

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2008-485-2391

IN THE MATTER OF an appeal from the Decision of the Social
Security Appeal Authority

BETWEEN IRENE GOH
Appellant

AND THE CHIEF EXECUTIVE OF THE
MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Hearing: 24 June 2009

Appearances: I Goh in person, M Murphy as a McKenzie Friend
RE Schmidt and EJ Child for Respondent

Judgment: 30 June 2009 at 4:30 pm

JUDGMENT OF ASHER J

*This judgment was delivered by me on 30 June 2009 at 4:30 pm
pursuant to Rule 11.5 of the High Court Rules*

.....
Registrar/Deputy Registrar

.....
Date

I Goh, 2-18 Harding Ave, Mt Wellington, Auckland
Crown Law, PO BOX 2858, Wellington 6140

Introduction

[1] This is an appeal by way of case stated under s 12Q of the Social Security Act 1964 (“the SSA”). The appeal is against determinations of the Social Security Appeal Authority confirming a decision of the respondent, the Chief Executive of the Ministry of Social Development (“the Chief Executive”) to:

- a) Review the benefits paid to the appellant in respect of the period 15 March 1998 to 11 September 2005, and to charge ACC weekly compensation against the appellant’s benefit entitlement during this period to establish an overpayment.
- b) To request reimbursement of the overpayment directly from ACC from the arrears of weekly compensation granted to the appellant.
- c) Charge ACC payments as a direct deduction against benefit entitlement rather than as income.

[2] I observe that (c) is not the position now taken by the Chief Executive, who accepts that the ACC payments should be treated as income.

[3] The case stated on appeal as settled by the Chairperson of the Social Security Appeal Authority sets out the following question of law for determination by this Court:

Did the Authority err in law in finding that s 81 empowered the Chief Executive to retrospectively review the appellant’s benefit and treat the appellant’s ACC compensation as income for the period 15 March 1998 to 11 September 2005, in circumstances where the compensation payments were paid as a lump sum to cover an earlier period in which compensation payments had been incorrectly denied?

Background

[4] On 1 August 1997 the appellant, Irene Goh (“Mrs Goh”), was injured in a hit-and-run motor vehicle accident while on her way to work. On 12 August 1997 she

was granted cover by the Accident Compensation Corporation (“ACC”). On 19 August 1997 she was granted a domestic purposes benefit, starting from 8 August 1997 applicable in relation to one dependent child.

[5] On 14 March 1998 the ACC ceased paying weekly compensation. On 11 December 2000 Mrs Goh was granted an invalid’s benefit with one dependant child. On 22 August 2005 the ACC revisited its decision, and advised that it had revoked its earlier 1998 decision to discontinue payments, and would reinstate Mrs Goh’s weekly compensation.

[6] Ultimately the ACC decided that Mrs Goh was entitled to back-dated weekly compensation from 15 March 1998 to 11 September 2005 of \$95,891.90. In the meantime, the Chief Executive reviewed Mrs Goh’s position. It formed the view that she had been overpaid \$48,404.56. It requested the ACC to reimburse that amount under s 252(4)(b) of the Injury Prevention, Rehabilitation, and Compensation Act 2001.

[7] A payment was made to Mrs Goh for the reinstated compensation since 1998, but from that sum the amount necessary to reimburse the Chief Executive in accordance with the Chief Executive’s calculations for income received by the appellant, was paid to the Chief Executive. That was the sum of \$48,404.56.

[8] Mrs Goh filed an application to review the Chief Executive’s decision. There were initially two internal reviews, which confirmed the decision to deduct the ACC payments as income. Mrs Goh then appealed to the Social Security Appeal Authority (“the Authority”) under s 12J of the SSA. The Authority, in a written decision of 14 November 2007, concluded that the Chief Executive was entitled to review retrospectively Mrs Goh’s entitlement to benefit from 12 August 1997 to 20 November 2005. It held that under a review arising from a back-dated payment of the ACC, the ACC payments received by Mrs Goh should be treated as income, rather than there being a direct deduction, under s 71A(4) of the SSA.

[9] The Chief Executive’s decision was confirmed. The quantum of the calculation of the overpayment was directed to be reviewed. In a second decision

the Authority, having received further information, reduced the debt to the Chief Executive to \$35,591.00.

The issue

[10] There is no issue about whether the Chief Executive has the power to retrospectively review a benefit. It is accepted on the authority of *Arbuthnot v Chief Executive of the Department of Work and Income* [2008] 1 NZLR 13 at [34], that the Chief Executive is entitled to do so retrospectively. The issue, as set out in the earlier Minute in this proceeding of 3 March 2009, is whether the Chief Executive was entitled to treat Mrs Goh's ACC compensation as income for the full period to which the ACC related, or only for the week in which it was received.

