

[2016] NZSSAA 064

Reference No. SSA 118/15

**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 1 December 2015 and 8 March 2016

**APPEARANCES**

R Hucker 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:

- (i) establish and recover an overpayment in respect of Sickness Benefit, Invalid's Benefit and Supported Living Payment paid to the appellant in the period 21 September 2009 to 19 October 2014;

- (ii) establish and recover overpayments of Accommodation Supplement, Disability Allowance and Temporary GST Assistance paid to the appellant in the period 21 September 2009 to 19 October 2014.

[2] The overpayments were established when the appellant became entitled to a backpayment of Accident Compensation in respect of the same period.

[3] The appellant says that the Ministry's calculations of the overpayments are incorrect.

### **Background**

[4] The appellant was badly hurt in a workplace accident on 18 April 2008. His injuries included a head injury. He was in receipt of benefits from the Ministry from 15 September 2009 to 11 January 2015 while he pursued Accident Compensation payments (ACC).

[5] In October 2014 he established retrospective entitlement to ACC for the period he was in receipt of benefits. As a result of the operation of s 252 of the Accident Compensation Act 2001, the Accident Compensation Corporation (the Corporation) was obliged to refund the amount of main (income-tested) benefit paid to the appellant in the period 15 September 2009 to 11 January 2015 to the Ministry of Social Development. The Ministry advised the Corporation that the gross amount of Sickness Benefit, Invalid's Benefit and Supported Living Payment paid to the appellant was \$64,599.52. Of this amount, the net amount (after tax) of \$57,424.66 was to be reimbursed to the Ministry. The Corporation then reimbursed the Ministry for the net amount of benefit paid. Adjustments in relation to tax occurred in accordance with the interdepartmental procedures in place to deal with these circumstances.

[6] In addition, the Chief Executive requested reimbursement from the appellant of Accommodation Supplement, Disability Allowance and GST Assistance paid to him. At various times, the amount it required the appellant to repay was stated to be \$18,003.55. The Ministry's Section 12K Report now states the correct amount of supplementary benefits to be repaid by the appellant is \$16,281.34. A further amount of \$1,722.20 is payable by the appellant's former partner.

[7] The appellant believes that the Ministry has made an error in the calculation of the main benefit. This is because he says the figures provided by the Ministry do not tally with information contained in certificates from the Inland Revenue Department.

[8] The appellant says that the Inland Revenue Department tax certificates state the combined income of himself and his former partner from main benefits in the period concerned, was as follows:

Appellant	\$53,716
Partner	<u>\$ 2,662</u>
Total	\$56,378

Alternatively, his gross income was \$60,340 of which \$6,624 was taxed leaving a net of \$53,716. If the net amount relating to his partner of \$2,662 is added, this gives a figure of \$56,378.

[9] He says that he has had an accountant do a calculation of the benefit paid into his bank account and made enquiries of the Inland Revenue Department about the crediting of tax. The accountant has informed him that the Inland Revenue Department have advised that there has been no crediting of tax to his account by the Corporation.

### **Decision**

[10] Section 80 of the Social Security Act 1964 gives the Chief Executive a discretion to conduct a backdated review of a person's entitlement to benefit. It is appropriate that the Chief Executive undertake such a review in respect of a period in which a backdated payment of ACC has been received by a person who was receiving benefit in the same period.

[11] Section 71A of the Act requires that the rate of main benefit payable be reduced dollar for dollar by the amount of weekly compensation payable.

[12] When a backdated payment of ACC is made, the income from ACC in effect replaces the income from benefit. It is the gross amount of benefit which must be refunded to the Ministry. Sometimes confusion can arise because of the way income tax is handled.

[13] The way in which repayment is made and tax is handled is outlined in a supplementary report from the Ministry of 26 November 2015 as follows:

- (i) The Ministry advise the Corporation of the gross and net amounts to be recovered from the arrears of ACC.

- (ii) The net amount is repaid by the Corporation to the Ministry.
- (iii) The amount for tax deducted from the original benefit payments is paid by the Corporation to the Inland Revenue Department which then credits this amount to the Ministry of Social Development.

[14] In summary, the gross amount of benefit is repaid to the Ministry with the refunding of the tax element coming from the Inland Revenue Department.

