

**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 an overpayment of New Zealand Superannuation and Disability Allowance paid in respect of the period 12 November 2011 to 2 December 2013 amounting to \$34,709.27 and an overpayment of Disability Allowance paid in the period 12 November 2011 to 9 December 2011.

[2] The overpayment was established on the basis that the appellant had left New Zealand and ceased to be entitled to these benefits.

***Background***

[3] The appellant is aged 84 years. She was first granted New Zealand Superannuation in 2006.

[4] On 1 December 2011 the Ministry were advised that the appellant had departed New Zealand indefinitely on 11 November 2011.

[5] Her Disability Allowance was suspended and cancelled from 10 December 2011 but it appears that no action was taken in relation to her New Zealand Superannuation.

[6] Two years later, on 26 November 2013, the Ministry were advised that the appellant was in Hong Kong and had decided not to return to New Zealand.

[7] As a result overpayments of New Zealand Superannuation and Disability Allowance were established on the basis that the appellant was not entitled to the amounts paid due to her absence from New Zealand.

[8] Initially it appears that the appellant's agent indicated that the debt would be repaid, although there was a subsequent enquiry as to why the appellant was not entitled to receive payment for the first six months of her absence from New Zealand. The appellant by her agent then sought a review of the 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] On behalf of the appellant it is submitted that the appellant left New Zealand to attend her granddaughter's wedding in **XXXX** which was held in December 2011. It is submitted that the appellant intended to return to **XXXX** about a month after the wedding, however she was sick at the time and medication and close follow-up from a doctor was required. The appellant's condition became worse instead of better. She suffers from hypertension, diabetes, a skin allergy and gout. Her gout means that she can hardly walk at times. It is submitted it was an unexpected health condition that prevented the appellant from returning to **XXXX**. It is acknowledged, however, that the appellant held only a one-way ticket to **XXXX**. The reason for this was said to be that it was anticipated it would be cheaper to buy the return ticket in **XXXX**. The appellant is in a position now where she has had to hire a helper to assist with her care. She requires significant support and her medical costs are large. It appears that in part she is financially supported by her daughter.

[10] On behalf of the Ministry it is submitted that the appellant is not entitled to receive payment of her New Zealand Superannuation overseas for the period concerned. It was also correct to establish an overpayment of Disability Allowance as there is no evidence the appellant continued to incur disability costs following her departure from New Zealand.

### ***Decision***

[11] Section 21 of the New Zealand Superannuation and Retirement Income Act 2001 (the Act) provides that a person is not entitled to receive New Zealand Superannuation while they are absent from New Zealand unless they fall within one of the exceptions contained in ss 22-35 of the Act.

[12] The exception contained in s 22 of the Act allows a person to be paid New Zealand Superannuation for the first 26 weeks of any absence if their absence does not exceed 30 weeks. If the person's absence exceeds 30 weeks and the Chief Executive is satisfied their absence was due to circumstances beyond their control which they could not have reasonably foreseen before departure, payment in respect of the first 26 weeks may still be made. Otherwise, if a person is absent for more than 30 weeks then there is no entitlement to payment for the first 26 weeks of their absence at all.

[13] The appellant was absent from New Zealand for more than 30 weeks. When the Ministry first became aware that the appellant had remained absent from New Zealand for more than 30 weeks it seems that there was no suggestion that she had had to remain in **XXXX** as a result of circumstances beyond her control. It is now alleged on behalf of the appellant that her departure from New Zealand was expressly for the purpose of attending a wedding and her failure to return to New Zealand was as a result of ill-health. The appellant, however, did not have a ticket to return to New Zealand at the time of her departure and three weeks after her departure her agent was uncertain about her return date. Moreover, the first time the appellant consulted him was on 20 July 2012. That was well after the appellant had been absent from New Zealand for more than 30 weeks.

