

[2015] NZSSAA 001

Reference No. SSA 156/11A

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXXXXX** of
XXXXX against a decision of a
Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Ms M Wallace - Chairperson
Mr K Williams - Member

DECISION ON THE PAPERS

Introduction

[1] The appellant appealed against a decision of the Chief Executive upheld by a Benefits Review Committee to establish and recover overpayments of Domestic Purposes Benefit, Accommodation Supplement, Disability Allowance and Training Incentive Allowance. The debts were established on the basis that the appellant had been living in a relationship in the nature of marriage with XXXX in the periods 26 October 1995 to 20 October 1996 and 2 June 1997 to 30 April 2006. The appellant denied that she had been living with XXXX in this period.

[2] The Authority issued its decision on 16 October 2012¹. The Authority concluded that it was satisfied that the appellant was living in a relationship in the nature of marriage with XXXX and was not entitled to Domestic Purposes Benefit in the period 26 October 1995 to 2 June 1997 and in the period 9 June 1997 to 6 April 2006 subject to the proviso that she may have had entitlement to benefit for a three-month period in 1999 as outlined in paragraph [62] of its decision.

[3] In a further decision issued on 11 December 2012² the Authority gave further directions relating to the calculation of the overpayment and considered whether or not the debts should be recovered pursuant to s 86(1) or s 86A of the Act. The Authority concluded that there were no circumstances which would warrant a direction that the debts not be recovered.

[4] The appellant then appealed to the High Court. The High Court found that the Authority had not erred in its conclusion that the appellant was living in a relationship

¹ [2012] NZSSAA 77.

² [2012] NZSSAA 101

in the nature of marriage with XXXX in the period 26 October 1995 with the exception of a three-month period in 1999. Nor had it erred in concluding that the appellant was not entitled to Domestic Purposes Benefit in the periods specified. However, the issue of whether or not steps should be taken to recover the debt was returned to the Authority for reconsideration apparently on the basis that the Authority did not have before it information about the appellant's circumstances and financial situation. This was despite the Authority having specifically requested the appellant to provide this information.

[5] The appellant has now had a further opportunity to provide submissions to the Authority on the issue of whether or not the debt should be recovered.

[6] The debt relating to Accommodation Supplement and Domestic Purposes Benefit which was recalculated following the Authority's decision now amounts to \$102,754.73. The Authority understands there are debts relating to Training Incentive Allowance and Disability Allowance of an additional \$1,072.29, although these amounts are not referred to in the Ministry's letter to the appellant of 22 February 2013 or the submissions made on behalf of the Chief Executive on the reconsideration.

Decision

[7] Sections 86(1) and 86A of the Social Security Act 1964 give the Chief Executive a discretion to take steps to recover a debt. Section 86(1) applies to debtors who are still in receipt of benefit. Section 86A applies to debtors who have sources of income other than benefit. In our view, the principles will be the same whether the recovery action is under s 86(1) or s 86A.

[8] Parliament has specified the circumstances in which a debt should not be recovered in s 86(9A). The occasions, therefore, that the Chief Executive should exercise his discretion not to take steps to recover a debt or debts which do not meet the criteria of s 86(9A) must be limited.³

[9] The considerations to be taken into account in exercising the discretion include the Chief Executive's obligations under the Public Finance Act 1989 to make only payments authorised by law and under the State Sector Act 1988 for the economic and efficient running of the Ministry. The context of the Social Security Act 1964 and the impact of recovery on the debtor and her dependents are also relevant.

[10] The circumstances in which the discretion should be exercised has been considered by the High Court on a number of occasions in the context of s 86(1). The circumstances have been described as "*extraordinary*,"⁴ "*unusual*,"⁵ and as "*rare and unusual*,"⁶ but these are not tests.

³ *Director-General of Social Welfare v Attrill*, [1998] NZAR 368.

⁴ *McConkey v Director-General of Work & Income New Zealand* HC, Wellington AP277-00, 20 August 2002.

⁵ *Cowley v Chief Executive of the Ministry of Social Development* HC, Wellington CIV-2008-485-381, 1 September 2008.

⁶ *Osborne v Chief Executive of the Ministry of Social Development* HC, Auckland CIV-2007-485-2579, 31 August 2009.

[11] Despite the fact that this matter was referred back to the Authority as a result of her previous failure to provide information about her financial circumstances when invited to do so, the submissions made on behalf of the appellant of 27 June 2014 for the reconsideration contain minimal information about the appellant's financial circumstances other than that she is self-employed with a taxable income of \$34,000 per annum.

[12] On 21 July 2014, the Authority wrote to the appellant's advocate again asking him to provide full details of the appellant's budget and her assets and liabilities. On 4 August 2014 a bundle of documents was received in response but again no comprehensive budget was provided. This is extraordinary given the failure to provide the information when requested in 2012 and the agreement that the issue of recovery be referred back to the Authority for reconsideration of her financial circumstances.