[15] We would not expect to see any crediting of the appellant's Inland Revenue Department account in this process. The process has been considered by the Courts on a number of occasions<sup>1</sup>.

[16] The tax certificates provided for both the appellant and his partner indicate gross income from benefits during the relevant periods, as follows:

<b>Year ending</b>	<b>Mr Wyatt</b>	<b>Mr Wyatt's partner</b>	<b>Total amount</b>
31 March 2010	\$2,045.26	\$2,045.26	\$4,090.52
31 March 2011	\$11,137.41	\$997.89	\$12,135.30
31 March 2012	\$11,696.91		\$11,696.91
31 March 2013	\$12,768.55		\$12,768.55
31 March 2014	\$15,056.27		\$15,056.27
31 March 2015	\$7,636.46		\$7,636.46
		<b>Total</b>	<b>\$63,384.01</b>

[17] These figures coincide with the Ministry payment details from the SWIFT system noted on the back of each income tax certificate at pages 122-132 of the Section 12K Report, with the exception of the tax certificate for the period 1 April 2014

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<sup>1</sup> See for example *Buis v Chief Executive of the Ministry of Social Development* HC Auckland CIV-2007-404-4703, 3 March 2009 and *Goh v Commissioner of Inland Revenue* [2011] NZCA 344.

to 31 March 2015. This certificate was apparently printed before the end of the income year. It includes an amount for Work and Income benefits of \$7,636.46. It appears that the total on this particular Inland Revenue Department certificate covers payments made up to 25 September 2014. It does not include payments made to the appellant on 2, 9, 16 and 23 October 2014 amounting to \$1,175.60. Confirmation that the appellant received these payments is contained in Tab 1 of his bundle of documents. If this amount is added to the tax certificate figure of \$7,636.46, the correct total for gross income for the year ending 31 March 2015 is \$8,812.06.

[18] If the figure of \$8,812.06 is substituted for the figure of \$7,636.46, the total of the figures in the tax certificate comes to \$64,559.61. (Alternatively: \$63,384.01 plus \$1,175.60 = \$64,559.61). This results in a difference of nine cents between the gross figure supplied by the Ministry to the Corporation and the total of the Inland Revenue tax certificates.

[19] We further note that the revised tax certificate provided for the year ending 31 March 2015 excludes the appellant's benefit income which has been replaced by his income from the Corporation.

[20] The appellant relies on figures apparently prepared by an accountant. The appellant says an accountant has added the amount paid into his bank account by Work and Income. The amount paid into the appellant's bank account does not add up to the same figure as the Ministry's figure. We have not been provided with a first-hand account from the accountant outlining his processes or verifying his figures.

[21] The figure paid into the appellant's bank account does not reflect the total amount paid to the appellant. That is because it does not take into account amounts deducted from the appellant's benefit entitlement before repayment. For example, the SWIFT reports in the Section 12K Report show repayments of advance payment of benefit being deducted from the appellant's benefit payments on a regular basis. There is no evidence before us that the appellant's accountant took variables such as this into account in making his calculation.

[22] We are satisfied that the Ministry's figures effectively align with the Inland Revenue Department figures if the October payments are added.

[23] We are not satisfied that there is any error in the calculation of the amount that the Corporation was required to reimburse the Ministry in respect of Sickness Benefit, Invalid's Benefit and Supported Living Payment.

*Recovery of main benefit debt – Section 86(9A)*

[24] 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.

[25] 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.

[26] 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.

[27] Before we can direct that a debt not be recovered pursuant to the provisions of s 86(9A) of the Social Security Act 1964 we must be satisfied that there has been an error on the part of the Ministry. The error must be an error which caused the debt.

An error in the calculation of a debt is not an error which causes a debt; but in any event we are not satisfied that the calculation was incorrect.

[28] There is no evidence that an officer of the Ministry has caused the debt which has arisen in this case. The debt has arisen because the appellant was successful in recovering a backdated payment of ACC. Reimbursement of the income-tested benefit debt is required by the provisions of s 252 of the Accident Compensation Act 2001. We cannot direct that the debt not be recovered pursuant to the provisions of s 86(9A) of the Act.

#### *Recovery of Supplementary Assistance*

[29] The second issue raised by the appellant is the calculation of the non-taxable supplementary benefits received by the appellant – Accommodation Supplement, Disability Allowance and Temporary GST Assistance.