The Chief Executive's power to retrospectively review and recover

[11] Section 81 of the SSA gives the Chief Executive the power to review benefits. Section 81(1) and (2) provide:

81 Review of benefits

- (1) The [chief executive] may from time to time review any benefit in order to ascertain—
 - (a) Whether the beneficiary remains entitled to receive it; or
 - (b) Whether the beneficiary may not be, or may not have been, entitled to receive that benefit or the rate of benefit that is or was payable to the beneficiary—

and for that purpose may require the beneficiary or his or her spouse [or partner] to provide any information or to answer any relevant question orally or in writing, and in the manner specified by the [chief executive]. If the beneficiary or his or her spouse [or partner] fails to comply with such a requirement within such reasonable period as the [chief executive] specifies, the [chief executive] may suspend, terminate, or vary the rate of benefit from such date as the [chief executive] determines.

- (2) If, after reviewing a benefit under subsection (1) of this section, the [chief executive] is satisfied that the beneficiary is no longer or was not entitled to receive the benefit or is or was entitled to receive the benefit at a different rate, the [chief executive] may suspend, terminate, or vary the rate of the benefit from such date as the [chief executive] reasonably determines.]

[12] Section 85A states that overpayments are debts due to the Crown. It provides:

85A Payments that are debts due to the Crown

The following payments or other sums are debts due to the Crown:

- (a) any penalty payable under this Act:
- (b) any benefit paid conditionally or provisionally under this Act that a person has become liable to repay (by direction of the chief executive or otherwise):
- (c) any advance payment of a benefit made to a person under section 82(6):
- (d) any money paid to or for the credit of a person as a grant of special assistance under a welfare programme approved under section 124(1)(d) that is—
 - (i) paid as a recoverable grant of assistance; or
 - (ii) otherwise recoverable from that person under the terms and conditions of the programme:
- (e) any amount described by this Act as a debt due to the Crown from the person:
- (f) a sum (an overpayment), paid or advanced under this Act or the Social Welfare (Transitional Provisions) Act 1990 [or Part 6 of the War Pensions Act 1954] or Part 1 of the [New Zealand Superannuation and Retirement Income Act 2001] to or for the credit of a person—
 - (i) that is in excess of the amount to which the person is entitled; or
 - (ii) to which the person has no entitlement.]

[13] The ability of the ACC to look backwards and determine retrospectively whether there has been an overpayment made was described this way in *Arbuthnot v Chief Executive of the Department of Work and Income* at [34]:

[34] The scope of the power has been enlarged over the years. Until 1991 the power of review was exercisable only in the event of “any change of circumstances” of the beneficiary or of the spouse of the beneficiary. Since 1991 there has been no such limitation (albeit, curiously, until 1993 no action could be taken following the review unless there had been a relevant change in circumstances). The other significant expansion has been that earlier, in the version of the section in force from 1991 to 1993, the benefit could be reviewed only “in order to ascertain whether the beneficiary

remains entitled to receive it". Now the power of review can also be exercised to ascertain whether the beneficiary:

. . . may not be, or may not have been, entitled to the benefit or the rate of benefit that is or was payable to the beneficiary.

The words emphasised give the Chief Executive 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. . . .

There is, therefore, no doubt about the Chief Executive's ability to assess a retrospective overpayment, and to recover that overpayment.

The relationship between benefits and accident compensation

[14] It is necessary to set out s 71A of the SSA, which 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 74D of the War Pensions Act 1954]) 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.
- (2) Where this section applies, the rate of the benefit payable to the person must be reduced by the amount of weekly compensation payable to the person.
- (3) In this section, weekly compensation means weekly compensation for loss of earnings or loss of potential earning capacity payable to the person by the Corporation under the Injury Prevention, Rehabilitation, and Compensation Act 2001.]
- (4) Subsection (2) does not apply where the person—
 - (a) was receiving the income-tested benefit immediately before 1 July 1999 and continues to receive that benefit; and
 - (b) was receiving compensation for loss of earnings or loss of potential earning capacity under the Accident Rehabilitation

Compensation and Insurance Act 1992 immediately before that date; and

- (c) section 71A(2) of this Act (as it was before it was repealed and substituted by the Accident Insurance Act 1998) required the compensation payments to be brought to charge as income in the assessment of the person's benefit.]]

[15] It is common ground between the Chief Executive and Mrs Goh that Mrs Goh's position falls under s 71A(4) and therefore s 71A(2) does not apply. This is because Mrs Goh was receiving the income-tested benefit immediately before 1 July 1999, was entitled to compensation, and s 71A(2) before its repeal in 1998 applied.

