[2015] NZSSAA 002

Reference No. SSA 031/14

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by XXXX of XXXX 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 appeals against a decision of the Chief Executive upheld by a Benefits Review Committee to establish and recover overpayments of Domestic Purposes Benefit paid to the appellant as follows:

(i) An overpayment of Domestic Purposes Benefit in respect of the period 19 March 2012 to 17 March 2013 amounting to $5,710.98.

(ii) An overpayment of Domestic Purposes Benefit and Sole Parent Support paid in respect of the period 13 May 2013 to 4 August 2013 amounting to $3,097.76.

Background

[2] At the time relevant to this appeal the appellant was in receipt of Domestic Purposes Benefit and towards the end of the period Sole Parent support. She had been in receipt of Domestic Purposes Benefit since 2004. She had also been in receipt of Domestic Purposes Benefit between 1991 and 1998.

[3] The appellant's entitlement to benefit was reviewed annually. It appears that at some point she began part-time employment with the XXXX. In March 2009, when her annual review was carried out, she advised that she was earning $80 to $100 a week from XXXX. Due to this and other earnings, an overpayment of $1,452.48 was established in respect of the March 2008 to March 2009 year.

[4] In February 2012, the appellant submitted her annual review for the 52 weeks ending 22 January 2012. She stated that she had earned $100 per week for the previous 52 weeks. Her income was assessed as being $5,200 per annum and no overpayment was established.

[5] In March 2013, the Ministry carried out a review in relation to the appellant's income for the 52 weeks ending 20 January 2013. The appellant presented information to the effect that she had been paid $16,490.75 in the 52 weeks ending 20 January 2013. As a result of the receipt of this information, it was assessed that the appellant had been overpaid $5,710.98 in respect of the period 26 March 2012 to 17 March 2013. The appellant was advised of the overpayment.

[6] On 30 May 2013, the appellant provided verification of her income for the period 4 January 2013 to 12 April 2013 and in August 2013 she provided verification of her income for the period 13 May 2013 to 4 August 2013. Following receipt of this information, the Ministry assessed that the appellant had been overpaid $3,038.90. The appellant was advised of the overpayment.

[7] The appellant's benefit was cancelled on 20 August 2013 at her request.

[8] The appellant sought a review of the decision to establish and recover the overpayment. The matter was reviewed internally and by a Benefits Review Committee. The Benefits Review Committee upheld the decision of the Chief Executive. The appellant then appealed to this Authority.

Decision

[9] A calculation of the overpayment in respect of the period 25 March 2012 to 23 March 2013 is set out at page 98 of the s 12K report. A calculation in respect of the period 24 March 2013 to 4 August 2013 is set out at page 102. The appellant has not disputed these calculations; rather her submissions are focussed on recovery of the debt.

[10] Generally speaking, overpayments of benefit are debts due to the Crown and must be recovered. There is a limited exception to this rule contained in s 86(9A) of the Social Security Act 1964. This provision gives the Chief Executive the discretion not to recover a debt in circumstances where:

(a) the debt arose as a result of an error by an officer of the Minister;

(b) the beneficiary did not intentionally contribute to the error;

(c) the beneficiary received the payments of benefit in good faith;

(d) the beneficiary changed their position believing they were entitled to receive the money; and

(e) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

[11] Pursuant to s 86(9B) of the Social Security Act 1964 the term "error" includes:

(a) the provision of incorrect information by an officer of the Ministry;

(b) an erroneous act or omission occurring during an investigation of benefit entitlement under s 12; and

(c) any erroneous act by an officer of the Ministry.

[12] The first issue to be considered is whether or not the debts arose as a result of errors on the part of the Ministry. The appellant submits that prior to and on 16 March 2012 she received a phone call from her local Work and Income office asking if she could increase her work hours to 15 hours per week. She was advised that this was a new requirement for all solo mothers with children over six years of age. As a result of this, she had approached her employer asking for additional work. She was offered a few hours' extra work and took it. The appellant, however, does not suggest that she ever advised the Ministry that she had increased her work hours or that she had reported her income. The appellant was asked for specific information on this point by the Authority on 21 January 2015. She has failed to respond.