[30] As previously outlined, when a person receives a backdated payment of compensation the ACC payments replace the benefits received. The ACC payments are treated as the appellant's income in calculating his entitlement to supplementary benefits such as Accommodation Supplement and Disability Allowance. Entitlement is assessed on the basis that the recipient is a non-beneficiary. The way in which the appellant's entitlement to Accommodation Supplement has been assessed is set out in detail in paragraphs 2.4 and 2.5 of the Section 12K Report and also at pages 26 and 27 of the Section 12K Report. It has been calculated that the appellant was overpaid \$8,096.85.

[31] The calculation of the overpayment of Disability Allowance is set out at pages 27, 28 and 29 of the Section 12K Report. The amount is \$8,082.57.

[32] The overpayment of Temporary GST Assistance is set out at page 24 of the Section 12K Report. The amount is \$101.92.

[33] On 3 November 2014 the appellant was advised that the total amount of debt in relation to supplementary assistance was \$18,003.55 which he must repay.

[34] On 26 November 2014 he was advised that the total amount of supplementary debt was \$17,901.63 which he must repay.

[35] The report to the Benefits Review Committee notes the amount to be repaid by the appellant is \$18,003.55.

[36] The appellant and his wife had separated in or about 8 May 2010. The appellant very clearly made the amount he was required to pay an issue at the Benefits Review Committee hearing, alleging that he should not be required to pay an amount of \$1,772.20 which should be repaid by his former partner. The Benefits Review Committee took advice from the report writer about this issue. She incorrectly advised that both parties were equally liable to pay their portion of combined supplementary debt of \$18,355. In its final decision the Benefits Review Committee appears to have largely ignored the issue. It upheld the original decision of the Chief Executive.

[37] The Section 12K Report provided by the Ministry to the Authority appears to be the first time the Ministry has acknowledged that the amount of Accommodation Supplement and Disability Allowance to be repaid by the appellant is \$16,281.34. The \$1,722.20, which was paid to the appellant's partner between 21 September 2009 and 7 May 2010, the period prior to their separation, is her liability. We note the comment in the Section 12K Report to the Authority paragraph 6.14, relating to the appellant's concern that he was being asked to repay \$18,003.55, states "it does not appear on his Ministry records and the concerns raised have no basis". This statement is very odd given that all previous correspondence to the appellant and the Report to the Benefits Review Committee make it very clear that the amount of \$18,003.35 is the appellant's responsibility. In effect, the concession that the amount of debt owed by the appellant is now \$16,281.34 and that his partner is responsible for a repayment of \$1,722.20 in supplementary benefit, appears to be an acknowledgement by the Ministry that its previous claims were incorrect. It appears that it is only as a result of the appellant's appeal to this Authority that this has occurred. The provision of incorrect and inconsistent information by the Ministry to the appellant is most unfortunate.

[38] We infer the Ministry accept that the amount of \$1,722.20 of the original figure of \$18,003.55 is the responsibility of his partner, satisfies the appellant's concern. In any event, the appellant has not identified any other error in the Ministry's calculation of the overpayments of Accommodation Supplement, Disability Allowance and GST Assistance. We therefore accept that the amount of \$16,281.34 is correct.



### *Recovery*

[39] The appellant has not pointed to any error on the part of the Ministry which has caused the debt. We are therefore not able to direct that it not be recovered pursuant to the provisions of s 86(9A) of the Act.

### *Recovery under s 86 of the Act*

[40] 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(1A) 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 that the rate of recovery will have on the debtor's ability to support himself or fulfil any obligations under the Act.
- (f) The cost of recovery.

[41] The appellant received approximately \$118,000 (after payment of income tax and lawyer's fees) from the arrears of ACC payments. He now receives more than \$900 per week gross in weekly payments from the Corporation. Prior to lodging his reviews and appeals with the Authority, the Ministry had endeavoured to recover the debt from him at the rate of \$35 per week. On the face of it, the appellant ought to be able to make repayments of \$35 per week however it is open to him to discuss this amount further with the Ministry.

[42] To the extent that the Ministry now acknowledge that the debt in relation to supplementary payments recoverable from the appellant is \$16,281.34, the appeal is allowed. In all other respects, the appeal is dismissed.

**DATED** at WELLINGTON this 30<sup>th</sup> 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

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