

[2016] NZSSAA 004

Reference No. SSA 130/14

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:

- (a) to suspend payment of New Zealand Superannuation paid to the appellant in Australia from 15 May 2013 on the basis that the appellant had been absent from Australia for a period exceeding 26 weeks; and
- (b) to establish and recover an overpayment of \$9,068.78 in respect of the period 11 May 2009 to 12 October 2012.

Background

[2] The appellant was granted New Zealand Superannuation on 9 November 2005. At the time of his application he was living in Australia. His application was granted based on the provisions of the Social Welfare (Reciprocity with Australia) Order 2002.

[3] On 23 April 2013, the Ministry received advice from Centrelink that the appellant was spending lengthy periods of time in Thailand and only returning to Australia every 12 months for a few weeks. He had been doing this since November 2009. The payment of New Zealand Superannuation was suspended on the basis that the appellant had ceased to live in Australia and was residing in a third country.

[4] Ultimately, Centrelink Australia advised that the appellant had been absent from Australia for the following periods:

9/11/08 to 10/10/09

8/11/09 to 1/11/10

11/11/10 to 4/11/11

13/11/11 to 13/10/12

13/11/12 – ongoing.

[5] The appellant's entitlement to New Zealand Superannuation was reviewed and an overpayment established for the period 11 May 2009 to 12 October 2012.

[6] 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.

[7] The main thrust of the submission made on behalf of the appellant is that he should not be required to repay the debt for the following reasons:

- The appellant believes that he is still considered by the Australian authorities to be resident in Australia.
- The Ministry has made many errors in recording his contact details and been slow to respond to communications. The appellant refers to a number of frustrations in dealing with the Ministry, including having 15 points of contact with the Ministry.
- The appellant received the payments of New Zealand Superannuation in good faith and was unaware that he was obliged to advise either Centrelink or the Ministry of his absence from Australia.
- The Ministry has failed to give the appellant advice about his obligations.

- The appellant alleges that the department knew his travel movements as a result of information sharing with Australia and did nothing for four years. This has resulted in him now being required to pay an overpayment.

Decision

[8] 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 under an agreement or convention adopted under s 19 of the Social Welfare (Reciprocity Agreements, and New Zealand Artificial Limb Service) Act 1990.

[9] The New Zealand Government has a reciprocal agreement with the Government of Australia.¹ This agreement allows for New Zealand Superannuation to be paid in Australia in certain circumstances and it governs the way in which entitlement is calculated. Article 6.1 in particular provides that where a person would be entitled to receive a benefit under the social security law of New Zealand, except that he or she is not ordinarily resident or resident and present in New Zealand on the date of application, that person shall be deemed, for the purpose of the application, to be ordinarily resident and resident and present in New Zealand on that date if he or she is present, either in Australia or New Zealand.

[10] It is this provision that enabled the appellant to apply for and be granted New Zealand Superannuation, although he was living in Australia at the time of his application.

[11] Article 6.4 provides that where a person is receiving a benefit by virtue of the agreement and that person departs for a third country:

- (a) the New Zealand benefit shall continue to be payable in accordance with the provisions of temporary absences under the social security law of New Zealand if that person was a New Zealand resident at the time he or she departed for the third country; and
- (b) in all other cases a benefit shall continue to be payable for a period of 26 weeks.

[12] The significance of this provision is that it does not require consideration of whether or not the person remains ordinarily resident in Australia. As in the case of a

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

person living in New Zealand, payment can only be made for a period of 26 weeks of absence from Australia.

[13] The information available makes it clear that the appellant has spent only brief periods in Australia since 9 November 2008. It is reasonably clear from the periods of the appellant's absence from Australia that his absences are not temporary in nature and extend well beyond 26 weeks.

[14] As a result, he ceased to be eligible for New Zealand Superannuation after the first 26 weeks.

[15] Article 14 of the agreement provides that where a person resides in a third country for a period which exceeds 26 weeks, he or she shall only be entitled to receive the New Zealand benefit while outside of Australia or New Zealand if entitled to receive that benefit under a reciprocal social security agreement that the party paying that benefit has entered into with that third country. New Zealand does not have a reciprocal agreement with Thailand.

