

**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

**HEARING** at AUCKLAND on 12 May 2016

**APPEARANCES**

Mr C Jones for the appellant  
Ms N Jaura 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 an overpayment of Accommodation Supplement and Temporary GST Assistance paid in respect of the period 5 June 2001 to 12 June 2015 amounting to \$21,263.75.

**Background**

[2] The appellant is 52 years old. He is single.

[3] In the period relevant to this appeal, the appellant was at various times in receipt of Sickness Benefit, Jobseeker Support, Accommodation Supplement and Temporary GST Assistance.

[4] In 2015, the appellant established entitlement to Accident Compensation payments (ACC) in respect of the same periods he was in receipt of benefits.

[5] Pursuant to the provisions of s 252 of the Accident Compensation Act 2001 the Corporation reimbursed the Ministry for the amount of the Sickness Benefit and Jobseeker Support paid.

[6] The Chief Executive then sought to recover the overpayments of Accommodation Supplement and Temporary GST Assistance directly from the appellant.

[7] The appellant objected to this. He 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 in relation to Accommodation Supplement. The Committee made no reference to the Temporary GST Assistance in its decision.

[8] The appellant then lodged an appeal with the Authority. The appellant does not dispute the recovery of main benefit from the ACC entitlement. He submits, however, that the Ministry has no power to seek recovery of the non-taxable Accommodation Supplement and Temporary GST Assistance because the appellant needed that assistance at the time it was received. In addition, the appellant points out that while s 252 of the Accident Compensation Act 2001 requires the Corporation to refund the main benefit payment, it does not provide for supplementary assistance to be repaid. He submits that if it was intended that the Chief Executive had the power to recover supplementary assistance then s 252 would have said so and required it to be repaid directly to the Corporation.

[9] It is submitted on behalf of the appellant that if the roles were reversed and backdated assistance should have been paid to him, then the Ministry would not pay it. It is submitted that s 81 of the Social Security Act 1964 does not apply in this situation and the provision has been used unlawfully.

## **Decision**

[10] This appeal raises two issues. The first issue is whether or not the Chief Executive was correct to establish an overpayment of Accommodation Supplement and Temporary GST Assistance. The second issue is whether or not the debt should be recovered.

[11] When a person receives a backdated payment of ACC, the ACC payment is treated as the appellant's income for the period in respect of which it was paid, and entitlement to supplementary assistance is assessed on the basis of that income.

[12] It depends entirely on the level of weekly ACC payments received by the appellant as to whether or not he remains entitled to the supplementary assistance received in the backdated period, or whether the income which has supplanted the income received from benefit was such that he was no longer entitled to the supplementary assistance received in the backdated period.

[13] The retrospective review of entitlement to benefit is carried out under s 81 of the Act. That the Chief Executive is entitled to undertake such a review under s 81 has been considered by the High Court on a number of occasions.

[14] In *M v Chief Executive of the Department of Work and Income*,<sup>1</sup> the Court found at [33]:

Section 81 plainly envisages a hindsight review of benefit entitlement. This does not mean that a beneficiary who subsequently receives backdated compensation entitlement was not entitled to have received a benefit for that backdated period: it simply means that the entitlement to a benefit has been retrospectively supplanted by an entitlement to compensation.

[15] In *Goh v Chief Executive of the Ministry of Social Development*,<sup>2</sup> the Court found at [21]:

... the whole purpose of the Act is to provide assistance for those in need of financial support, taking into account support received from other sources. Therefore, there can be no purpose to allow a person to benefit twice, and achieve compensation from two sources, which would not have been available if the full position was known.

[16] In *van Kleef v Chief Executive of the Ministry of Social Development*,<sup>3</sup> the Court was specifically considering the recovery of an overpayment of Accommodation Supplement which was established following receipt of a payment of ACC. The Court was in no doubt that s 81 empowered the Chief Executive to undertake a backdated review of benefit entitlement. The Court also confirmed that ACC weekly payments are income as defined by the Social Security Act 1964.

[17] We do not consider that anything turns on the fact that s 252 of the Accident Compensation Act 2001 does not specifically provide for recovery of supplementary assistance directly from ACC. Amongst other things, the calculation of entitlement to Accommodation Supplement is quite different from the calculation of entitlement to a main benefit where ACC payments have been received. Moreover, it would be something of a windfall for a person to be able to retain supplementary assistance in circumstances where, as a result of the main benefit being replaced by ACC payments, the person's level of income meant they were no longer eligible for those supplementary payments.

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<sup>1</sup> HC; Wellington AP335/01, 27 August 2002, Goddard J.

<sup>2</sup> HC; Auckland CIV-2008-485-2391, 30 June 2009, Asher J.

<sup>3</sup> [2013] NZHC 387.

[18] There will be cases where a person becomes entitled to ACC and on review it is established that because of the level of ACC payments made, they remain entitled to receive the Accommodation Supplement paid during an earlier period. That is not the situation in this case because of the level of ACC payments paid.

[19] The use of s 81 is of course discretionary. The appellant points to the fact that he has had to pay a higher rate of tax on the lump sum received than had the ACC payments been paid when they should have been paid. However, we do not consider that this is a sufficient reason, on its own, for the Chief Executive not to conduct a backdated review of the appellant's benefit entitlement. We understand that the appellant received a backdated lump sum after recovery of the main benefit from the amount paid to him. His advocate was not able to tell the Authority how much he received but based on the information from ACC, at pages 68 to 73 of the Section 12K Report, he received more than enough to repay the debt in relation to supplementary assistance, even after the payment of tax.

[20] We are satisfied that the Chief Executive was correct to review the appellant's entitlement to supplementary assistance and establish a debt.

*Recovery of the debt (s 86(9A))*

[21] 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.

[22] 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) any erroneous act or omission that occurs during an investigation of benefit entitlement under s 12; and

(c) any other erroneous act or omission by an officer of the Ministry.

[23] 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.

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

*Recovery (s 86(1))*

[25] The debt in this case was established after changes were made to s 86(1) of the Act on 7 July 2014.

[26] The Chief Executive is under a duty to take all reasonably practicable steps to recover the debt. The appellant will need to discuss recovery with the Ministry and may be able to negotiate recovery by instalment at a rate which takes into account his financial circumstances.

[27] The appeal is dismissed.

**DATED** at WELLINGTON this 16 day of June 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