[2015] NZSSAA 018

Reference No. SSA 142/14

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

HEARING at WELLINGTON on 12 February 2015

APPEARANCES

Mrs A Teo for the appellant
Mr R Dennett for the Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant appeals against a decision of the Chief Executive upheld by a Benefits Review Committee to establish and recover an overpayment of Supported Living Payment made in the period 7 August 2013 to 13 May 2014.

[2] The overpayment occurred as a result of a mistake made by Centrelink and a decision by Centrelink to review the appellant's entitlement to the Disability Support Pension.

[3] The amount of the overpayment the Ministry seeks to recover is $1,862.96 of which $336 has been recovered leaving a balance outstanding of $1,526.96.

Background

[4] The appellant was born in New Zealand. He suffered a medical misadventure as a baby as a result of which he is blind and deaf. He receives weekly compensation from the Accident Compensation Corporation as a result (ACC payments). The appellant now lives in Australia. He is aged 34 years. In November 2013, as a result of New Zealand's reciprocal agreement with Australia relating to social security benefits, Centrelink sent an application for Supported Living Payment to the Ministry and advised that they had granted the appellant a Disability Support Pension from 31 July 2013 at the notional rate of AU$24,216.40 per annum.

[5] On the basis of this advice, a Supported Living Payment was granted to the appellant from 7 August 2013 at the rate of $174.10 gross per week. The Ministry

advised that this was based on the New Zealand proportional rate which was the lesser of the proportional rate and the Australian notional rate of $465.70 per week.

[6] On 12 December 2013 the appellant's mother, who is his agent, contacted the Ministry and advised that there had been a drop in the payment of the appellant's Disability Support Pension. She contacted the Ministry again on 14 February 2014 to advise that the payment of Disability Support Pension had been stopped and an overpayment had been established. Centrelink discontinued paying the Disability Support Pension to the appellant because it had failed to take into account the appellant's ACC payments in assessing his entitlement at the outset. When it realised it had made this error it reviewed the appellant's entitlement and concluded he was not eligible for the Disability Support Pension.

[7] The Ministry did not complete a review of its own payments to the appellant until 12 May 2014. The review determined that between 7 August 2013 and 13 May 2014 the revised notional rate was less than the assessed New Zealand proportional rate. Under the reciprocal agreement with Australia, the appellant was entitled to receive only the lesser of the two rates. The Ministry says that the appellant was entitled to $70.47 per week rather than $174.10 per week in the period 7 August 2013 to 3 September 2013. It was determined that an overpayment of $4,903.45 had occurred. The appellant was duly advised of this debt.

[8] His agent sought a review of decision. 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.

[9] As previously noted, prior to the hearing of the appeal a decision was made to write off a significant part of the debt. That was because of Ministry delays in reviewing the appellant's entitlement after it had been advised of the Centrelink mistake. The balance to be recovered stands at $1,526.96.

[10] The position of the appellant and his agent is that at all times they have been open and honest with the Ministry and Centrelink. The receipt of the ACC payments was disclosed in the Supported Living Payment application made to the Ministry and in the application lodged with Centrelink. The overpayment has not occurred as a result of any fault on their part and should not therefore be recovered.

[11] The Ministry say that the debt has not arisen as a result of any error on the part of the Ministry. The provisions of s 86(9A) of the Act therefore do not apply. It is further submitted that the circumstances are such that steps should be taken to recover the debt pursuant to s 86(1) of the Act.

Decision

[12] The manner in which the overpayment has been calculated is set out in the s 12K report. The appellant did not specifically dispute the calculation of the overpayment. The central issue in this appeal is whether or not the debt should be recovered.

[13] 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 his position believing he was entitled to receive the money; and

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

[14] Pursuant to s 86(9B) of the Act 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.

[15] The requirements of s 86(9A) are cumulative. If one of the criteria cannot be made out it is not necessary to proceed to consider the subsequent criteria.

[16] The first question the Authority must consider is whether or not the overpayment occurred as a result of an error on the part of an officer of the Ministry.

[17] On behalf of the Chief Executive it is submitted that the overpayment occurred not as a result of an error on the part of the Ministry but as a result of an error by Centrelink.

[18] At the time the Ministry received the appellant's application for Supported Living Payment it was aware that the appellant was a single man and it was aware by virtue of the application form that the appellant was receiving $422.85 per week in ACC payments. The application for New Zealand Service included advice from Centrelink that the appellant had been granted an Australian pension at AU$24,216.40. The Ministry received 331 applications for single persons to receive Supported Living Payment in Australia under the reciprocal agreement in 2013 and 303 in 2014. It is surprising that Ministry staff did not pick up that a person receiving $422.85 per week in ACC payments from New Zealand was unlikely to be entitled to receive AU$24,216.40 in Australia. This information ought to have triggered a question in the mind of the person dealing with the matter in New Zealand. In our view, the failure by an officer of the Ministry to question the Australian figure in light of the knowledge that the appellant was receiving ACC payments constitutes an error on the part of the Ministry. We are satisfied that the appellant did not intentionally contribute to the error.

[19] The question we must then ask is whether or not the appellant received the payments of benefit in good faith. We are satisfied that the appellant received the benefit payments believing that he was entitled to them.

[20] We are then required to consider whether the appellant spent the money believing that he was entitled to receive the benefit money and would not have to

repay any of it. The appellant's mother, as his agent, said that some of the money received had been used on a cruise and the appellant was left with approximately $600 to $700 at the point he became aware there was an overpayment. If, in fact, the appellant had money remaining at the point that he or his agent became aware that the money had been paid in error, then the appellant could not satisfy this limb of s 86(9A). It appears that while part of the money had been spent in the belief that it would not have to be repaid, part of the money remained available for repayment. It appears therefore that the appellant can only satisfy this limb of s 86(9A) in relation to part of the debt.

[21] Finally, we must consider whether it would be inequitable in all the circumstances including the debtor's financial circumstances to permit recovery. The appellant suffers from significant disabilities. His mother acts as his agent in relation to his financial affairs. We understand that he has 24-hour care provided by ACC. His income is spent on board and other activities related to his well-being. His mother said that if he were required to repay the debt then something might need to be taken out of his programme. An amount of $336 has already been recovered in respect of the debt. We consider it would be inequitable to recover the money spent before the appellant and his agent were informed of the failure to take into account the ACC and the likelihood that a debt would occur.

[22] In view of the repayments already made and the advice from the appellant's mother that he had some of the overpaid money remaining in his bank account, we direct that the Chief Executive limit recovery of the debt to a total of $700 of which $364 remains owing, pursuant to the provisions of s 86(9A) of the Act.

Taking steps to recover the debt under s 86(1) or s 86A

[23] Sections 86(1) and 86A 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.

[24] 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 therefore be limited.[1]

[25] 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.

[26] 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.

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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,

[27] We have considered the appellant's particular circumstances including his financial circumstances. It appears from the evidence given at the hearing that at the time he became aware that there had been an overpayment, not all of the benefit money had been spent. We are therefore not prepared to direct that no steps be taken to recover the amount of $700 previously referred to.

[28] The appeal is allowed in part. Costs are reserved.

DATED at WELLINGTON this 16 day of March 2015

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Ms M Wallace
Chairperson

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Mr K Williams
Member

1 September 2008.
[4] *Osborne v Chief Executive of the Ministry of Social Development* [2010] 1 NZLR 559.