[2015] NZSSAA 085

Reference No. SSA 088/14

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
Lady Tureiti Moxon - Member

DECISION ON THE PAPERS

Introduction

[1] The appellant appeals against decisions of the Chief Executive upheld by a Benefits Review Committee to:

(a) Establish an overpayment of New Zealand Superannuation paid in respect of the period 11 August 2012 to 28 January 2013 amounting to $2,524.24 (excluding an amount of $126 already recovered).

(b) Suspend his entitlement to New Zealand Superannuation from 25 September 2013 on the basis that he had no entitlement.

Background

[2] The appellant is married and living in Australia.

[3] He was granted New Zealand Superannuation on 9 August 2012 in accordance with the provisions of the New Zealand Government's reciprocal

agreement with the Australian Government.[1] Payments were made to him on the basis of the lower of the Australian notional rate or the New Zealand proportional rate. The lower rate in this instance was the Australian notional rate of AU$102.41 gross per week. The appellant was also advised that he must test his eligibility for a United Kingdom pension.

[4] Subsequently, on 28 January 2013 the Ministry received advice that the appellant had been granted a United Kingdom pension at £57.40 per week from 11 August 2012.

[5] In September 2013, a review of the appellant's entitlement to New Zealand Superannuation was completed on the basis of the United Kingdom payment of £57.40 per week being deducted directly from the appellant's entitlement to New Zealand Superannuation pursuant to the provisions of s 70 of the Social Security Act 1964.

[6] It was concluded that the appellant had been overpaid New Zealand Superannuation by an amount of $6,641.25 in respect of the period 11 August 2012 to 24 September 2013.

[7] In addition, as the amount of the United Kingdom pension the appellant received at that time exceeded the rate of New Zealand Superannuation that the Ministry understood was payable, it was determined that the rate of New Zealand Superannuation payable was nil. The appellant was advised of this by letter dated 20 September 2013.

[8] The appellant sought a review of 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.

[9] In the process of preparing the Section 12K report, a decision was made that the overpayment in respect of the period 28 January 2013 to 24 September 2013 amounting to $3,907.52 would be written off, as the Ministry was aware of the appellant's United Kingdom pension entitlement during this period and failed to review his New Zealand Superannuation entitlement promptly. The balance claimed is $2,524.24 of which $160 has already been recovered.

[10] In his appeal to the Authority the appellant questions why, having calculated the United Kingdom portion of his New Zealand pension, the amount of the United

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

Kingdom pension should be deducted directly from his entitlement to New Zealand Superannuation. The appellant notes that he does not understand how the Ministry have arrived at their decision. He requests a clear and fair explanation.

[11] The appellant also questions why it is that his United Kingdom pension is $429.29 a month, Centrelink Australia pay $245.42 a month, but the New Zealand pension is only $106.72, although he spent the larger part of his working life in New Zealand.

Decision

How is the appellant's entitlement calculated?

[12] New Zealand Superannuation cannot be paid overseas unless the recipient can bring themselves within one of the exceptions contained in ss 22−35 of the New Zealand Superannuation and Retirement Income Act 2001, or that an agreement or convention adopted under s 19 of the Social Welfare (Transitional Provisions) Act 1990 applies.

[13] In this particular case the New Zealand Government has a reciprocal agreement on social welfare with the Government of Australia. This agreement governs the way in which New Zealand Superannuation can be paid in Australia.[2]

[14] Article 6 of the agreement provides that a person who would be entitled to New Zealand Superannuation under the social security law of New Zealand shall be deemed to be ordinarily resident and present in New Zealand on the date of application if he or she is an Australian resident.

[15] We understand the appellant is an Australian resident (as defined in Article 5 of the agreement) and is entitled to receive New Zealand Superannuation under Article 6 of the reciprocal agreement.

[16] Article 9 sets out the way in which the rate of New Zealand Superannuation is to be ascertained. It provides for a formula. The first element of the formula is to calculate the person's periods of working age residence in New Zealand between the ages of 20 and 65 years. The period is calculated in whole months. In addition, where the applicant is not a permanent resident of Australia, periods of working age residence in a third country are included as periods of working age residence in New Zealand.

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[2] See Schedule 1 of the Social Welfare (Reciprocity with Australia) Order 2002.

[17] In this case, the appellant's periods of working age residence have been calculated on the basis of 93 months' residence in the United Kingdom and 443 months' residence in New Zealand between May 1975 and his departure for Australia on 3 April 2012, giving the appellant total New Zealand residence (including his United Kingdom residence) of 536 whole months.

[18] The second element of the formula is to calculate the maximum rate of New Zealand Superannuation payable and deduct from this amount an amount agreed between the New Zealand and Australian authorities which has been published in the *New Zealand Gazette*.[3]

[19] The maximum rate payable at the time the appellant became eligible for New Zealand Superannuation was $302.40 gross per week. The deduction published in the *New Zealand Gazette* was 15%, which reduced the maximum benefit rate to $257.04 gross per week.

