

Reference No. SSA 024/15

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

HEARING at AUCKLAND on 10 August 2015

APPEARANCES

The appellant in person

Mr B Moodley 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 28 August 2013 to 11 March 2014 amounting to \$8,091.09.

[2] The overpayment was established because the appellant was absent from New Zealand for more than 30 weeks.

[3] The primary issue in this case is whether or not the debt should be recovered.

Background

[4] The appellant applied for New Zealand Superannuation on 9 May 2013. She received written advice on the same day that her application had been granted from 18 May 2013.

[5] The application completed by the appellant included a statement signed by the appellant confirming that she had read her obligations which included an obligation to advise the Ministry of any travel overseas. The letter advising the appellant of the grant of New Zealand Superannuation also confirmed that she must advise the Ministry of any travel overseas. In fact, the appellant left New Zealand the following day on 10 May. She did not advise the Ministry of her departure.

[6] The appellant returned to New Zealand on 10 August 2013 but departed again on 17 August 2013. Again, she did not inform the Ministry of her departure.

[7] The Ministry became aware of the appellant's departure as a result of a data match with New Zealand Customs on 18 February 2014. A letter was written to the appellant asking that she make contact. Subsequently, the Ministry stopped her New Zealand Superannuation payments from 12 March 2014.

[8] A review of the appellant's entitlement to a benefit in respect of the period 18 August 2013 to 11 March 2014 was carried out. On the basis that the appellant had been absent from New Zealand for more than 30 weeks, it was determined that she was not entitled to payment of New Zealand Superannuation for the first 26 weeks of her absence, and an overpayment of \$8,091.09 was established. The calculation of the overpayment is set out at page 39 of the section 12K report.

[9] The appellant 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.

[10] The appellant says that she was very stressed at the time of her departure from New Zealand on 17 August 2013 and simply overlooked telling the Ministry that she was leaving. She left New Zealand to travel to **XXXX** in Australia, where her brother lives. The appellant said that her brother has multiple health problems including diabetes, depression and sleep apnoea. He is overweight and his alcohol consumption is a concern. The appellant said she had promised her mother to look after her brother. As a trained nurse, she was able to provide significant assistance to him. She had ensured that he had a proper diet and regular medication regime. She checked his diabetes, reassured him and arranged to reconnect him with friends who are able to provide him

with support. At the time that she had first received a communication from the Ministry at the beginning of March 2014, she was on the brink of returning to New Zealand and, in fact, did return on 29 March. She had emailed the Ministry on 3 March to set up an appointment for 29 March.

Decision

[11] The New Zealand Superannuation and Retirement Income Act 2001 provides that a person is not entitled to New Zealand Superannuation while that person is absent from New Zealand, unless the exceptions contained in sections 22 to 35 of the Act (or any reciprocal agreement with another country) applies.

[12] Section 22 of the Act sets out one of the exceptions to the rule that New Zealand Superannuation cannot be paid while a person is absent from New Zealand. It provides that a person can be paid New Zealand Superannuation for the first 26 weeks of any absence, if that person's absence does not exceed 30 weeks. Section 22(b) provides that if the person's absence exceeds 30 weeks and the Chief Executive is satisfied that this was for reasons beyond the person's control that he or she could not have reasonably foreseen before departure, the person can continue to receive New Zealand Superannuation for the first 26 weeks. In effect, if the person does not return within 30 weeks, then they cannot be paid for the first 26 weeks of any absence from New Zealand.¹

[13] In the appellant's case, the 26 weeks came to an end on 8 February 2014 and the 30-week period ended on 8 March 2014. The appellant returned to New Zealand on 29 March, 33 weeks after she left New Zealand.

[14] The appellant has provided a number of medical reports relating to her brother's condition but these do not suggest that there was any crisis in her brother's health in late February/early March 2014 which prevented her from returning to New Zealand.

[15] We are not satisfied that any of the exceptions in sections 22 to 35 of the Act apply in this case. Because the appellant did not return to New Zealand within 30 weeks, she was not entitled to payment in the first 26 weeks of her absence. We are satisfied that the Chief Executive was correct to establish an overpayment. The issue for the Authority is whether or not the overpayment should be recovered.

[16] 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

¹ For discussion of this section see *Beer & Walters v Ministry of Social Development* [2012] NZHC 205.

Social Security Act 1964. This provision gives the Chief Executive the discretion not to recover a debt in circumstances where:

- (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.

[17] 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.

[18] 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.

[19] The first issue we must consider is whether or not the debt was caused by an error by an officer of the Ministry. Both the customer obligations form completed by the appellant when she applied for New Zealand Superannuation, and the letter telling her of the grant of New Zealand Superannuation advised the appellant that she should contact the Ministry if she was travelling overseas. The appellant did not do so. Had she done so, it is likely that she would have received advice about the need to return to New Zealand within 30 weeks. We also note that there is information on the Ministry's website to the effect that if a person does not return within 30 weeks of leaving New Zealand they may need to repay all of the money paid since they left.

[20] We are not satisfied that the debt was caused as a result of an error on the part of an officer of the Ministry. Rather, it was caused by the appellant failing to advise the Ministry that she was travelling overseas or failing to return within 30 weeks of her departure.

[21] Because we are not satisfied that the debt occurred as a result of an error on the part 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.

[22] 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.

[23] 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

[24] 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.

[25] 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 The discretion has been described as a general discretion.⁷

[26] We note that the appellant did email the Ministry on 3 March 2014 to advise of her return on 29 March. It is possible that if the Ministry had picked this up quickly enough they could have pointed out to her that she needed to be back by 8 March to avoid an overpayment. The timeframe was short and it is not clear that the appellant would have been able to return before 29 March in any event. She was clearly planning to return on 29 March.

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

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.

⁷ *Harlen v Ministry of Social Development* [2012] NZHC 669.

[27] While the appellant says that she was stressed at the time she left New Zealand and this caused her oversight, we note that in fact the appellant spent less than six weeks in New Zealand in 2013. Her ticket to **XXXX** was booked in July, so the trip was not sudden or unexpected. She was only in New Zealand for seven days immediately prior to her departure to **XXXX**, having apparently spent the previous months in **XXXX** with her son and daughter-in-law. This raises a question about whether the appellant was actually resident in New Zealand in any event.

[28] As previously noted, there does not seem to be any compelling reason why the appellant could not have returned to New Zealand within 30 weeks, had she chosen to do so.

[29] The appellant and her husband are both now in receipt of New Zealand Superannuation and both are working. They have an income in addition to their New Zealand Superannuation of at least \$1,300 per week. They rent at the present time but also have at least one investment property. The appellant did not say that she could not repay the debt.

[30] Taking into account all of the circumstances, including the appellant's financial circumstances, we are not prepared to direct that the Chief Executive take no steps to recover the debt.

[31] The appeal is dismissed.

DATED at WELLINGTON this 21st day of August 2015

Ms M Wallace
Chairperson

Mr K Williams
Member