[14] We infer that the appellant was an elderly person in declining health at the time of her departure from New Zealand and conceivably her health continued to decline following her departure and was a factor in her decision not to return to New Zealand. There is, however, no evidence to support the proposition that there was an unexpected decline in her health which prevented her return to New Zealand. The fact that her agent advised on 1 December 2011 that there was no certain return date suggests that

there was always a prospect that the appellant would not return to New Zealand. We are not satisfied on the basis of the evidence available that the appellant's failure to return to New Zealand within 30 weeks was due to circumstances beyond her control that she could not have reasonably foreseen before departure.

[15] We are not therefore satisfied that the appellant was entitled to payment of New Zealand Superannuation for the first 26 weeks of her absence.

[16] Section 26 of the Act allows for a person to be paid New Zealand Superannuation overseas in circumstances where it is the intention to be away for longer than 26 weeks. The section requires, however, that an application to be paid overseas must be made in New Zealand at a time when the applicant is ordinarily resident and present in New Zealand. The appellant did not make any such application.

[17] A third option is contained in s 27 which allows for an applicant to be paid New Zealand Superannuation overseas where an application was not made while the person was ordinarily resident and present in New Zealand because they intended to be absent for only 26 weeks. For such an application to be accepted, the Chief Executive must be satisfied that the absence extended beyond 26 weeks due to circumstances beyond the applicant's control that could not reasonably have been foreseen before leaving New Zealand. The appellant has not made an application under this section although she was apparently invited to do so in March 2014.

[18] In short, none of the exceptions to the rule that New Zealand Superannuation cannot be paid while the person is absent from New Zealand apply in the appellant's case.

[19] As there is no basis on which the appellant could be paid New Zealand Superannuation overseas during the period relevant to this appeal, the Chief Executive was correct to establish an overpayment of New Zealand Superannuation for the period 12 November 2011 to 2 December 2013.

#### *Disability Allowance*

[20] Contrary to the Ministry of Social Development's report, at the time of the appellant's departure from New Zealand s 77(2) of the Social Security Act 1964 allowed the appellant to be paid Disability Allowance for the first four weeks of her absence from New Zealand. The Section 12K report does not outline why the appellant was in receipt of Disability Allowance but the appellant was elderly at the time of her departure and it is likely that she suffered from some of the conditions that she currently suffers from. She currently takes medication for cholesterol, gout, high blood pressure and diabetes. We are prepared to accept for present purposes that the appellant was entitled to continue receiving Disability Allowance for the first four weeks of her absence from New Zealand. The debt in relation to Disability Allowance is to be disestablished.

#### *Calculation of overpayment of New Zealand Superannuation*

[21] We are then required to consider the calculation of the overpayment. The calculation of the overpayment is set out in the Section 12K report. The appellant has not raised any issues relating to the calculation of the overpayment.

#### *Recovery of overpayment*

[22] 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 Ministry;
- (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.

[23] 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) any erroneous act or omission occurring during an investigation of benefit entitlement under s 12; and
- (c) any erroneous act or omission by an officer of the Ministry.

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

[25] The first issue we must consider is whether or not the debt relating to the first 26 weeks of the appellant's absence from New Zealand was caused as a result of an error on the part of the Ministry. The Ministry were advised of the appellant's departure overseas but were apparently not given a clear indication that the appellant had left New Zealand permanently. In these circumstances it was reasonable for the Ministry to continue paying the appellant for the first 26 weeks of her absence. We are not satisfied that the overpayment in relation to this period arose as the result of any error on the part of the Ministry.

[26] The second period is the period after the first 26 weeks. We must first consider whether or not the debt in this period occurred as a result of an error on the part of the Ministry. The Ministry were advised that the appellant had departed New Zealand with no known date of return. It would have been prudent for the Ministry to review the appellant's records at the end of the 30-week period and attempt contact with the appellant at that point. In fact, the Ministry continued to pay the appellant for a further two years and took no steps to ascertain whether or not the appellant had returned to New Zealand. We agree with the Benefits Review Committee that this was an error on the part of the Ministry. An issue then arises as to whether or not the appellant intentionally contributed to the error. The appellant is elderly and in poor health. She relies on her agent to organise benefit matters for her. We accept neither she nor her agent intentionally contributed to the overpayment.

