

[2016] NZSSAA 047

Reference No. SSA 176/15

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr R D Burnard - Chairperson
Mr K Williams - Member

HEARING at WELLINGTON on 14 April 2016

APPEARANCES

Mr G Howell for the appellant
Mr R Signal for the Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] This is an appeal against a decision of a Benefits Review Committee of 29 September 2015 which upheld the establishment by the Ministry of overpayments of benefit to the appellant totalling \$6,291.72 with repayments to be made at the rate of \$10 per week.

Background

[2] The appellant currently receives a Supported Living Payment benefit at the single rate and a Disability Allowance of \$61.69 per week.

[3] An allegation was received by the Ministry that the appellant was running a computer repair company in Lower Hutt. She was subsequently interviewed by an

investigator in connection with deposits into her bank account which were identified as income which she had not declared. The overpayment amounts were established and she was advised in writing of the details. She did not attend a hearing of a Benefits Review Committee on 29 September 2015 which upheld the Ministry's decision.

Grounds for appeal

[4] By s 12K of the Social Security Act 1964 ("the Act") there is a requirement of subsection (2) that a notice of appeal to this Authority "shall state with particularity the grounds of appeal and the relief sought". The appellant was represented by an experienced advocate Mr G Howell who lodged an appeal by email on 9 December 2015. The notice recorded that neither the appellant nor her advocate attended the hearing of the Benefits Review Committee "despite our forewarning of the BRC of this". Mr Howell noted that a request had been made to the Ministry on 14 October that the hearing be "voided" and a new hearing set up. He said that request had not been responded to. Mr Howell also recorded that he had emailed indicating the need for reasons why the \$10 per week deduction was occurring and stating that it was entirely unclear why the Benefits Review Committee only considered the repayment of debt issue whereas it was clear "in context the debt itself was disputed". Mr Howell said that the desired result was that the debt be reassessed, and in fact reduced to zero as the claims are unfounded, and that debt recovery cease and that any monies recovered be refunded. He noted that it was preferred that a further Benefits Review Committee hearing be arranged that he and his client could attend "rather than proceeding with an appeal at this stage". He said that "until the Ministry accept the need for a BRC an appeal is the only way forward – hence an appeal is being lodged ...".

Case for the Ministry

[5] Mr R Signal representing the Chief Executive presented a lengthy report under s 12K(4)(e) of the Act on which he relied at the hearing. This report was accompanied by over 700 pages of material.

Authority's findings

[6] From the evidence given by XXXX to the Authority in support of her appeal and the documentation presented by Mr Signal in the Section 12K Report, we note that the appellant conducted her business activities through a company known as XXXX Limited. She provided the Ministry, following the investigator's interview with copies of GST returns for the company for the years 2009 to 2014 inclusive. The investigator's interview had concentrated on payments by way of deposit into the appellant's bank accounts that had not been identified as income. The significance of these payments

according to the Ministry was that the appellant's benefit entitlements should have been abated by the appropriate amount in accordance with the Income Test provisions of s 3 of the Act. The payments deposited to the appellant's account and not reported to the Ministry have primarily been financed by GST refunds to XXXX Limited from time-to-time. For instance a payment into her account of \$800 on 1 May 2013 (evidenced by a bank statement at page 651 of the Section 12K report) follows a GST return of 24 April 2013 which recorded a GST refund of \$877.53.(page 101 of the Section 12K report). Similarly at page 694 of the Section 12K report reference is made to a payment of \$400 on 7 April 2014 following a GST refund of \$793.19 on 2 April 2014 (recorded at page 99 of the Section 12K report).

[7] Mr Howell somewhat faintly contended that these sums fell within the exception in the definition of the word "income" at s 3 of the Act where at Clause (f)(xi) income is not to include "any amount of goods and services tax payable by the Commissioner of Inland Revenue to that person", but this exception is not in our opinion applicable as the refund had already been paid to the entitled recipient, namely XXXX Limited and became part of the funds of the company which were then transferred into XXXX's Achiever Saver account and later into her personal account. It was not GST payable to her. Further, the deposits made to XXXX's account came from the company funds generally and were not confined to GST refunds. This is apparent for instance in connection with the payment of \$800 referred to above which was made following a period when the company made sales of \$2,150.

