[2015] NZSSAA 036

Reference No. SSA 006/15

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
Lady Tureiti Moxon - Member

HEARING at WELLINGTON on 13 April 2015

APPEARANCES

The appellant in person
Ms S Singh 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 Temporary Accommodation Assistance paid in respect of the period 22 February 2012 to 5 June 2012.

Decision

[2] The appellant is aged 73 years. She is married. She is in receipt of New Zealand Superannuation.

[3] The appellant's home in Christchurch was severely damaged in the earthquakes of 22 February 2011 and June 2011. As a result of the earthquakes her home, which included rental flats, became uninhabitable and we understand will not be rebuilt.

[4] The appellant was insured through what was AMP Insurance, (now Vero) and she received accommodation assistance pursuant to her insurance policy from the outset.

[5] Initially this assistance was available for the first 12 months from 22 February 2011 but two changes occurred to alter this. The first change was that instead of limiting liability to pay assistance for a 12 month period a decision was made by the insurance company to limit payment to the first $25,000.

[6] The second change came about after the appellant sought specialist advice in relation to her insurance policy. The change was that she became entitled to make a second claim following the earthquake of June 2011. In effect she became eligible to receive accommodation assistance for a second period up to a total of $25,000.

[7] The first issue in this case is what period was covered by the first claim stemming from the earthquake of 22 February. A letter dated 26 February 2013 and emails dated 18 March 2013 and 7 April 2015 explain the position.

[8] The email of 18 March 2013 from the insurance company explains that up to 24 January 2012 the insurance company had paid a total of $11,839.59 in accommodation benefit. Part of this amount related to removal expenses and a balance of $9,000 related to the appellant's actual accommodation costs of $170 per week. In effect it amounted to 52 weeks of payment at $170 per week. On 25 January after the decision to pay $25,000 per event rather than time limit payments was made, a further payment of $13,160.41 was made to the appellant. Of this amount $6,366.80 was to cover the difference in the $170 per week paid for actual accommodation costs and the $575 per week rent it is said the appellant began paying in November 2011. This payment covered the period to 22 February 2012. The balance of $6,793.61 (of the $13,160.41) covered payment of rent at $575 per week from 23 February 2012 to 13 June 2012. We note in passing that the documentation from the insurance company suggests that the appellant had informed the insurance company in November 2011 that she had shifted and was now paying $575 per week rent. The appellant now denies this was the case. In any event the appellant received $575 per week from her insurance company to pay her rental costs for the period 23 February to 13 June 2012.

[9] The insurance company began payment under the second claim on 29 May 2012.

[10] As noted in the email from Vero of 7 April 2015 although there was a gap in actual payments between January and May 2012 that period was in fact covered by the payment made on 25 January. The email notes that it may not have been adequately explained to the appellant.

[11] An overpayment of Temporary Accommodation Assistance has arisen in this case because in September 2011, apparently in anticipation of her insurer's Accommodation Assistance ending on 22 February 2012, the appellant made application for assistance under the Government's Temporary Accommodation Assistance Welfare Programme. This is a Programme designed to assist persons affected by the Canterbury earthquakes of 2010 and 2011. The application was held until 20 February 2012 and then processed that day. She was granted assistance from 22 February. It seems that the Ministry was not made aware of the payment on 25 January 2012.

[12] Following the granting of her application, the appellant was paid Temporary Accommodation Assistance under the Programme for a period of three months. In effect she received both an insurance payment and assistance under the government Programme in respect of the same period.

[13] When this came to the Chief Executive's attention an overpayment of Accommodation Assistance was established for the period 22 February 2012 to 5 June 2012.

[14] The appellant says that she was encouraged to apply for Temporary Accommodation Assistance by the insurance company. In effect she says she did so unaware that the payment of $13,160.41 included an allowance for accommodation costs between February and June 2012.

Decision

[15] We are satisfied on the basis of the evidence available that the payment made to the appellant on 25 January 2012 by the insurance company included funds which were intended to pay her accommodation costs in respect of the period 22 February 2012 to 13 June 2012.

[16] The provision for Temporary Accommodation Assistance is contained in a welfare Programme established under the Social Security Act 1964.