[13] The s 12K report includes a copy of the letter sent to the appellant on 30 April 2009 which reminds her of how earnings affect benefit entitlement and the importance of telling Work and Income promptly of changes that could affect her payments. As a person who had received a benefit over a number of years we think it reasonable to infer that the appellant was aware that the amount of income that she received would affect her benefit entitlement. The information about the appellant's wages between 21 January 2012 and 20 January 2013 indicates that her income fluctuated from week to week but was always in excess of $100 per week. We are therefore surprised that the appellant was not contacting the Ministry on a regular basis to advise of changes to her income.

[14] While the Ministry may have contacted the appellant to enquire as to whether she could increase her work hours, the obligation was on the appellant to report her income from that increase in her work hours. We are not satisfied that any error on the part of the Ministry resulted in the overpayment which occurred in respect of the period 19 March 2012 to 17 March 2013. As a result, we cannot direct that the debt in relation to this period should not be recovered pursuant to s 86(9A).

13 May 2013 to 4 August 2013

[15] We have considered the overpayment in respect of the second period separately. By March 2013, the Ministry had full details of the appellant's wages and the fact that she was regularly earning more than $100 per week. Despite this information, on or about 6 April 2013 the appellant's earnings were assessed as 'nil' and she was advised that from 15 April 2013 she would receive $15,359.24, presumably the full rate of Domestic Purposes Benefit. We have not received a full explanation from the Ministry as to why no income was to be charged for the ensuing year. The Ministry have advised "it can only be assumed that the appellant declared nil income for this week". The change may, however, have coincided with the appellant's change of employment. We are prepared to give the appellant the benefit of the

doubt and accept that the failure to charge the appellant's entitlement to benefit with income at this point was as a result of an error on the part of the Ministry.

[16] We must then consider whether the appellant intentionally contributed to the error. We must also consider whether the appellant received the payments believing she was entitled to them. We note that the appellant apparently commenced work with XXXX in May 2013. There is no evidence that she reported her income from employment at Pathways until August 2013. The appellant would have been aware that her income from XXXX affected her entitlement to benefit. We can only assume therefore that she intentionally contributed to the Ministry error which resulted in the overpayment. Moreover, we are not satisfied that she received the payments of benefit believing that she was entitled to them.

[17] As all of the requirements of s 86(9A) have not been made out it is not necessary for us to consider the subsequent criteria of s 86(9A). We are not able to direct that the debt in respect of this period not be recovered pursuant to s 86(9A).

[18] Sections 86(1) and 86A of the Act 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.

[19] Parliament has specified the circumstances in which a debt should not be recovered in s 86(9A). The occasions 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 therefore be limited.[1]

[20] 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 his or her dependents are also relevant.

[21] The circumstances in which the discretion should be exercised have 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,"*[2] *"unusual,"*[3] and as *"rare and unusual,"*[4] but these are not tests.

[22] The appellant has been invited to provide information about her financial circumstances but has failed to do so.

[23] We are satisfied on the balance of probabilities that given the length of time that the appellant has been on benefit, she was aware of her obligation to advise the Ministry when her income changed and that such income would affect her entitlement

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[1] *Director-General of Social Welfare v Attrill,* [1998] NZAR 368
[2] *McConkey v Director-General of Work & Income New Zealand* HC, Wellington AP277-00, 20 August 2002.
[3] *Cowley v Chief Executive of the Ministry of Social Development* HC, Wellington CIV-2008-485-381, 1 September 2008.
[4] *Osborne v Chief Executive of the Ministry of Social Development* HC, Auckland CIV-2007-485-2579, 31 August 2009.

to benefit. We understand the appellant continues to receive a benefit. She has a dependent child in her care. She owns her own home subject to a mortgage. The outgoings on her home take up much of her income. At least in part her mortgage is a result of previous losses on a business. The appellant has shown that she has the ability to earn income over and above benefits. We are not satisfied that the appellant's financial circumstances or the needs of her family or the circumstances in which the debt arose are such that we should direct that no steps be taken to recover the debt pursuant to s 86(1) or s 86A of the Act.

[24] The appeal is dismissed.

DATED at WELLINGTON this 13th day of February 2015.

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Ms M Wallace
Chairperson

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Mr K Williams
Member

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