[16] The fact that s 71A(2) is accepted as not applying means that the Chief Executive does not have the benefit of the mandatory reduction in s 71A(2), and that Mrs Goh has the benefit of the compensation being treated as income. If the accident compensation is treated as income, her benefit, while reduced, is only reduced by a percentage, rather than suffering the dollar for dollar deduction that follows from the application of s 71A(2). The Chief Executive is content to apply sub-section (4) to all of the back-dated compensation, and not just the portion that corresponds to the period before 1 July 1999. This works in Mrs Goh's favour.

[17] Section 252 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 ("IPRCA") is also relevant. It provides:

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.

This section specifically addresses what should happen when a person, having received a benefit under the SSA, then establishes a claim to an entitlement from the ACC in respect of all or part of the same period. The excess benefit payment is regarded as having been paid in respect of that entitlement, and the ACC must refund that excess benefit payment if requested to do so by the department responsible for the administration of the SSA. That is what the Chief Executive says has happened here.

The submissions of the parties

[18] Mrs Goh, who has represented herself with the assistance of Mr M Murphy as McKenzie Friend, argues that her ACC compensation payment made in 2005 should have been treated as income only for the week in which it was paid. Thus, there would be a deduction for that week but that week only. Mrs Goh submits that she should be repaid the amount that ACC deducted from the payment to her and which was paid to the Chief Executive, plus any accrued interest.

[19] Mr Childs for the Chief Executive submits that the ACC payment, being made as it was on account of weekly income for the period from 15 March 1998 to 11 September 2005, must be treated as income. The payment, ACC says, has had the effect of reducing Mrs Goh's benefit entitlement throughout the entire period.

Analysis

[20] In *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 CA at 161, Blanchard J summarised the “concern of the [SSA]” as:

the provision of financial help for people who for one reason or another could not adequately support themselves.

Section 1A(c)(ii) of the SSA provides that its purpose includes (amongst other things) ensuring that financial support:

is provided to people taking into account ... any financial support that they are eligible for or already receive, otherwise than under this Act, from publicly funded sources.

[21] Thus, the whole purpose of the Act is to provide assistance for those in need of financial support, taking into account support received from other sources. Therefore, there can be no purpose to allow a person to benefit twice, and achieve compensation from two sources, which would not have been available if the full position was known. Thus, while Mrs Goh understandably feels aggrieved at the way in which she has been treated by the system generally, she is, in terms of the provisions of the Act, seeking a windfall. She seeks to have the benefit of two lots of payments when, if all proper steps had been taken, she would have only been entitled to one.

[22] In reviewing whether a beneficiary was entitled to receive a benefit under s 81, the Chief Executive was entitled to consider the income being received by Mrs Goh. During the relevant period when she was receiving the benefit, she was receiving no income from ACC. However, the lump sum payment she became entitled to, following the ACC review of its position in 2005, meant that she was receiving a back-dated payment. Did it relate to the whole period, or just the week on which it was received?

[23] “Income” is defined extensively at s 3 of the SSA. The definition at s 3(1)(a) provides that income in relation to a person,-

Means any money received or the value in moneys worth of any interest acquired, before income tax, by the person which is not capital (except as hereinafter set out) ...

[24] Section 64 sets out the mode of ascertaining income for benefit purposes. Section 64(2B) provides:

64 Mode of ascertaining income for benefit purposes

(2B) For the purposes of determining a person's weekly income under subsection (2A), the chief executive may determine the period or periods to which any income relates, having regard to—

- (a) the extent to which it *was earned in that period or those periods*; or
- (b) the extent to which any other *entitlement to it arose* in, or in respect of, *that period or those periods*; or
- (c) the period or periods for which it was otherwise received, acquired, paid, provided, or supplied.]

[emphasis added]

[25] The wording of this section requires the Chief Executive to focus on the “period” when the income was “earned” or “arose in”, rather than the time when the income was paid. In other words, the section indicates that in determining what is income it is correct for the Chief Executive to treat entitlements paid for certain periods as income for the periods, even if the payments are actually made at a much later date. The period to which payments are attributable will usually be identified by reference to the period when the right to payment was acquired.

[26] A similar issue arose in *Tapp v The Chief Executive Officer of the Department of Work and Income* [2003] NZFLR 761. The Court of Appeal considered the way in which four weekly payments of the appellant’s husband’s retiring allowance were to be brought into account when assessing the net weekly benefit to which she was entitled. She argued that because the retiring allowance was paid only once every four weeks, only one in every four of her weekly benefits should be subject to the abatement provisions of the SSA. The Court of Appeal rejected this argument and held that the abatement would apply to every one of her weekly benefit payments, and stated at [18]-[19]:

[18] It is immaterial that pursuant to s 89(1) the cash is paid in advance. In the absence of any legislative provision to the contrary *the period to which income is attributable will usually be identified by reference to the dates upon which rights and interests are acquired*. That approach is consistent with the meaning of “income” as defined in s 3(1) of the Social Security Act. Where retiring allowance payments are made in advance they represent “money received” in respect of the subsequent period of entitlement to which they relate, just as any payment in arrears would represent a liquidation of the “interest acquired” consequent upon the superannuitant’s survival for the period that had already elapsed.

