

[2016] NZSSAA 059

Reference No. SSA 127/15

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Tauranga 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

HEARING at AUCKLAND on 12 May 2016

APPEARANCES

The appellant in person
Ms S Singh 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 Unemployment Benefit/Jobseeker Support and Temporary Additional Support paid in respect of the period 30 November 2011 to 23 November 2014.

[2] The amount that the Chief Executive is now seeking to recover is made up as follows:

- Unemployment Benefit/Jobseeker Support \$5569.18

• Accommodation Supplement	\$271.00
• Disability Allowance	\$2.20
• Temporary Additional Support	<u>\$3746.41</u>
	\$9588.79

Background

[3] The appellant is aged 49 years. She is single.

[4] The appellant was granted Unemployment Benefit from 30 November 2011 and Temporary Additional Support from 7 December 2011.

[5] She continued to receive these benefits until 23 November 2014.

[6] As a result of a datamatch with the Inland Revenue Department, the Ministry received advice that the appellant had received income from a number of different employers.

[7] In November 2014 the appellant was advised that the Inland Revenue Department's records indicated that she had received income from a number of employers. She was advised that the income may affect her payments and was asked to complete verification documents or to correct any incorrect information.

[8] On 1 December 2014 a letter was sent to the appellant stating, amongst other things, "we are writing to tell you we have finished our review of your payments and as a result we will not be taking any further action in this particular case". It transpires that this letter was sent in error.

[9] The Ministry proceeded to carry out a backdated review of the appellant's entitlement to benefit. On 29 January 2015, the appellant was sent a letter which advised:

We refer to our letter dated 29 November 2014 which advised we would be taking no further action with your case however upon further review of your file and income earned we have determined a reassessment of past entitlements was necessary.

The letter proceeded to set out eight employers the appellant had received income from and advised the appellant of an overpayment of \$10,037.83.

[10] The appellant sought a review of decision. The appellant wrote to the Ministry that it was unconscionable to advise a client that this matter would not be taken any further and then two months later contact the client and go back on their word by saying that a staff member had made a mistake by “pressing the wrong button”. “It is very poor to use the excuse that a staff member had ‘pressed the wrong button’ when printing out their letter to me”. The appellant requested that the Ministry waive the decision contained in the letter of 29 January 2015.

[11] 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.

[12] At the appeal hearing, the appellant repeated that she had received a letter stating that the Ministry were not going to take any further action and that this should be the end of the matter. She was unaware in the subsequent period that the Ministry were going to establish a debt against her.

[13] The appellant said she understood she could earn \$80 per week without declaring it but offered no other explanation for failing to declare her income.

[14] On behalf of the Chief Executive it was submitted that the Chief Executive should not be bound by administrative errors such as the error in this case. The administrative error of sending the letter of 1 December did not cause the debt.

Decision

[15] In the original notice of appeal, the appellant asked that the overpayment be assessed taking into account the income in the week that it was earned. This has now been carried out, resulting in a reduction in the debt from \$10,037.80 to \$9,588.79. The appellant did not further challenge the calculation at the hearing.

Exercise of discretion to conduct a review and establish debt

[16] The first issue to be considered is whether or not it was appropriate, having advised the appellant that no further action would be taken in her case, for the Chief Executive to proceed to carry out a backdated review of the appellant’s entitlement to benefit over the period 30 November 2011 to 23 November 2014. The review was carried out under s 81 of the Act. We note the following:

- (i) There is no suggestion that the appellant put before the Ministry information which influenced the Ministry's decision to review or not review the debt before the letter of 1 December 2014 was written.
- (ii) There is no suggestion that the letter of 1 December 2014 was written as a result of any settlement between the appellant and the Ministry in relation to any disagreement over the debt.
- (iii) The appellant was specifically asked by the Authority as to whether she had changed her position as a result of receiving the letter. She advised that she did not do anything. There is no evidence that the appellant did anything different or changed her position as a result of receiving the letter.
- (iv) The Chief Executive of the Ministry of Social Development has an obligation 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.
- (v) The explanation given by the Ministry for the sending of the letter on 1 December is that an officer accidentally ticked an incorrect box which enabled the system-generated letter to be sent.
- (vi) The information available shows that on at least 11 occasions the appellant failed to declare her income on Work and Income forms. Nor did she contact the Ministry on the many occasions that she ought to have reported her income (with the exception of one instance).

[17] We accept that it must have been upsetting for the appellant to receive a letter advising that she had a substantial debt, having previously received a letter stating that no action would be taken against her.

[18] However, we are not satisfied that the totality of the circumstances outlined give rise to a legitimate expectation on the part of the appellant and that no further action would be taken to establish and recover a debt. In circumstances where the letter was sent out in error, in the absence of any compelling reasons such as the letter causing the appellant to act in a way which was detrimental to her, the Chief Executive is entitled to correct that error. Nor do we consider an estoppel which might prevent the Chief Executive from exercising discretion to establish an overpayment against the appellant arises. We are satisfied that it was appropriate for the Chief Executive to conduct a backdated review and establish an overpayment in this case.

[19] It is not apparent from the Section 12K Report precisely how the matter was handled, but we would have thought that it would have been appropriate to outline the situation and what had happened to the appellant, possibly in person, before sending the letter of 29 January 2015.

Recovery of the debt

[20] 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.

[21] 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.

[22] 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.

[23] 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 department.

[24] The overpayment in this case occurred as a result of the appellant failing to tell the Ministry about her employment over a period of three years. The appellant has received benefit on and off for many years. She should by now be well aware of her obligation to report all income. She offered no real explanation for failing to report her income or declare it on the various forms she completed.

[25] There is no suggestion that the overpayment in this case arose as a result of an error on the part of the Ministry. As a result, we are not able to direct that the debt not be recovered pursuant to s 86(9A) of the Act.

Recovery – s 86

[26] Since July 2014, s 86 of the Social Security Act 1964 has provided that the Chief Executive is under a duty to take all reasonably practicable steps to recover a debt. Section 86(1BA) provides that the Chief Executive may determine the rate of recovery and method of recovery having regard to the directions made by the Minister relating to the rates and methods of recovery. The Ministerial Direction on Debt Recovery requires the Chief Executive to have regard to the following matters (at clause 4):

- (a) The amount of the debt.
- (b) The ability of the debtor to meet his needs.
- (c) The circumstances of the debtor.
- (d) Whether the rate of recovery would cause undue hardship to the debtor.
- (e) The effect the rate of recovery will have on the debtor's ability to support herself or fulfil any obligations under the Act.
- (f) The cost of recovery.

[27] The appellant is able to discuss a rate of recovery with the Ministry. If her financial circumstances deteriorate at any time, the recovery may be deferred for a period. The rate of recovery was not a matter addressed by the appellant at the hearing of this matter. She will need to discuss the rate of recovery with the Ministry.

[28] The debt is to be recovered.

[29] The appeal is dismissed.

DATED at WELLINGTON this 16th day of June 2016

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member

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