[27] We must then consider whether the appellant received the payments of benefit believing she was entitled to them.

[28] In the original submissions, the suggestion is that neither the appellant nor her agent contacted the Ministry at any time between the notification of her departure on 1 December 2011 and the notification that she was not returning two years later. In response to a question from the Authority, the appellant's agent has said that she went to the Ministry with a friend, **XXXX**, on three occasions. She says that on the first occasion she went to the office and gave verbal advice that the appellant (her mother) would not be returning in a short time. On a second occasion six months later she went with her friend and advised that the appellant was too sick to travel and she would not be returning to Auckland. Finally, in September 2013 while in Auckland, she realised that the appellant's superannuation had continued to be paid. She contacted the Ministry again to have her mother's benefit stopped.

[29] These various contacts suggest the appellant was aware that her residence in **XXXX** would affect her benefit entitlement. The appellant had previously had her New Zealand Superannuation suspended as a result of her overseas travel. We think it is reasonable to infer from these circumstances that the appellant and her agent were aware that the appellant was not entitled to receive New Zealand Superannuation indefinitely while she was overseas.

[30] On this basis alone it would not be possible to direct that the debt not be recovered pursuant to s 86(9A) and it is not essential that we proceed to consider the subsequent criteria of s 86(9A). The next criteria of s 86(9A) is that the appellant spent the money believing that she was entitled to it and would not have to repay it. The evidence from the appellant's agent suggests that the money accumulated in an account and was not spent. If the Authority had been required to consider this criteria it would not have been satisfied that the appellant had spent the benefit money believing she was entitled to it and would not have to repay it.

[31] We are not able to direct that the debt not be recovered pursuant to the provisions of s 86(9A) of the Social Security Act 1964.

*Taking steps to recover pursuant to s 86(1)*

[32] 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.

[33] 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.<sup>1</sup>

[34] The exercise of the discretion in s 86 or s 86A does not result in the debt being written off, it is simply a discretion that can be exercised from time-to-time to take no steps to recover a debt.

[35] 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

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<sup>1</sup> *Director-General of Social Welfare v Attrill*, [1998] NZAR 368.

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.

[36] 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*,”<sup>2</sup> “*unusual*,”<sup>3</sup> and as “*rare and unusual*,”<sup>4</sup> but these are not tests.

[37] The appellant is elderly. She has returned to live in **XXXX**. It appears that she is supported by her daughter who pays her expenses.

[38] While we doubt the appellant experienced a sudden and unexpected deterioration in her health while she was in **XXXX**, no doubt her age and health would have contributed to her decision to remain there. Had she applied to be paid New Zealand Superannuation in **XXXX** prior to her departure from New Zealand she may have been granted a partial pension based on the period of time she had been in New Zealand.

[39] Balanced against this is that the appellant has the funds to repay the debt and she has in the past been aware that her absence from New Zealand affected her eligibility for New Zealand Superannuation.

[40] Taking into account all the circumstances, we are not prepared to direct that no steps be taken to recover the debt in relation to New Zealand Superannuation.

[41] The appeal as it relates to New Zealand Superannuation is dismissed.

[42] The appeal as it relates to the overpayment of Disability Allowance is allowed.

**DATED** at WELLINGTON this 8<sup>th</sup> day of April 2015

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Ms M Wallace  
Chairperson

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Mr K Williams  
Member

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<sup>2</sup> *McConkey v Director-General of Work & Income New Zealand* HC Wellington AP277-00, 20 August 2002.

<sup>3</sup> *Cowley v Chief Executive of the Ministry of Social Development* HC Wellington CIV-2008-485-381, 1 September 2008.

<sup>4</sup> *Osborne v Chief Executive of the Ministry of Social Development* HC Auckland CIV-2007-485-2579, 31 August 2009.