

[2016] NZSSAA 50

Reference No. SSA 054/13

**IN THE MATTER**

of the Social Security Act 1964

**AND**

**IN THE MATTER**

of an appeal by **XXXX** of Auckland  
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**

[1] The Authority issued a decision in relation to this matter on 14 September 2015.

[2] At the conclusion of its decision the Authority invited the appellant to make submissions within 21 days of the date of the decision, on whether or not the Chief Executive should be directed to take no steps to recover the debt, pursuant to s 86(1) and s 86A of the Social Security Act 1964. The appeal was adjourned for that purpose.

[3] Ultimately, submissions were not received from the appellant until 27 November 2015. The appellant was then requested to provide information about her financial circumstances which had been omitted from her earlier submission. Further submissions were received on 14, 21 and 24 December. A Ministry response to these submissions, including calculation of the debt, was not received until 15 February 2016. A final response from the appellant was not received until 27 April 2016.

[4] The Ministry advise that the revised assessment of the appellant's income based on the Authority's findings, is as follows:

Year ending	Previously assessed	Adjusted income
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31 March 2006:	\$23,864	\$23,864
31 March 2007:	\$61,375	\$61,419
31 March 2008:	\$72,662	\$62,662
31 March 2009:	\$45,174	\$19,569
31 March 2010:	\$47,604	\$24,104
<b>Total</b>	<b>\$250,679</b>	<b>\$191,618</b>

[5] As a result, the debts have been adjusted and reduced as follows:

Domestic Purposes Benefit: (Sole Parent) 18/7/05 – 11/7/10	\$57,925.56
Accommodation Supplement: 01/04/05 – 01/06/08	\$36,783.43
Disability Allowance: 29/05/06 – 30/03/08	\$4,766.61
Special Benefit: 01/04/05 – 01/06/08	\$7,394.14
Temporary Additional Support: 04/06/09 – 03/02/10	\$2,176.66
Special Needs Grant	\$808.50
<b>Total</b>	<b>\$109,852.91</b>

[6] Sections 86(1) and 86A of the Act (as they were at the time relevant to this appeal) 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.

[7] 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.<sup>1</sup>

[8] The considerations to be taken into account in exercising the discretion include the context of the Social Security Act 1964, 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 circumstances of the appellant; including her financial circumstances and the impact of recovery on her and her children, taking into account the International Convention on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, are also relevant.

[9] 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",<sup>2</sup> "unusual",<sup>3</sup> and as "rare and unusual",<sup>4</sup> but these are not tests.<sup>5</sup>

[10] The appellant submits that the debt should not be recovered for the following reasons:

- (i) The Ministry's investigation took place after the appellant had had to deal with an abusive partner and then ex-partner.
- (ii) Following the breakdown of her relationship, she moved to Auckland with two small children to start again. She was in Auckland on her own without family support apart from the children's father.
- (iii) The stress of the investigation and hearings has been very high.
- (iv) The benefits paid to her were simply inadequate for her to make ends meet and meet costs such as mortgage, food and other costs.
- (v) To make ends meet she was obliged to borrow. This included borrowing from family.

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<sup>1</sup> *Director-General of Social Welfare v Attrill* [1998] NZAR 368.

<sup>2</sup> *McConkey v Director-General of Work & Income New Zealand* HC, Wellington AP277-00, 20 August 2002.

<sup>3</sup> *Cowley v Chief Executive of the Ministry of Social Development* HC, Wellington CIV-2008-485-381, 1 September 2008.

<sup>4</sup> *Osborne v Chief Executive of the Ministry of Social Development* [2010] 1 NZLR 559 (HC).

<sup>5</sup> *Van Kleef v Chief Executive of the Ministry of Social Development* [2013] NZHC 387.

- (vi) She has now repaid this borrowing from her mother, but requiring her to repay the Ministry as well would be requiring her to repay the same amount twice.
- (vii) She lost over \$200,000 on the sale of a home she had to sell earlier than expected to repay debt.
- (viii) The appellant is suffering from complex regional pain syndrome which she has suffered from since February 2013. She is also recovering from a back injury. Her health issues impact on her ability to work and support herself.
- (ix) In 2015 the appellant was holding down two jobs and doing a Masters degree at Auckland University. At the time of the April 2016 submission it is said that she currently works for 20 hours per week for \$20 per hour in an administrative role. She occasionally receives income from her musical work which simply pays for itself.
- (x) Initially, it was submitted that the XXXX Family Trust now owns her home at XXXX. This property was purchased for \$537,000 in 2014. Her 2001 car is valued at \$3,000. She has the following liabilities:
  - \$324,330.74 mortgage.
  - \$32,626.31 bank loan.
  - \$40,000 familial loan.
  - \$10,000 school fees.
  - \$10,000 dentist fees.
- (xi) In a later submission the appellant has stated that her home has now been used as security for a further property purchased by her mother. The amount involved is \$454,000. She also alleges she owes a further \$175,000 to her mother and stepfather.
- (xii) The final submission of 27 April 2016 was made on the appellant's behalf by her legal counsel. The submission states that the appellant has little or no equity in her home.

No supporting documentation verifying the appellant's financial circumstances has been provided.

*The circumstances in which the debt arose*

[11] The appellant asks that we take into account that she was in Auckland without family support raising two children on her own at the time the overpayments occurred. She says the benefits paid to her were inadequate to meet her needs.

[12] We are not persuaded that the appellant was unable to purchase the basics for herself and her children on the benefits received. Moreover, we note that the appellant moved house and increased her mortgage commitments in her first year in Auckland. If she was unable to meet her outgoings she ought to have sought cheaper accommodation. In fact, the appellant has purchased four homes and sold three in Auckland in the nine years from 2005 to 2015. The additional financial resources available to her were used to purchase a lifestyle not available to most beneficiaries.

