[2015] NZSSAA 050

Reference No. SSA 171/14

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
Lady Tureiti Moxon - Member

HEARING at AUCKLAND on 9 March 2015 by telephone conference call and on the papers.

APPEARANCES
The appellant in person
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 New Zealand Superannuation paid in the period 15 July 2007 to 6 May 2009 amounting to $3,850.17.
[2] The issue in this case is whether the debt should be recovered.

Background

[3] The appellant is aged 72 years. He receives New Zealand Superannuation on a portable basis in Australia. He has been paid New Zealand Superannuation in Australia in accordance with the reciprocal agreement between Australia and New Zealand since 8 July 2007.

[4] In February 2012 the Ministry received information about a revision of the annual notional rate of the Australian Age Pension that the appellant was entitled to receive in respect of the period 15 July 2007 to May 2009. The revision by Centrelink of the appellant's Australian Age Pension entitlement was a result of Centrelink becoming aware of the appellant's income from employment during that period. It is said that the appellant had either under-declared or failed to declare income. As a result of the revision in the Australian notional rate the appellant's New Zealand proportional rate of Superannuation entitlement was reviewed for this period. The resulting retrospective review resulted in the Ministry establishing that the appellant had been overpaid $5,195.61 and underpaid $1,345.44 leaving net debt to

be recovered of $3,850.17. The appellant was advised of this in a letter dated 5 March 2012.

[5] Article 9(3) of the Reciprocal Agreement with Australia[1] provides that the rate of New Zealand Superannuation payable to the appellant shall not exceed the amount of the Australian Age Pension that would have been payable to him if he was entitled to receive the Australian Age Pension, but not entitled to receive New Zealand Superannuation.

[6] On behalf of the Chief Executive it is submitted that when he became aware that the appellant's Australian notional rates had been reviewed he was obliged to review the appellant's New Zealand Superannuation entitlement to comply with the provisions of Article 9(3) of the Agreement, to ensure that the appellant was paid no more by way of New Zealand Superannuation than the amount of the Australian notional rate.

[7] The appellant did not dispute the calculation of the overpayment. Rather he submitted that the debt should not be recovered. He refers to his personal circumstances and the fact that Centrelink have waived a number of debts established there in relation to the same period. He says that in fact he understood he was entitled to earn $18,000 per annum without it affecting his entitlement to the Australian Age Pension. In fact he earned only $19,215 – slightly more than the limit.

Decision

[8] 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 was caused partly or wholly 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.

[9] 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.

[1] See the Social Security (Reciprocity with Australia) Order 2002.

[10] The first issue the Authority must consider is whether or not the debt was caused wholly or partly by an error on the part of the Ministry. It is submitted on behalf of the Chief Executive that the debt was not caused as a result of any error on the part of the Ministry in New Zealand. Rather the debt arose because Centrelink, on being advised of the appellant's income in the relevant period, reviewed the notional rate of Australian Age Pension payable to the appellant. This resulted in a lower rate of Australian Age Pension being payable to the appellant and in turn a lower rate of New Zealand Superannuation being payable.

[11] It is further submitted that although the appellant's debts have been waived by virtue of a consent order made by the Australian Administrative Appeals Tribunal, the debts in Australia were caused because the appellant under-declared or completely failed to declare his income. The Australian tribunal process did not vary the fact that the debts had been correctly established. This is confirmed in an email from a Centrelink staff member dated 18 May 2015.

[12] We accept that although the appellant lodged an appeal with the Australian Administrative Appeals Tribunal the information available indicates the matter did not go to a hearing. The appeal was settled on the basis of Centrelink waiving its right to recover part of the debt rather than any finding being made that the debt had been established incorrectly. We also note one of the debts, namely the debt for the period 3 March 2010 to 30 March 2011 which Centrelink waived is not relevant to this appeal as it falls outside the period reviewed in this appeal.

[13] We are not satisfied that the debt of New Zealand Superannuation arose as a result of an error by an officer of the Ministry. We cannot direct that the debt not be recovered pursuant to the provisions of s 86(9A) of the Social Security Act 1964.

Action to recover debt under s 86(1) or s 86A

[14] 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.

[15] 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.[2]

[16] 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.

[17] 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.

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[2] *Director General of Social Welfare v Attrill and others,* [1998] NZAR 368.
[3] *McConkey v Director-General of Work & Income New Zealand* HC Wellington AP 277-00,

[18] 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 taking action to recover the debt. It is a general discretion.[6]

[19] The Australian debt, and hence the New Zealand debt, arose because of the appellant's failure to declare income, or declare income correctly at a time which would avoid an overpayment. The consent order made in Australia provides that Centrelink has agreed to waive recovery of all of the debt which occurred in the period of 12 December 2007 and 5 February 2008. It agreed to partially waive the debt in respect of the period 15 October 2008 to 6 May 2009. We are unaware of the reasons for the waiver or partial waiver.

[20] The appellant says that all of the debt is a result of the employment he undertook in the period 2 August 2008 to 26 October 2008, a period of just under three months, when he worked as a supervisor on a job at **XXXX** for which he earned approximately $12,450. The appellant says that from 1 November to 21 November he only worked one week. He worked two weeks in December, two weeks in January, three weeks in February and he had finished work by 26 February 2009. The appellant's concern was that Centrelink, instead of spreading the income over 12 months spread it over a three month period. The appellant says that over the 12-month period his wages were only $19,215. He was allowed to earn $18,000. In effect, taken over a year the amount he earned in excess of the total amount he was entitled to earn was relatively modest. We have been unable to confirm this. Centrelink says the debts were correctly established.

[21] We note the following:

(i) The waiving of the debt in Australia is a relevant factor to be taken into account. It is reasonable to infer that Centrelink was satisfied that there were grounds for a waiver.

(ii) The Australian waiver for the period 15 October 2008 to 6 May 2009 is only partial. Repayment of $1,000 has been waived. The appellant is to repay $780.06. We do not know the basis for this.

(iii) The calculation of the New Zealand debt includes both underpayments and overpayments. It is likely that the appellant was inconvenienced by the underpayment of his New Zealand Superannuation at various times.

(iv) New Zealand Superannuation is not income tested. It is only the operation of the reciprocal agreement which requires the Ministry in New Zealand to establish a debt. However to forego recovery of the debt gives the appellant an advantage over other recipients of New Zealand Superannuation in Australia.

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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* HC Auckland [2010] 1 NZLR 559 (HC).

[6] *Harlen v the Ministry of Social Development, [2012] NZHL 669.*

(v) The appellant is aged 73 years. He suffers from back problems. His only income is his pensions from Australia and New Zealand. He has occasional income from lawn mowing. He says he has difficulty in making ends meet.

(vi) The appellant refers to the difficulties he has had in dealing with the debt, and the stress it has placed him under.

(vii) The New Zealand debt relates to a period of 22 months – not simply the three month period in 2009 referred to by the appellant or even the 12 month period in which that three month period fell.

[22] Taking into account all of the circumstances we direct that the Chief Executive take no steps to recover the debt as follows:

(i) In respect of the period 12 December 2007 to 5 February 2008, this being the first period in respect of which the Australian debt has been waived.

(ii) Two thirds of the debt in respect of the period 15 October 2008 to 6 May 2009, this being the period Centrelink has waived part of its debt.

[23] The balance of the debt is to be recovered. The Ministry are to advise the appellant of the recalculated amount to be recovered.

[24] The appeal is allowed in part.

DATED at WELLINGTON this 4th day of August 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