[8] It was not part of the Authority's enquiry to investigate the basis of the large GST claims for expenses which would have required significant funds to finance but we were surprised at the amount of the losses, which XXXX said were financed from her benefit and some assistance from her mother.

[9] The Authority have accordingly concluded that the overpayments were correctly established by the Ministry and no challenge has been made out by the appellant to the amount of the debt. In broad terms the deposits into the appellant's bank account arose from the business activities conducted by her company which led to significant GST refunds for which she made use of for her personal expenses.

[10] Section 85A(f) of the Act provides that an overpayment is a debt due to the Crown. There is a limited exception to this rule in subsection (9A) of s 86 which reads:

(9A) The chief executive may not recover any sum comprising that part of a debt that was caused wholly or partly by an error to which the debtor did not intentionally contribute if—

(a) the debtor—

(i) received that sum in good faith; and

(ii) changed his or her position in the belief that he or she was entitled to that sum and would not have to pay or repay that sum to the chief executive; and

(b) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

[11] There is no evidence before the Authority that the overpayments in this case were caused by an error or omission by an officer of the department, and therefore no basis on which the Chief Executive could be required to exercise his discretion not to recover the debt. Furthermore a duty is imposed on the Ministry to take such steps as are practicable to recover the debt under the Social Security (Fraud Measures and Debt Recovery) Amendment Act 2014.

[12] There is a discretion as to the method and rate of debt recovery and whether recovery should be deferred on a temporary basis.

[13] The Authority has limited detail on XXXX's financial position and Mr Howell did not produce a statement of her assets and liabilities, nor any reasons why the deduction referred to by the Benefits Review Committee of \$10 per week should be interfered with.

[14] Mr Howell raised an issue regarding the constitution of Benefits Review Committees generally and the Committee involved in this case in particular. He said that the members should be from a different unit of the Ministry and he was concerned that he believed that members of the Committee were from the same WINZ unit "from a desk next door" to the officers who had made the decision. The only requirement regarding the constitution of the Review Committees which is relevant to this contention appear at s 10A(7) which reads:

"No officer of the department shall act as a member of the review committee if that officer was involved in the decision being reviewed."

Mr Howell invited us to set guidelines for the Ministry requiring members of a Committee to be from a different unit to the unit employing the officers who made the original decision. The section does not support this contention but sensibly prohibits an officer involved in the decision from taking part in the review.

[15] Members of Benefit Review Committees are not acting judicially in reviewing Ministry decisions – their function is administrative.

[16] The Authority is not prepared to make any directions on this issue.

Interview with investigator

[17] Mr Howell also said that there was a procedural concern which his client had regarding the interview conducted by the investigator. A full transcript appears as part of the Section 12K Report. The Authority considers that the record of the interview indicates that the process was conducted fairly and openly by the interviewer. XXXX complained that the transcript was “not the same as what was said at the interview” but we were not persuaded by her evidence that any material mistakes had occurred. She said that the interview was very confrontational and that the transcript had not picked up the atmosphere. Naturally she was in a situation where issues arose which disturbed her. The fact that the matter was investigated as a result of anonymous information conveyed to the Ministry clearly troubled XXXX, as did the fact that the Ministry had obtained copies of her bank statements. We do not consider however that any complaints she might have about the conduct of the interview had any bearing on the substance of the allegations against her of failing to declare income received from her company which was required to be applied in abatement of her benefit entitlements.

Conclusion

[18] For the reasons given above this appeal is dismissed.

DATED at WELLINGTON this 24th day of May 2016

Mr R D Burnard
Chairperson

Mr K Williams
Member