[2015] NZSSAA 042

Reference No. SSA 032/15

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 10 June 2015

APPEARANCES

The appellant in person
Ms J Hume 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 overpayments of benefit paid between the period 8 September 2008 and 13 April 2014. The total amount now owing is $6,391.

[2] The debt relates to the payment of Domestic Purposes Benefit, Accommodation Supplement, Temporary Additional Support and Temporary GST Assistance and has arisen as a result of the appellant's earnings during the period in question.

[3] The appellant requests that the Authority take into account her personal circumstances and direct that the debt not be recovered.

Background

[4] In 2007 the appellant separated from her husband and moved with their four children from the family home. Amongst other things, the appellant's husband had suffered significant set-backs in his career and financial difficulties had arisen. The appellant and the children moved into a rented property. The appellant set about starting a new life. Whilst she applied for Domestic Purposes Benefit to meet her expenses she also commenced part-time employment as a teacher a short time later. In the ensuing years, the appellant continued to work part-time as a teacher. In 2009 she also went back to university to complete her teaching degree with a view to making herself more employable and able to earn a higher salary. Unfortunately, in the early part of 2011 an incident occurred in her teaching position as a result of which she resigned and, for a period, her teacher's registration was under consideration. By December 2011 she had resumed part-time employment. At the present time she holds down two part-time jobs.

[5] In addition to parenting four children, the appellant has had to deal with the stress resulting from the breakdown of her marriage, the loss of the family home, difficult financial circumstances, the effects of the Christchurch earthquakes and the problem with her teaching career.

[6] The overpayments that have arisen in this case have been established following reviews of her benefit entitlement at the end of each income review year, taking into account the income received by the appellant from her part-time work and the benefit paid. The s 12K report sets out in some detail why the debt has accumulated over the years and the calculation of the debt. A primary reason appears to have been that while the appellant was conscientious about reporting her income, it has at times been reported too late for the necessary adjustments in her benefit payments to be made.

[7] The appellant says that taking into account her determined efforts to upskill herself, her efforts to support her family from her employment, and the difficult circumstances she has faced the debt should not be recovered.

Decision

[8] The appellant has not disputed the calculation of the debt in this case which is set out in detail in the s 12K report. We note, however, that the appellant was advised on 13 June 2014 that the debt was $14,120.14. Since she has sought a review of decision and lodged her appeal, reviews by the Ministry have resulted in the debt being reduced to $6,391. The reasons for the reduction are detailed in the s 12K report. The reduction in the debt is primarily as a result of the following:

- A reassessment of the appellant's entitlement to Temporary Additional Support and Accommodation Supplement throughout the period had never been carried out. This resulted in arrears of $3,488.52 being payable to the appellant, which has since been offset against the debt.

- An amount of $2,055.16 had been added to the debt balance twice.

- A review in November 2014 resulted in arrears of Domestic Purposes Benefit of $2,227.46 being owed to the appellant.

The details of this review are set out at paragraph 3.5 of the s 12K report.

[9] As the appellant did not challenge the latest assessment of the debt, we accept that the debt has now been correctly quantified.

[10] The issue for the Authority is whether or not the debt should be recovered.

[11] The appellant is a person whose efforts to work to support her family, upskill, and parent four children are to be admired. However, 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.

[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 for us to consider subsequent criteria.

[14] We must first consider whether the overpayments arose as a result of an error on the part of an officer of the Ministry. The appellant pointed to two matters. The first related to the difficulties that she had with the Inland Revenue Department and being able to take advantage of the Working for Families tax credit. On at least two occasions it was suggested that the appellant cancel her Domestic Purposes Benefit and receive the Working for Families tax credit instead. This would have enabled her to avoid Domestic Purposes Benefit overpayments. The appellant says that she was unable to take advantage of the Working for Families tax credit because the Inland Revenue Department considered that teachers only worked five hours a day. Thus, when in fact she had a .5 teaching position, they considered that she was only working 12.5 hours per week instead of the 20 hours per week required before a person can receive the Working for Families tax credit. She pointed out that the current Primary Teachers Collective Agreement provides "the normal hours of work for employees should as far as practical however not exceed 40 hours per week Monday to Friday".

[15] We agree with the appellant that for the Inland Revenue Department to regard classroom contact hours as the only period a teacher is working is not easy to understand. However, concerns about the rulings of the Inland Revenue Department do not constitute an error by an officer of the Ministry of Social Development as required by s 86(9A) of the Act.

[16] The overpayments in this case have arisen primarily because at times the appellant has not reported her income in a way which would enable overpayments to be avoided. For example, on occasions when her benefit was resumed during school holiday periods there was often a delay in the appellant advising that she had returned to employment at the beginning of the school year. On other occasions when she did relieving work, her income was reported when her payslip was received rather than at the time the work was done. At times it may have been difficult for the appellant to report her income soon enough for her benefit payments to be reduced, but this does not mean that the appellant should be permitted to receive and retain a higher benefit payment that the one she was entitled to.

[17] In May 2010 there was discussion about the appellant declaring her income in advance to avoid overpayments. The appellant did declare her income in advance on that occasion. She did not continue to do so. Over the years there were various

discussions and communications with the appellant advising her of the overpayments incurred.