[13] The appellant misled the Ministry about her circumstances, including her financial circumstances over a significant period. Moreover, the Authority concluded in its decision of 14 September 2015 that the appellant had not been open and frank with the Authority. The appellant has abused the systems in place for helping people genuinely in need of support from the state. Maintaining the integrity of the benefit system is one of the matters to be taken into account in any decision relating to the exercise of the discretion to take steps to recover a debt, either under s 86(1) or s 86A. To direct that the debt not be recovered in this case, where the evidence indicates the appellant regularly misled the Ministry, would have implications for the integrity of the benefit system.

#### *International conventions*

[14] The High Court has held that in the exercise of the discretion under s 86(1) and s 86A consideration should be given to New Zealand's obligations under the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of the Child.<sup>6</sup> A common theme of the International Covenant and Convention is the right to an adequate standard of living with specific reference to the basics of food, clothing and housing. We accept that the financial circumstances of the appellant need to be taken into account and that she should not be left with insufficient funds to meet her living costs. In addition, the needs of her dependent children, including their right to an education, must be considered in determining whether or not recovery should occur (and the rate of recovery if recovery is made by instalment) and when recovery should occur.

#### *Ability to repay the debt*

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<sup>6</sup> See *Harlen v Ministry of Social Development* [2012] NZHC 669.

[15] The submission that the appellant now has little or no equity in her home must be seen in light of a submission made by the appellant to the Authority on 20 August 2015. In that submission, the appellant advised she had purchased her home at XXXX for \$534,000. The appellant stated: "My GV went up \$300,000 this year from \$420,000 to \$720,000. Properties like mine are selling for \$1.2 million now because the Council rezoned the street as 8A. Lucky I guess". She stated "my home today has doubled in value in the 2½ years I have lived here".

[16] We understand there is mortgage debt specifically related to the purchase of the appellant's home at XXXX of \$356,956. While the appellant is now claiming that there is a further amount of \$175,000 owing to her mother and stepfather, this claim must be seen in the light of evidence provided at the hearing. A statement was produced to the Authority at the hearing confirming that the debt owed by the appellant to her mother had been repaid in full.<sup>7</sup> Furthermore, the appellant produced a document setting out a calculation of the original amount owed to her mother as being \$199,690 and that after the repayments the outstanding balance was \$27,765.17.<sup>8</sup> There was no suggestion at the hearing that the appellant still owed \$175,000 to her mother and stepfather. While the appellant says the accounting for the debt owed to her mother was contained in the bank statements, she has never provided a set of statements for the Fastsaver XXXX account from which she regularly made drawings.

[17] We conclude that the claim made on behalf of the appellant, that there is little or no equity in the property at XXXX, is not reliable. Based on her August 2015 submission it would appear that at that time there was a substantial equity which would be available to her to repay the debt. We bear in mind that the appellant's home now belongs to a Trust. We have not been provided with any evidence that this would prevent the appellant repaying the debt from this source. Neither would the situation be significantly different if the appellant was required to rearrange the financing of the property allegedly purchased by her mother.

[18] In December 2015 the appellant provided a budget of her income and expenditure. She disclosed gross income including Supplementary Assistance from the Ministry, Family Tax Credit and paid employment, of \$982.30. She claims her expenditure to be \$1,397, including \$100 per week on telecommunication costs and \$585 for the outgoings on her home. The amount claimed for outgoings on her home seems to be higher than the amount used to calculate her Accommodation Supplement entitlement.

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<sup>7</sup> Letter of 11 March 2013.

<sup>8</sup> Exhibit 8.

[19] The appellant's budget suggests the appellant has a shortfall in her weekly expenditure of almost \$400 per week. We understand the appellant to be saying she funds this shortfall from borrowing. We can only conclude that the appellant has a plan as to how this borrowing is to be repaid.

[20] The appellant says that she does not receive Child Support from her children's father. She claims that she parents her children alone without assistance from him. This must be seen in the light of a letter to the Authority dated 20 May 2015, allegedly signed by the children's father, designed to assist the appellant with her appeal to the Authority. If the letter is genuine, this suggests that the appellant's submission that the children's father has no involvement in raising and supporting the children may not be correct. It seems surprising that the father would pay Child Support until the appellant's benefit was cancelled but not thereafter. It is possible of course that he now pays for the children's expenses directly rather than pay Child Support.

[21] The appellant says she has significant debts for school and dental fees. It is difficult to understand why she would incur school fees of \$10,000 and dental fees of \$10,000 without any idea of how she was going to pay these amounts.

[22] We take into account that the appellant has health issues and that this impacts on her ability to support herself from wages at the present time.

[23] No submission has been made on the impact repayment of the debt might have on the appellant's children. They are currently teenagers attending a private school.

[24] The appellant's reporting of her financial circumstances is not supported by any documentary evidence. We consider her claims in relation to her financial circumstances to be unreliable. We are not satisfied that she is unable to repay the debt from her financial resources, either by a lump sum on the sale of the XXXX property or by periodic instalments.

[25] Repayment arrangements can be negotiated with the Ministry to reduce the impact on the appellant's children so that they are not left without food, clothing, housing and education.

[26] Taking all these circumstances into account, we are not prepared to direct that no steps should be taken to recover the debt pursuant to the provisions of s 86(1) or s 86A. The debt is to be recovered.

[27] To the extent that in its decision of 14 September 2015 the Authority has directed the Ministry to reassess the appellant's income and the resulting debt, the appeal is allowed. In all other respects, the appeal is dismissed.

**DATED** at WELLINGTON this 31 day of May 2016

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Ms M Wallace  
Chairperson

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Mr K Williams  
Member

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Lady Tureiti Moxon  
Member

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