[20] The formula assessment to produce the proportional rate of New Zealand Superannuation payable to the appellant is as follows:

$$\frac{536 \text{ (months' working age residence in NZ)}}{540 \text{ (working months' working age residence between 20-65 years)}} \times \$257.04 \text{ (maximum NZ Superannuation rate payable)} = \$255.14 \text{ gross}$$

[21] The New Zealand proportional rate is $255.14 gross per week. However, Article 9.4 of the reciprocal agreement then provides that regardless of the proportional rate calculated, 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. 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 New Zealand Superannuation.

[22] Australian Age Pension is income and asset tested. The appellant's wife is in employment and we understand this is taken into account in assessing his Australian Age Pension entitlement. As at 9 August 2012, the Ministry were advised that the appellant's entitlement to an Australian notional rate of age pension was AU$82.46

[3] Article 9.1(b)(i) of the reciprocal agreement.

per week or NZ$104.23 per week. Accordingly, the amount of New Zealand Superannuation payable could not exceed $104.23 per week.

[23] Centrelink Australia later advised that it had assessed the appellant's entitlement incorrectly for the period 22 April 2013 to 20 September 2014. As at 22 April 2013, the weekly rate was AU$113.49. This matter is dealt with later in this decision.

[24] Having established the rate of New Zealand Superannuation payable, the Chief Executive is then obliged to apply the provisions of s 70 of the Social Security Act 1964 to any overseas pension received by the appellant. Section 70 provides:

- where a person receives an overseas pension; and
- the payment forms part of a programme providing benefits, pensions. or periodic allowances for any of the contingencies for which benefits, pensions, or periodic allowances are paid under the New Zealand social security legislation; and
- the programme is administered by or on behalf of the Government of the overseas country; then

The amount of the overseas pension must be directly deducted from the entitlement to New Zealand Superannuation.

[25] Article 15 of New Zealand's reciprocal agreement with the United Kingdom[4] also provides for the pension the appellant receives from the United Kingdom to be deducted from any entitlement to New Zealand Superannuation.

[26] Both the High Court in New Zealand[5] and this Authority[6] have previously found that the basic and graduated United Kingdom pension are pensions which need to be deducted from an entitlement to New Zealand Superannuation, pursuant to the provisions of s 70 of the Act.

[27] The rationale behind this deduction is that the appellant should not be advantaged over other recipients of New Zealand Superannuation in Australia who are not entitled to receive a pension from a third country such as the United Kingdom.

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4 Social Welfare (Reciprocity with the United Kingdom) Order 1990.
5 *Dunn v Chief Executive of the Ministry of Social Development* [2008] NZAR 267.
6 [2013] NZSSAA 43.

[28] In his original Notice of Appeal, the appellant questioned why the greater part of his pension payments are now being received from the United Kingdom when he had spent most of his working life in New Zealand. He suggests that New Zealand should pay the greater amount. The answer is that the reciprocal agreements with both Australia and the United Kingdom, and s 70 of the Social Security Act 1964, govern the calculation of the payment due to him.

Suspension of payment

[29] The second issue raised by this appeal was the decision to suspend payment of New Zealand Superannuation to the appellant from 25 September 2013. On 20 September 2013, the Ministry obtained from Centrelink a list of Australian notional rates of age pension relating to the appellant. The Ministry, using these rates to calculate the appellant's New Zealand Superannuation entitlement after the deduction of his United Kingdom pension, concluded that the appellant no longer had entitlement to New Zealand Superannuation, as the amount of the United Kingdom pension he had received exceeded the entitlement to New Zealand Superannuation based on the Australian notional rate. As a result, his entitlement to New Zealand Superannuation payments was suspended. We understand that the Australian notional rates were incorrect in that Centrelink had made a mistake in relation to the appellant's assets which affected their calculation of his entitlement. This mistake was subsequently corrected and the appellant's entitlement to New Zealand Superannuation was reviewed in respect of the period 22 April 2013 to 20 September 2013. This resulted in the Ministry assessing that the appellant had an entitlement to New Zealand Superannuation and his payments were reinstated. Arrears of $1,796.31 were paid to the appellant.

[30] On the basis of the information available, we accept that the Ministry's decision to suspend the appellant's New Zealand Superannuation payments on 25 September 2013 was correct at the time, as it was obliged to follow the advice given to it by Centrelink.

[31] There is no suggestion that the Ministry were at fault in this suspension. As the payments have now been reinstated and arrears paid we cannot take this matter any further.

Overpayment

[32] As noted at the outset, it was a backpayment of United Kingdom pension which resulted in the establishment of the overpayment in this case. The overpayment was originally in respect of the period 11 August 2012 to 24 September 2013 and

amounted to $6,641.25. The Chief Executive has now conceded that in respect of the period 28 January 2013 to 24 September 2013 the debt arose because the Ministry did not act promptly on the information it received that the appellant was receiving a United Kingdom pension. This part of the debt has now been written off.

