions of s 252 of the Act.

Discussion

[28] The issue upon which the appellant has been granted leave relates to who fixes the amount of excess benefit payment to be refunded from the backdated payment of weekly compensation. But it is clear from the formulation of the point of law concerned that Judge Cadenhead fundamentally had in mind the question of what was the correct interpretation and application of s 252 of the Act. This is implicit from the Judge's observation that "the legislation is silent on that particular point, and that conclusion is arrived at by implication". I am satisfied that s 253, mentioned by Judge Cadenhead, has no relevance to this appeal.

[29] Section 252 applies where a person receives a payment of an income-tested benefit under the Social Security Act 1964 in respect of a period, and that person later establishes a claim to entitlement from the respondent in respect of all or part of the same period. In this case, it is not disputed that the appellant was paid an income-tested benefit under the Social Security Act 1964 in respect of a period for which the appellant had established an entitlement from the respondent for the same period. Both parties have acknowledged this position.

[30] Section 252 provides that where this situation arises, an excess benefit payment is regarded as having been paid in respect of that entitlement: s 252(2). For clarification, s 252(3) of the Act states that an excess benefit payment is the part of the benefit payment that is in excess of the amount of benefit properly payable, having regard to the entitlement under the Act. It is accepted by the appellant in his helpful written submissions that none of the benefit paid to him by WINZ was "properly paid", once it had been determined by the respondent that he had established an entitlement to weekly compensation under the Act.

[31] One of the issues on appeal is resolved by s 252(4) of the Act, which places an obligation on the respondent to refund the excess benefit payment to the department responsible for the administration of the Social Security Act 1964. This applies in two situations, namely, (a) if the respondent knows that s 252 applied or (b) if the respondent is requested to by WINZ to refund an amount of excess benefit payment. The correct amount is established in the evidence as $27,711.61.

[32] The appellant submitted that s 252(4)(b) gave WINZ the power to specify the amount of excess benefit payment to be refunded. However, I am satisfied that paragraph (b) gives no such power. There is no need for such statutory power to be provided as the amount of excess benefit payment is defined in s 252(3) of the Act. Paragraphs (a) and (b) of s 252(4) only relate to the situations in which the respondent must refund the excess benefit payment. Once the respondent becomes aware that a refund is required, by either of the means specified in paragraphs (a) or (b), it must refund the excess benefit payment.

[33] Quite apart from the legal position under s 252(4), the facts of this case demonstrate that WINZ made no such request for a refund of an excess benefit payment. There was no need for it to do so. This is because on 19 August 2003, the appellant's then solicitor told the respondent that a benefit had been paid to the appellant for at least some part of the period for which he was found to be entitled to weekly compensation. Thus, as from the time of receipt of the letter, the respondent was aware that s 252 applied and that a refund to WINZ was required. Section 252(4)(b) has no application on the facts of this case.

[34] The question as to the amount of the refund to be paid to WINZ simply does not arise under s 252. Section 252 provides that the excess benefit payment is payable to WINZ.

[35] The only remaining issue that arises in the context of this appeal is whether the gross amount or net amount of the excess benefit payment is required to be refunded to WINZ. This was, in fact, the issue pursued both at review (to the Reviewer) and in the District Court by the appellant. The appellant contended in the proceedings below that it was the net amount to be reimbursed. The appellant argued that reimbursement of the gross amount resulted in the appellant being taxed twice on the same amount.

[36] In Judge Beattie's decision, this issue was discussed at [13] as follows:

> In similar view, Mr Tui explained the position as follows:
>
> > "The total gross benefit was deducted from the total gross weekly compensation payable, no actual reimbursement occurs here. The nett amount of the benefit was reimbursed to WINZ and the taxable portion was paid to the Inland Revenue Department. This is because when a claim for reimbursement is submitted by WINZ, IRD automatically refund the tax amount to WINZ. This is done so that for tax purposes it appears that weekly compensation was paid instead of a benefit. This proves that there is no 'discrepancy' in the taxation. However, if Mr Reddell was unaware that the IRD had reimbursed WINZ the tax amounts, it may explain why he perceives that he has been taxed twice."

[37] When a refund under s 252(4) of the Act is required, there are not just two interested parties involved. There are four: the respondent, WINZ, IRD and the appellant. This is because part of the excess benefit payment to be refunded contains a tax component, which has previously been paid by WINZ to the IRD. Further, part of the entitlement from the respondent which the appellant had established attracted taxation. Obviously, the refund of the excess benefit payment must be carried out in a tax neutral way. This is why in March 1999 the respondent, WINZ and the IRD developed an administrative protocol to deal with refunds pursuant to s 252 of the Act. This process is confirmed in the affidavits of David Clifford Grice and Catherine Anne Thompson, which were admitted by consent for the purpose of this appeal.

[38] This protocol was referred to in the judgment of *Buis* at [5]:

> The ACC refunded the net benefit to Work and Income New Zealand (WINZ) in October 1999. (WINZ is the division within the Ministry of Social Development (MSD) responsible for the administration of benefits.) The tax component was paid to the IRD on 4 July 2000 and transferred by the IRD to WINZ by a credit to the Crown revenue account. This system of refunding benefits to WINZ was agreed by the ACC, WINZ and the IRD in March 1999. WINZ stipulated that, for administrative reasons, payment of the tax component should be made via the IRD. This procedure has been followed ever since with all such sums being aggregated and credited to WINZ monthly.

