

[2016] NZSSAA 036

Reference No. SSA 011/16

**IN THE MATTER**

of the Social Security Act 1964

**AND**

**IN THE MATTER**

of an appeal by **XXXX** of Feilding  
against a decision of a Benefits  
Review Committee

**BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

Ms M Wallace - Chairperson  
Mr K Williams - Member

**HEARING** at WELLINGTON on 12 April 2016

**APPEARANCES**

Mr G Howell for the appellant  
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 New Zealand Superannuation paid in respect of the period 23 June 2014 to 21 June 2015 amounting to \$1,351.42 for the appellant and \$1,351.05 for his wife.

**Background**

[2] The appellant has been in receipt of New Zealand Superannuation since 12 August 2012 when he attained 65 years of age. Since 12 November 2012, the

appellant's wife (Mrs XXXX) has been included in his entitlement to New Zealand Superannuation as a non-qualified partner. Mrs XXXX is aged 51 years.

[3] From the outset, Mrs XXXX advised that she was in part-time employment with Spotless Services earning \$290.85 a week. This amount was charged against the couple's entitlement to New Zealand Superannuation.

[4] The couple left New Zealand in January 2013 with the intention of residing permanently in the Philippines. Mrs XXXX's entitlement to payment was cancelled. The appellant was paid the half married rate on a portable basis.

[5] In June 2013, the appellant and his wife returned to live in New Zealand permanently. On 24 June 2013, Mrs XXXX applied to be included in the appellant's New Zealand Superannuation as a non-qualified partner. Neither the appellant nor his wife was in employment at the time and New Zealand Superannuation was granted at the maximum rate with a non-qualified partner included from 24 June 2013.

[6] On 21 October 2013 Mrs XXXX declared that she was in employment for five hours a week earning \$14.10 per hour. In April 2014, the Ministry were notified that Mrs XXXX had taken up additional employment at a motel working 15 hours per week and earning \$210 per week. As a result, from 23 April 2014 prospective income of \$14,827.28 per annum was charged against the entitlement of the appellant and his wife to New Zealand Superannuation. A letter was sent confirming this decision and again setting out the advice that income of more than \$5,200 would affect the appellant's entitlement to New Zealand Superannuation, reducing it at the rate of 70 cents for every dollar over that amount.

[7] Later on the same day, the appellant advised that he had estimated his wife's income to be \$347 a week, or \$18,044 per annum. He confirmed this information in a review form he returned on 28 April 2014.

[8] In June 2014, the appellant advised that his wife had ceased employment with Spotless Services and the income charged was reduced to \$13,676 per annum. The appellant's New Zealand Superannuation payments increased.

[9] On 7 October 2014, the appellant requested the income charge be increased to \$16,000 as his wife's income fluctuated and he did not want to be overpaid. As a result payments of New Zealand Superannuation to the appellant and his wife were reduced.

[10] At the end of the appellant's benefit review year, a review was carried out in relation to the appellant's entitlement. Confirmation was received that Mrs XXXX had received income of \$19,630.20 gross in the period 23 June 2014 to 21 June 2015. After deducting the exemption of \$5,200, the balance of \$14,430.20 was abated at the rate of 70 cents for every dollar. It was assessed that the appellant had been overpaid \$1,351.42 and Mrs XXXX had been overpaid \$1,351.05. Full details of the calculation are set out at paragraphs 2.2 and 2.3 of the Section 12K Report.

[11] The appellant was advised of the decision to establish and recover the overpayment.

[12] 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.

[13] The appellant submits that it was extremely difficult for him to estimate precisely what his wife's income would be at various times. His wife's pay fluctuated considerably and it was not practical for him to be able to track these fluctuations. Work and Income have the staff and technology to do so. Moreover, the Ministry have a handshaking ability with Inland Revenue Department computers and instead of expecting pensioners to perform complex mathematical equations they should use that facility to predict benefit entitlement more accurately. In addition, the appellant points out that the \$100 income threshold has not been increased for many years and the 70% abatement rate is extremely high. His estimate was made with proper care but without historical data it was not possible to be accurate. The appellant notes that he has made considerable contributions to the community through voluntary work, including Civil Defence, Victim Support and Community Patrol New Zealand.

## **Decision**

[14] The appellant did not attempt to dispute the calculation of the overpayment. New Zealand Superannuation is paid pursuant to the New Zealand Superannuation and Retirement Income Act 2001. The rates of payment are set out in the first schedule of that Act. The rate payable to a person who is married to a spouse who is not entitled to receive New Zealand Superannuation is set out in Schedule 1(2)(b) of the Act. This provides that the rate payable is subject to Income Test 3. Income Test 3 is defined in s 3 of the Social Security Act 1964.

[15] The sole issue in this case 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.

[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 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 overpayment occurred as a result of an error on the part of an officer of the Ministry. We are satisfied that the appellant was aware that income affected the New Zealand Superannuation entitlement of himself and his wife. We accept that estimating his wife's fluctuating income was not an easy matter. This is particularly the case for a person who is elderly. We have reservations about whether the Ministry might be better placed to make more accurate estimates. The Ministry can carry out data matching with the Inland Revenue Department, but that is not the same as tracking an individual's earnings on a week-by-week basis. We accept that the appellant was conscientious in advising most, but not all, of the fluctuations in his wife's income. The wage summary included in the Section 12K Report indicates that in many weeks she earned

substantially more than the amount he had advised. We are not satisfied there was any error on the part of the Ministry which caused the overpayment.

[20] Because we are not satisfied that there is any error on the part of the Ministry in this case we cannot direct that the debt not be recovered pursuant to the provisions of s 86(9A).

[21] We appreciate that the appellant must be frustrated to have discovered that he and his wife had been overpaid but they have had the use of the money in the meantime and can negotiate a rate of repayment with the Ministry. If he does not wish to incur overpayments in the future the appellant would be best to overestimate his wife's income or alternatively not have his wife included in the assessment of his entitlement to New Zealand Superannuation at all.

[22] We note the appellant's comment that the \$100 income exemption which applies to persons in his circumstances has not increased for many years. It is not within the power of this Authority to change that exemption.

[23] We thank the appellant for drawing to our attention the fact that mileage costs for travel to the Authority differ from other rates of mileage paid by the Ministry.

[24] Because we are not satisfied that the criteria in s 86(9A) has been made out we are unable to direct that the debt not be recovered. The appeal is dismissed.

**DATED** at WELLINGTON this 16<sup>th</sup> day of May 2016

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Ms M Wallace  
Chairperson

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Mr K Williams  
Member