[17] The purpose of the Programme is to provide special assistance to people who, because of the Canterbury earthquakes require assistance to meet their temporary accommodation costs. Clause 10 of the Temporary Accommodation Assistance Programme provides that Temporary Accommodation Assistance cannot be granted until the date on which the applicant's insurance cover for temporary accommodation assistance expired.

[18] The information is that the appellant's temporary accommodation insurance payments under her first claim continued until 13 June 2012 and continued under the second claim until 1 August 2013.

[19] We are satisfied that there was no gap in the payments from the insurance company between 22 February 2012 until June 2012. The payment of $13,160.41 made on 25 January covered the appellant's accommodation costs for the period from November 2011 to June 2012.

[20] The appellant therefore had no entitlement to the Temporary Accommodation Assistance that was paid to her in respect of the period 22 February 2012 to 5 June 2012. When the Chief Executive became aware that the appellant had in fact received insurance accommodation payments for this period it was appropriate to establish an overpayment.

Recovery of Overpayment

[21] We are then required to consider whether or not the overpayment should be recovered.

[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 her position believing she 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 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.

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

[25] We are first required to consider whether or not there was any error on the part of the Ministry.

[26] We note that in this case the appellant originally lodged an application for Temporary Accommodation Assistance in September 2011 in anticipation of the temporary assistance from her insurance company expiring. On 3 December and 3 February 2012 the appellant was asked to provide confirmation of her tenancy costs by providing a copy of her tenancy agreement. The appellant faxed a tenancy agreement showing payment of rent of $170 per week on 9 February 2012. There is no evidence indicating that either on that date or between 24 January and 22 February she advised the Ministry she had received the additional payment for temporary accommodation assistance from the insurance company.

[27] In correspondence following the hearing the appellant has claimed she did advise the Ministry of the payment. This was not what she said at the hearing. Moreover there is no reference to her advising the Ministry of the receipt of the money in various statements presented, at least one of which was apparently prepared by a lawyer. In a further email of 5 May she states she did not realise she needed to declare money received before payment of her Temporary Accommodation Assistance started.

[28] We are not satisfied that the appellant advised the Ministry of the receipt of the payment from the insurance company at any time in 2012.

[29] The appellant may not have appreciated that the payment covered her rent for the period 22 February to June 2012 but the fact of the matter is that she had an obligation to advise the Ministry of the receipt of the money. The Ministry say the appellant signed the client obligations form which advised her of the need to advise of any change in her circumstances in September 2011. We do not accept that the appellant was unaware of her obligation.

[30] In any event the Ministry had no way of knowing about the payment at the relevant time. We are not satisfied that the overpayment was caused as a result of an error by the Ministry. We are not therefore able to direct that the debt not be recovered pursuant to s 86(9A) of the Act.

[31] 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.

[32] 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].

[1] *Director General of Social Welfare v Attrill and others,* [1998] NZAR368

[33] 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.

[34] 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.

[35] We accept that the appellant has been seriously affected by the Christchurch earthquakes. We further note that she has spent a substantial amount of money in litigation against her insurance company. We understand that she has now been paid out in relation to her claims but at the time of hearing we understand she remained living in rented accommodation. She has now married. Her husband receives a pension from the United States of America. The appellant receives a single rate of New Zealand Superannuation. The appellant received a substantial amount of assistance from her insurer to cover her temporary accommodation costs in the period to which this overpayment relates. Moreover we do not think the circumstances arose as a result of Ministry error. We are not satisfied that the are circumstances in which the debt arose, or the appellant's personal situation or her financial circumstances would justify us in directing that the Chief Executive take no steps to recover the debt. The debt is to be recovered.

[36] The appeal is dismissed.

DATED at WELLINGTON this 18th day of May 2015

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Ms M Wallace
Chairperson

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Mr K Williams
Member

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Lady Tureiti Moxon
Member

[2] *McConkey v Director-General of Work & Income New Zealand* HC WN AP 277-00, 20 August 2002
[3] *Cowley v Chief Executive of the Ministry of Social Development* HC WN 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