[39] In *Buis*, Rodney Hansen J considered whether the excess benefit payment is to be calculated by reference to the gross benefit paid or to the net benefit received by the beneficiary after deducting income tax: at [2]. The provision in question was s 373 of the Accident Insurance Act 1998. As noted at [26], s 252 of the Act substantially re-enacted s 373 of the 1998 Act with only minor differences. Section 373 provided:

> **373 Relationship with social security benefits: reimbursement by insurers**
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> (1) This section applies where a person—
> (a) Receives a payment of an income-tested benefit under the Social Security Act 1964 in respect of a period; and
> (b) Establishes a claim to an entitlement from an insurer (including the manager) in respect of all or part of the same period.
>
> (2) An excess benefit payment is treated as having been paid in respect of that entitlement.
>
> (3) An excess benefit payment is the part of the benefit payment (up to the amount of the entitlement) that is in excess of the amount of benefit properly payable, having regard to the entitlement under this Act.
>
> (4) The insurer must refund the excess benefit payment to the department responsible for the administration of the Social Security Act 1964—
> (a) If the insurer knows that this section applies; or
> (b) If requested to do so by the department.
>
> (5) For the purposes of this section, an excess benefit payment includes a payment of any part of a married rate of benefit that is paid to the spouse of the person who established the claim to the benefit.

[40] Rodney Hansen J considered the factual position and was required to determine a submission by the plaintiff that WINZ could not recover the gross excess benefit payment. Further, there was a submission that WINZ could recover only the net benefit from ACC and had to deal with the IRD to obtain a refund of tax. The Judge stated:

> [29] The plaintiff's case appears to assume that he has been taxed twice, first by way of the payments made by WINZ to the IRD and, secondly, by ACC, including the tax on the excess payment benefit reimbursed under s 393 [sic]. Among the grounds for relief pleaded is the following at para 26(n) of the amended statement of claim:
>
> > When the defendant deemed, or treated, any amount of a benefit or excess benefit as having been paid to the plaintiff on account of compensation, it had to treat that sum as it was treated at the time it was originally paid and could not tax it again as though the plaintiff had been paid the gross sum without deduction of PAYE tax.
>
> [30] The benefit was indeed taxed. As earlier noted, the sum of $15,770.79 was paid by WINZ to the IRD. The reimbursement by ACC of the gross benefit (including the tax paid to the IRD) does not, however, result in the tax being paid twice. Mr Buis is paying the same tax on the same income, and no more. But if, as Ms Bedford contended, only the net benefit were refunded by ACC, WINZ would be out of pocket and Mr Buis would receive a windfall benefit.
>
> [31] Section 373 ensures that what had been paid as a benefit by WINZ becomes compensation paid by ACC. Liability for the gross benefit paid by WINZ is transferred to ACC when an entitlement to compensation is established. That is achieved by a mechanism which is tax neutral. The relative positions of the Crown and the taxpayer are unaffected. There is no reason for the plaintiff to think he has been disadvantaged.
>
> [32] Ms Bedford sought to make something of the fact that the tax component of the benefit was paid to the IRD and not to WINZ. I understood her to contend that this was contrary to s 373(4) which requires the insurer to refund the excess benefit payment to WINZ. But, as earlier noted, the affected parties – ACC, WINZ and the IRD – agreed that the tax component should be refunded to the IRD in the first instance and then transferred to WINZ. By this means the full amount of the refund is made to WINZ, albeit in part through the agency of the IRD.

[41] The appeal was therefore dismissed. The reasoning of Rodney Hansen J has clear application to the present case.

[42] It is clear from the language of s 252 that the amount to be reimbursed to WINZ is the excess benefit payment. Applying the principles in *Buis*, the amount to be reimbursed is the gross amount of the excess benefit payment. But the benefit payment to the appellant by WINZ had attracted taxation as required by the relevant income tax law. This had been paid by WINZ to the IRD. In order that all the parties, including the appellant, could be returned to their correct financial positions when the reimbursement was made by the respondent, an administrative protocol was required as a matter of practical necessity to ensure that the provisions of s 252(4) are complied with.

[43] Pursuant to this protocol the respondent paid the net excess benefit payment to WINZ and the tax component to the IRD. This is because the IRD had refunded the tax component to WINZ. Hence, the respondent was required to pay the tax to the IRD on the reimbursement. The tax component was determined in accordance with the applicable income tax legislation. It is not a question of the respondent or WINZ determining the amount of the tax component, this is fixed by statute. The advice by WINZ to the respondent in its letter of 11 December 2003, discussed at [22] above, could not and did not alter the requirements of s 252 of the Act or the application of the payment protocol.

Result

[44] In the circumstances of this case, the respondent was required under s 252(4) of the Act to refund WINZ the excess benefit payment. The respondent does not determine the tax component, as this is done by reference to the applicable income tax legislation. The payment of the appropriate amounts to WINZ and the IRD was correctly made pursuant to the administrative protocol referred to above.

[45] I am satisfied that both legally and factually the respondent refunded the proper amount and did not breach s 252 of the Act. The appeal must therefore be dismissed.

[46] The respondent did not seek costs. No order for costs is made.

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Stevens J