

[2015] NZSSAA 101

Reference No. SSA 022/15

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Australia 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 paid in the period 6 November 2013 to 20 May 2014 amounting to \$2,583.15. The overpayment arose as a result of a change in the rate of the Australian Age Pension payable to the appellant.

Background

[2] The appellant has lived in Australia since 1986. He was granted an Australian Age Pension from 6 November 2013 when he attained the age of 65 years.

[3] On 19 November 2013 the Ministry received an application for New Zealand Superannuation. The application was granted from 6 November 2013 at the proportional rate of \$106.97 per week. Arrears of \$212.56 were paid directly to Centrelink at their request. These arrears were subsequently returned by Centrelink to Work and Income New Zealand in February 2014 with an incorrect number. They were returned by Centrelink because the appellant's Australian Age Pension had been cancelled from 6 November 2013.

[4] It was not until 20 March 2014 that the appellant's New Zealand Superannuation was suspended on the basis that the appellant was not entitled to an Australian Age Pension from 6 November 2013 onwards. It was determined that he had no entitlement to New Zealand Superannuation from 6 November and an overpayment was established. After deduction of certain amounts, the balance to be repaid was calculated to be \$2,583.15.

[5] The appellant sought a review of the decision to stop his payments of New Zealand Superannuation. The matter was reviewed internally and by a Benefits Review Committee. The appellant then appealed to this Authority. A further review carried out in the process of preparing for the appeal resulted in a decision that there had been an unacceptable delay on the part of the Ministry in cancelling the appellant's benefit in the period 5 March 2014 to 6 May 2014. The debt in respect of that period has now been written off. In addition the arrears payment which was intended to cover the appellant's entitlement in respect of the period 6 November 2013 to 19 November 2013 was returned by Centrelink. Therefore, the remaining debt relates to the period 20 November 2013 to 4 March 2014 and amounts to \$1,604.60.

[6] The appellant submits:

- He did not receive any communication from Centrelink that his Australian Age Pension had been cancelled. The first communication he received was a letter from Work and Income relating to the overpayment on 20 May 2014.
- It took Centrelink Australia 16 weeks to inform the Ministry in New Zealand about the cancellation.
- It took the Ministry a further 12 weeks to cancel the payment and in the meantime the payments continued.
- He is not in a position where he can afford to repay the debt. The mistakes have all been made by the Ministry and by Centrelink.

Decision

[7] The first point to be made is that New Zealand Superannuation cannot be paid overseas unless the recipient can bring themselves within one of the exceptions contained in ss 27 to 35 of the New Zealand Superannuation and Retirement Income

Act 2001, or an agreement or convention adopted under s 19 of the Social Welfare (Transitional Provisions) Act 1990 applies.

[8] In this particular case, New Zealand has a reciprocal agreement on social security with Australia¹. This agreement governs the way in which New Zealand Superannuation can be paid in Australia. Of particular significance in this case is Article 9.4 of the Reciprocal Agreement which provides that regardless of the proportional rate of New Zealand Superannuation that can be paid to a person in Australia, the New Zealand Government must not pay more than the amount of the Australian Age Pension that would have been payable to the person if he or she was entitled to receive an Australian Age Pension but not entitled to receive New Zealand Superannuation. In short, if the appellant had no entitlement to an Australian Age Pension, he could not be paid New Zealand Superannuation. We understand the reason for this requirement is to ensure that recipients of New Zealand Superannuation in Australia do not receive more than recipients of Australian Age Pension in Australia, who are not entitled to receive New Zealand Superannuation, or persons in Australia who are not entitled to receive Australian Age Pension because of the income and asset test in place in relation to the Australian Age Pension.

[9] Once the Ministry became aware that the appellant's entitlement to Australian Age Pension had been cancelled, he had no alternative but to cancel payment of New Zealand Superannuation to the appellant. Moreover, as the appellant's Australian Age Pension had been cancelled from 6 November 2013, it was appropriate that the Ministry in New Zealand conduct a backdated review under s 81 of the Act, to ascertain whether the appellant had entitlement to any of the payments which had been made to him.

[10] As it transpired that the appellant had no entitlement to Australian Age Pension from 6 November 2013 onwards, he had no entitlement to New Zealand Superannuation and it was therefore appropriate that a debt be established in relation to the payments made.

Recovery of debt

[11] 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:

¹ See the Social Welfare (Reciprocity with Australia) Order 2002, Schedule 1.

- (a) the debt was wholly or partly caused 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 would not have to repay it; and
- (e) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

[12] 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.

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

[14] The first question to be considered is whether or not the overpayment occurred as a result of an error on the part of an officer of the Ministry of Social Development in New Zealand. The Chief Executive acknowledged that in respect of the period 5 March 2014 to 6 May 2014 the debt arose as a result of an error, in that Ministry staff did not action the information available to them promptly.

[15] The issue for the Authority is whether or not the overpayment in respect of the period 20 November 2013 to 4 March 2014 was caused as a result of an error on the part of an officer of the Ministry. The position was that Centrelink had advised the Ministry that the appellant had been granted an Australian Age Pension. The Ministry first received information on 26 February 2014 which indicated that the appellant's Australian Age Pension had been cancelled. Unfortunately, an incorrect number was given for the message and return payment. The correct information allowing the payment and the client to be identified was received on 5 March 2014.

[16] The appellant was advised by letter dated 26 November 2013 that his New Zealand Superannuation would be reassessed whenever the notional rate of his Australian Age Pension changed. He was also advised to contact the Ministry about any changes which could affect his payments. The appellant must have been aware that he was not receiving any payments of Australian Age Pension, but apparently made no attempt to inform the Ministry that his Australian Age Pension payments had stopped. He also received communications from Centrelink about the need to contact them if he was receiving New Zealand Superannuation. Had the appellant contacted the Ministry to advise that payment of his Australian Age Pension had stopped, the overpayments would not have occurred. We are not satisfied that there was any error on the part of the Ministry of Social Development in New Zealand between 5 March 2014 and 20 May 2014 which caused or partly caused the overpayment. We are not therefore able to direct that the debt not be recovered pursuant to the provisions of s 86(9A) of the Act.

Recovery under s 86(1)

[17] 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. It is also important to understand that it is a discretion to take action to recover a debt. It does not result in the debt being written-off.

[18] 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.²

[19] 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, taking into account the International Convention on Economic, Social and Cultural Rights, are also relevant.

² *Director-General of Social Welfare v Attrill* [1998] NZAR 368.

[20] 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”,³ “unusual”,⁴ and as “rare and unusual”,⁵ but these are not tests.⁶

[21] The appellant says his income is limited to New Zealand Government Superannuation and a small war service pension. His wife works part-time. They do not own their own home. He has offered to repay \$25 per fortnight.

[22] We do not consider that the circumstances in which this debt arose or the appellant’s financial circumstances are such that we should direct that no steps be taken to recover the debt pursuant to s 86(1).

[23] We direct the debt be recovered at no more than \$25 per fortnight.

[24] The appeal is dismissed.

DATED at WELLINGTON this 17th day of December 2015

Ms M Wallace
Chairperson

Mr K Williams
Member

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³ *McConkey v Director-General of Work & Income New Zealand* HC, Wellington AP277-00, 20 August 2002.

⁴ *Cowley v Chief Executive of the Ministry of Social Development* HC, Wellington CIV-2008-485-381, 1 September 2008.

⁵ *Osborne v Chief Executive of the Ministry of Social Development* [2010] 1 NZLR 559 (HC).

⁶ *Van Kleef v Chief Executive of the Ministry of Social Development* [2013] NZHC 387.