[33] The calculation of the overpayment is set out in pp 28-36 of the Section 12K Report. Pages 28-31 cover the period with which we are now concerned. The appellant raises an issue as to the exchange rate used. Different exchange rates are used for each month. Up until 7 December 2013 the exchange rate used was governed by the Social Security (Overseas Pension Deduction) Regulations 1996. These have since been replaced by the Social Security (Overseas Pension Deduction) Regulations 2013. The appellant refers to the amounts received in his bank account, however, the Chief Executive is required to apply the exchange rate which is calculated in accordance with the Regulations. This may differ from the actual rate that applied to a payment made into his bank account.

[34] We are prepared to accept that the overpayment has been calculated correctly. The issue is whether or not we can direct that the debt not be recovered pursuant to the provisions of s 86(9A) of the Social Security Act 1964.

[35] 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 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.

[36] 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.

[37] 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.

[38] The first issue for the Authority is whether or not the debt is the result of an error on the part of the Ministry. The Chief Executive has accepted that the debt arose as a result of an error on its part in respect of the period 28 January 2013 to 24 September 2013. We are therefore concerned only with the period 11 August 2012 to 28 January 2013.

[39] Centrelink apparently became aware of the grant of the United Kingdom pension in October 2012 and began using this information in calculating the appellant's entitlement to benefit at that point. It appears that while Centrelink apparently advised the New Zealand authorities of the reduction in the appellant's entitlement to the Australian Age Pension, they did not inform the Ministry in New Zealand that this was the result of the appellant's receipt of a United Kingdom pension. There would be no particular reason for the Ministry to check the reason for a change in the rate of Australian pension payable. It could equally have been as a result of an increase in the appellant's Australian income which resulted in the change. For whatever reason, there is no evidence that the Australian authorities, the United Kingdom authorities, or the appellant advised the Ministry prior to 28 January 2013 that the appellant had been awarded a United Kingdom pension. The overpayment has occurred as a result of the appellant receiving a backdated payment of United Kingdom pension and a delay in the Ministry being informed of the grant of the pension. We are not satisfied that the overpayment in respect of the period 11 August 2012 to 28 January 2013 arose as a result of an error on the part of the Ministry. We are not therefore able to direct that the debt not be recovered pursuant to the provisions of s 86(9A) of the Social Security Act 1964.

[40] 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.

[41] 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.[7]

[42] 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.

[43] 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",[8] "unusual",[9] and as "rare and unusual",[10] but these are not tests.[11]

[44] The appellant says that he and his wife were told on a number of occasions that they would be entitled to receive the full amount of New Zealand Superannuation while living in Australia and this information was important in making the decision to move to Australia. He refers to the many mistakes made by the Ministry in calculating the debt and the lack of clear explanation about how his entitlement has been calculated.

[45] There can be no doubt the issue regarding the overpayment has been stressful and time-consuming for the appellant. Not only did the Ministry delay in actioning the advice about the appellant's United Kingdom pension but there was a lengthy delay in the Ministry producing its Section 12K Report. The mistake by Centrelink relating to the amount of his Australian Age Pension further complicated the matter. The calculation of his entitlement to New Zealand Superannuation is complicated and his frustration at the Ministry's failure to answer questions, mistakes and the delays is understandable.

[46] We are also concerned that the appellant may not have been given adequate information about his pension entitlement before he left New Zealand – in particular,

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[7] *Director-General of Social Welfare v Attrill* [1998] NZAR 368.
[8] *McConkey v Director-General of Work & Income New Zealand* HC, Wellington AP277-00, 20 August 2002.
[9] *Cowley v Chief Executive of the Ministry of Social Development* HC, Wellington CIV-2008-485-381, 1 September 2008.
[10] *Osborne v Chief Executive of the Ministry of Social Development* [2010] 1 NZLR 559 (HC).
[11] *Van Kleef v Chief Executive of the Ministry of Social Development* [2013] NZHC 387.

that if he was entitled to a United Kingdom pension it would be deducted from any New Zealand benefit entitlement.

[47] Balanced against those factors is the fact that a substantial portion of the original debt has been written off and the appellant is not without the means to repay the debt. The appellant has not suggested that he would be without the basics of food, shelter and clothing if he were required to repay the debt. The appellant's wife works full-time. They own their own home and have some savings. Taking into account all the circumstances, we are not prepared to direct that the debt not be recovered, pursuant to s 86(1).

[48] To the extent the Chief Executive has agreed not to recover part of the debt as a result of this appeal, the appeal is allowed in part. To the extent that part of the debt is to be recovered, the appeal is dismissed.

DATED at WELLINGTON this 13th day of November 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