[19] That interpretation is also consistent with the implied purpose of the legislation. The implied purpose of the abatement function contained in the definition of “Income Test 3” in the Social Security Act is to balance self-support incentives against reservation of benefits to those in need. Steps by way of self-support are encouraged if a beneficiary is not unduly penalised for the resultant income. Social security benefits are to be reserved for those who truly need them. In this instance the balance has been struck by allowing a complete exemption of combined incomes from independent sources to a maximum of \$80 per week, an abatement of 70 cents for every one dollar of such income above that level, and extinction of the benefit at the point that that abatement equals the value of the social security benefit. To consider income from independent sources in only one week out of every four, and assume that cash receipts during a given week are the determining factor, would be contrary to the evident intention to consider income as a matter of substance rather than form. It could not be suggested that a person receiving income on a monthly basis has any greater need for support than one receiving it on a weekly basis in circumstances where the total value of the income is the same.

[emphasis added]

[27] I also accept the submission of Mr Childs for the Chief Executive, that the overall tone in the language of s 71A is consistent with the Chief Executive’s approach. In terms of attributing an applicable time to a payment, phrases such as “qualified to receive” (sub-section (1)), and “entitled to receive” (subsection (1)(a)), focus on the period or date when the right to the payment was acquired, rather than any actual payment or receipt date. Although s 71A does not apply, that is only because of the provision of s 71A(4)(c). It is significant that this section, aimed at dealing with the recovery of income tested benefits when weekly compensation is belatedly paid, adopts such an approach.

[28] It is also relevant that s 252(1) of the IPRCA, which provides for the ACC to reimburse the amount of any excess benefit entitlement to the Chief Executive, refers to payments “in respect of a period”, indicating again that the focus is not on the dates of receipt of the income but, rather, the period to which the income relates.

[29] A date of entitlement approach rather than a date of payment approach is also consistent with the approach taken by Goddard J in *M v Chief Executive of the Department of Work and Income* HC WN AP335/01 27 August 2002. This was a case that unlike the present, fell within s 71A. Goddard J stated, referring to s 71A and s 71, at [30]:

Nor is either section concerned with the timing of any benefit or compensation payment: the only concern is with the time period that payment of both is covered. That is evident from the wording in s 71A that “the rate of any such benefit that would otherwise be payable should be reduced by the amount of compensation for loss of earnings and loss of potential earning capacity *for the time being payable* to that person”.

[30] In a number of other cases the Courts have adopted the approach of regarding the ACC payments as applying during the same period as when the benefits were paid: *Buis v Accident Compensation Corporation* HC AK CIV-2007-404-004703 6 March 2009 Rodney Hansen J, at [31]; *Lang v Chief Executive of the Ministry of Social Development* HC WN CIV-2006-485-837 8 December 2006 Simon France J, at [20].

Conclusion

[31] When the Chief Executive’s power to review and recover benefits is exercised in a situation where s 71A of the SSA does not apply, compensation paid retrospectively to cover a past period should be treated as income for the period when the right to payment was acquired. This is consistent with the approach to the meaning of income in the relevant statutes and authorities. It is also consistent with the purposes of the Act which involve taking into account the other financial support a claimant is receiving in determining the need for financial help.

[32] Therefore, the Authority did not err in law in finding that s 81 empowered the Chief Executive to retrospectively review Mrs Goh’s benefit, and treat Mrs Goh’s ACC compensation as income for the period from 15 March 1998 to 11 September 2005. If ACC had paid compensation from 15 March 1998, then its weekly or fortnightly receipt would have constituted income. The fact that it was paid late does not change its character, or the period to which it relates.

[33] There may be a question as to whether the ACC was entitled to make a lump sum deduction from its compensatory payment to Mrs Goh. However, that question is probably academic, as the Chief Executive would be able to recover the excess income paid to Mrs Goh directly, if the deduction had not been made. In any event, this point is not raised in the question of law and is not to be determined in this proceeding.

Result

[34] The question of law:

Did the Authority err in law in finding that s 81 empowered the Chief Executive to retrospectively review the appellant's benefit and treat the appellant's ACC compensation as income for the period 15 March 1998 to 11 September 2005, in circumstances where the compensation payments were paid as a lump sum to cover an earlier period in which compensation payments had been incorrectly denied?

is answered "No".

[35] The appeal is accordingly dismissed.

Costs

[36] If there is any issue as to costs, the respondent is to file submissions within 14 days, with the appellant having a further 14 days within which to reply.

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Asher J