[16] We are satisfied that the Chief Executive was correct to suspend payment of New Zealand Superannuation to the appellant in May 2013, after it became aware of his situation.

[17] We are also satisfied that after the first 26 weeks of the appellant's temporary absence from Australia in 2008 the appellant had no ongoing entitlement to New Zealand Superannuation. It was therefore appropriate that his entitlement to benefit be reviewed and an overpayment established. The calculation of the payment in this case is very generous to the appellant. It has been calculated on the basis of entitlement for the first 26 weeks of absence on each occasion he left Australia.

[18] The Australian Authorities have now determined that he was not resident in Australia from 2008 onwards. The periods of time spent in Thailand and Australia make it clear that he was not temporarily absent from Australia but had in fact ceased to live in Australia and was now living in Thailand. Strictly speaking, an overpayment should have been established for the period commencing 26 weeks after 9 November 2008 onwards.

Recovery of debt

[19] 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.

[20] 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.

[21] 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.

[22] The first issue is whether or not the overpayment arose as a result of an error by an officer of the Ministry. The appellant says that the Ministry of Social Development were aware of his absence from Australia and took no action to cancel his benefit at an earlier date. The Ministry deny this allegation and say that there is no Ministry record of Centrelink having advised the Ministry of the appellant's travel movements between Australia and Thailand before 23 April 2013. The Ministry received two communications from Centrelink in November 2008 and November 2009. Both of these communications related to the appellant's address in Australia; both his residential address and his postal address. Neither of these addresses indicates that the appellant had left Australia or that his new contact details were in Thailand.

[23] We are not satisfied that the Ministry received any communication from Centrelink alerting them to the fact that the appellant was no longer living primarily in Australia or of his travel to Thailand, until April 2013.

[24] The second allegation is that the Ministry failed to give the appellant adequate advice about his obligations.

[25] The Ministry point out that the letter advising the appellant of the grant of New Zealand Superannuation of 8 February 2006 clearly stated:

“Change in your circumstances

It is very important that you immediately advise us of any changes in your circumstances. Some changes may affect your entitlement. Examples include address changes, overseas travel, the granting of or change to any overseas pension, a change of marital status. Once you advise us of any changes, we will check that you are being paid your correct entitlements.”

[26] The travel records suggest the appellant left Australia to travel to Thailand for a lengthy period in 2008, some two-and-a-half years after this advice was given. We consider that this advice was sufficient to alert the appellant to the need to contact Work and Income New Zealand if he was travelling to Thailand. There appears to be no dispute that he did not do so.

[27] The appellant also refers to the difficulties he has had dealing with Work and Income since his New Zealand Superannuation was cancelled and the overpayment established, including dealing with 15 different people. This is most unfortunate. However s 86(9A) requires that the debt be caused by an error on the part of an officer of the Ministry. Unsatisfactory service errors which did not actually result in the debt do not meet the criteria for the debt not to be recovered.

[28] We are not satisfied that the overpayment arose as a result of an error on the part of the Ministry in this case. As a result, we are not able to direct that the debt not be recovered pursuant to the provisions of s 86(9A) of the Social Security Act 1964.

[29] 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.

[30] 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

[31] 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.

[32] 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

[33] As previously noted, the debt established is substantially less than the debt that ought to have been established. The result is very fair to the appellant.

[34] The appellant says that his only income is Australian Old Age Pension payments of approximately \$810.90 per fortnight. He says this income is below the accepted poverty line in Australia and New Zealand. He has not disclosed any assets or liabilities. He lives in a rented apartment in Thailand.

[35] It appears that the appellant's financial circumstances are modest, although he has been able to fly between Thailand, Australia and New Zealand in recent years. We are not satisfied that the appellant would not be able to repay the debt by instalment. Such instalments would need to be very modest given the appellant's financial circumstances.

[36] We are not satisfied that this is a situation where we should direct that the debt not be recovered pursuant to s 86(1).

[37] The appeal is dismissed.

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.

DATED at WELLINGTON this 16th day of February 2016

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member

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