[18] The second point made by the appellant was that she was not provided with enough information about the timing of her declarations of income by the Ministry to avoid overpayments, and that this constituted an error on the part of an officer of the Ministry. In response, the Ministry point to an email of 12 May 2010 in which the appellant reported her likely income in advance and wrote "I guess this is what I need to do each fortnight, to simplify things and do it before Friday when you have the day off. I will send through my payslip when I get it". This email indicates that the appellant had been told that by declaring her income prior to receiving her payslip or in the week it was earned, overpayments could largely be avoided. Most of the debt to which this appeal relates occurred after May 2010, but in respect of the debt in the previous review year, we note that part was caused because the appellant did not advise that she had resumed work on 28 January 2009 until 10 February 2009. The appellant must have been aware that this would result in an overpayment. She was also advised by letters on 29 June 2009 and 29 July 2009 that if her income was likely to be the same as it had been in the previous 52 weeks it was likely that she would not be entitled to Domestic Purposes Benefit in the next 52 weeks. Despite this advice, she elected to continue receiving a Domestic Purposes Benefit and was overpaid.

[19] We acknowledge that reporting income while receiving a benefit can have its difficulties and can result in overpayments where a beneficiary has fluctuating income. Whilst it can be annoying for the beneficiary to find they have a debt despite their efforts to inform the Ministry of their income, where there is no fault on the part of the Ministry, in most situations the debt will need to be recovered. A suitable repayment rate can be negotiated and no interest is payable on the debt.

[20] Because we are not satisfied that the overpayments have arisen as a result of any errors on the part of an officer of the Ministry in this case we cannot direct that the debt not be recovered pursuant to the provisions of s 86(9A) of the Act.

[21] 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.

[22] 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].

[23] 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 her dependent children are also relevant.

[24] 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

[1] *Director-General of Social Welfare v Attrill and others,* [1998] NZAR 368.

circumstances have been described as *"extraordinary,"* [2], *"unusual,"* [3] and as *"rare and unusual,"* [4] but these are not tests.

[25] Exercise of the discretion under s 86(1) or s 86A does not result in a debt being written off. Rather, it is a discretion about the action of recovering the debt. It is a discretion exercised in relation to a wide range of beneficiary debt. In some cases the debts will be large and in others small. In some cases the debt may have arisen as a result of fraud, in other cases the debt will have occurred through no fault of the beneficiary. The High Court has previously found that the discretion is a general one. [5]

[26] In the case of a person who has part-time employment, it is not uncommon for there to be difficulties in the beneficiary reporting income and for a review at the end of the beneficiary's review year to find that underpayments and overpayments have occurred.

[27] In this case, the appellant was advised at the end of each review year from 2009 onwards that a debt had been incurred. There were also (at various times) discussions with her about ways in which incurring debt could be avoided. It is understandable that the appellant did not always declare her income as quickly as she may have done to avoid an overpayment. She was a very busy person with many demands on her time, but the reality was that she must have been aware that at the end of each year there may be an overpayment which she might have to repay if her income was not reported promptly. The appellant did not challenge the debt at the end of each review year. Rather, it seems her concern arose when faced with the accumulation of debt over a period of years and when she ceased to receive a "parent" benefit.

[28] We have previously acknowledged the difficult circumstances that the appellant has had to cope with over the time concerned and her unrelenting effort to support herself and her family.

[29] On the other hand. the Chief Executive has a legal obligation to pay only amounts to which a person is legally entitled. The Government has set rates of benefit payable under the Act and has provided for a recovery of debt in s 86(1) and s 86A.

[30] We have considered the fact that the appellant's situation in relation to her ability to apply for Working for Families appears to be the result of an unusual position taken by the Inland Revenue Department. However, having been made aware that she was not eligible for Working for Families, the appellant knew that if she did not report her income at least at the end of the week in which it was earned, then it was likely she may incur overpayments.

[31] The appellant has presented a budget which shows a significant deficiency between her current income and expenditure. It does not include any payments of Child Support but this would not account for the deficiency in her budget. One of the appellant's children apparently has a need for maths tuition. She is also repaying a debt to the Inland Revenue Department arising from her marriage. Any reduction in the appellant's income at the present time will impact on her ability to support the

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[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* [2010] NZLR 559 (HC).
[5] *Harlen v Ministry of Social Development* [2012] NZHC 669.

dependent children in her care and to a lesser extent, her older children who are at university.

[32] Taking into account all the circumstances in this case, we direct that the Chief Executive defer taking any action to recover the debt until 1 February 2018. By this time the appellant's older children will have completed their study, her third child will have completed secondary school and she will have one dependent child in her care. We are not prepared to direct that no steps should be taken to recover the debt on a permanent basis.

[33] We share the appellant's concern that had she not challenged the debt, the debt balance claimed by the Chief Executive as owing would have been almost double what was in fact owed. This is a matter of great concern. The appellant is a person with the energy and skill necessary to challenge the Ministry. The Authority is extremely concerned that many other people in the appellant's position do not challenge the Ministry's assessments and are therefore left repaying debt to the Ministry which they do not owe. The situation is exacerbated by the routine failure of the Ministry to provide easy to understand information about how the debt has been calculated. This is a matter which requires the Chief Executive's urgent attention.

[34] We further note that it has been stressful for the appellant, with many other demands on her time, to challenge the Ministry's decision and that the errors made by the Ministry in calculating the debt are significant. These errors in themselves have also caused her stress. We recommend the Chief Executive consider making an *ex gratia* payment to the appellant.

[35] To the extent that recovery of the debt is to be deferred until 1 February 2018 the appeal is allowed. In other respects the appeal is dismissed.

DATED at WELLINGTON this 1st day of July 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