[13] The information available indicates that the appellant has outgoings in respect of legal aid of \$5 a week, child support of \$389 a month and loan payments of \$665 a fortnight. Precisely what the loan repayments relate to is not disclosed to the Authority. They possibly relate to the house which the appellant has now transferred to a trust. The information provided suggests the appellant has an 01 bank account which she keeps in credit and an 03 account with an overdraft facility. She also operates a business current account. In an accompanying e-mail from the appellant she advises that she allows \$500 a week for living expenses and to meet her bills. Bank statements provided by the appellant record that the appellant regularly makes payments to bonus bonds.

[14] In addition to her overdraft the appellant has a Visa card debt of \$3,000 and a tax debt. In an email dated 1 August 2014 she states "I don't feel I have a lot more debt than most people and just juggle everyday living with what I have".

[15] In relation to assets, the appellant lists a Subaru Forester worth \$2,000. The appellant has transferred her family home to a trust and forgiven at least part of the resulting debt of \$395,000 as at 27 June 2011.

[16] As at 27 June 2014, the appellant's youngest child no longer lived with her. She has care of this child for the weekend each fortnight. What costs the appellant has associated with these visits or how they impact on her budget has not been explained.

[17] Based on the appellant's declared taxable income of \$34,000 per annum the appellant receives more than a beneficiary with one child. She does not have any unusual expenses. There is nothing in the appellant's financial circumstances that would persuade us that she cannot afford to repay the debt or that her ability to pay child support or have the care of her youngest child every second weekend would be compromised if she were required to repay the debt.

[18] It is submitted on behalf of the appellant that regard should be had to the overriding nature of the relationship between the appellant and her partner in exercising the discretion to recover the debt. In this regard the advocate refers to the evidence of violence in the relationship.

[19] The Authority dealt with the claim that the relationship was a violent relationship in its original decision of 16 October 2012. The Authority was not persuaded that the appellant was a person who suffered from battered woman's syndrome or "learned helplessness". The Authority rejected any suggestion that the violence in the relationship negated the proposition that the appellant and XXXX were in a relationship in the nature of marriage. The appellant was a person who used the money available to her to establish her own business, purchase houses and organise travel to the XXXX using both the funds she earned from her business and the benefits she wrongly received from the state. The full extent of the income she earned is unknown. It is difficult to see on what basis the few instances of violence about which there was evidence should be considered as a reason for the appellant being excused from repaying the debt. The appellant appears to have been the main income earner in the relationship; she had no need for state assistance. She was apparently skilful in using her financial resources and increasing her assets.

[20] We have also had regard to whether the Ministry should be seeking recovery from XXXX. The appellant and XXXX indemnified each other against any claim against each of them by Work and Income New Zealand for overpayments in the consent orders made in the District Court under the Relationship Property Act. Having specifically dealt with that issue in the Relationship Property settlement, that is the end of the matter. If the appellant wishes to rescind the indemnity she has given XXXX she would need to apply to have the consent orders overturned. We do not consider that there is any basis on which the Ministry should seek reimbursement from XXXX for the appellant's Work and Income debt. In terms of the consent orders it would be open to him to seek reimbursement from the appellant if the Ministry were to pursue him.

[21] The appellant's advocate also submits that the Authority should consider the purposes of the Social Security Act 1964 and that any debt recovery should not cause or aggravate financial hardship.

[22] On behalf of the Chief Executive, it is submitted that the Act is intended to help people financially where appropriate and when needed but where assistance is available through other means those other means should be used before the Act is considered. It is also clear that other relevant factors such as efficient Government administration and the proper use of public funds need to be taken into account.

[23] We note that the appellant received benefit at a time when she herself was earning money, the full extent of which she did not declare to the Ministry. Neither did she declare the existence of assets which would have had an impact on her eligibility for Accommodation Supplement. This was in addition to the fact that she was living in a relationship in the nature of marriage. We have previously noted that she accumulated assets as a result of her financial management during the period she was both working and receiving benefit. As part of the Relationship Property settlement the appellant retained ownership of a house. That she has chosen to divest herself of this asset (possibly in part in an attempt to avoid repayment of this debt) is a deliberate choice made by the appellant.

[24] Taking into account all of the circumstances of this case the Authority is not satisfied that there is anything, either in relation to the circumstances in which the debt was incurred or the appellant's financial circumstances or her family circumstances, which would persuade it that the discretion in either s 86A or s 86(1) should be exercised to take no steps to recover the debt from the appellant.

[25] The appeal is dismissed.

DATED at WELLINGTON this 13th day of February 2015

Ms M Wallace
Chairperson

Mr K Williams
Member