

[2016] NZSSAA 068

Reference No. SSA 041/16

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Johnsonville 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 WELLINGTON on 14 June 2016

APPEARANCES

The appellant in person
Ms E Kirkman 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:

- (a) establish and recover an overpayment of New Zealand Superannuation paid in the period 1 March 2015 to 22 September 2015 amounting to \$6,415.54.
- (b) decline to pay New Zealand Superannuation to the appellant in Australia on a portable basis.

Background

[2] The appellant is aged 69 years. He receives New Zealand Superannuation at the half married rate. He works as an academic at Victoria University.

[3] On 28 February 2015, he left New Zealand to travel to Australia where he planned to spend the year on study leave.

[4] The appellant did not inform the Ministry of his departure, overseas. The appellant confirmed to the Authority that he understood that he could not leave New Zealand for more than 26 weeks and continue to receive New Zealand Superannuation.

[5] The appellant said that at the time of his departure, he anticipated he would need to return to Wellington in June to see an orthopaedic surgeon he had been consulting. However, as his symptoms subsided this did not eventuate. The appellant claims that he then forgot to contact the Ministry or apply for portability of his New Zealand Superannuation.

[6] On or about 1 September 2015, the Ministry became aware that the appellant had left New Zealand, as a result of a data match.

[7] The Ministry wrote to the appellant at his New Zealand residential address on 2 September 2015 asking him to confirm that he had left New Zealand on 28 February 2015. The appellant did not respond and as a result, his benefit was suspended on 17 September 2015.

[8] The appellant confirmed his absence from New Zealand for study leave on 25 September 2015. On 30 September 2015, he was advised by the Ministry that an overpayment had been established in respect of the period 1 March 2015 to 22 September 2015.

[9] On 23 October 2015, the Ministry received an application for portable New Zealand Superannuation from the appellant. His application was declined.

[10] The appellant sought reviews of the decisions made. 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.

[11] The appellant submits that he was busy while in Australia. He temporarily forgot that he could not be absent from New Zealand for more than 26 weeks. In

addition his support person noted that the appellant's family situation in Australia was difficult. He and his wife were staying with their daughter who has a child with a mental impairment. The appellant submits that forgetfulness is not controllable and therefore, his absence from New Zealand arose as a result of circumstances beyond his control which he could not have reasonably foreseen before departure.

[12] The appellant advised that he could recall one occasion when he had advised the Ministry of his impending departure overseas since he was first granted New Zealand Superannuation in 2011.

Decision

[13] New Zealand Superannuation cannot be paid overseas unless the recipient can bring themselves within one of the exceptions contained in ss 22–35 of the New Zealand Superannuation and Retirement Income Act 2001, or an agreement or convention adopted under the Social Security (Reciprocity Agreements, and New Zealand Artificial Limb Services) Act 1990.

[14] In the case of temporary absences, s 22 provides that where a person is absent from New Zealand for no more than 30 weeks, they may be paid New Zealand Superannuation for the first 26 weeks. There is an exception to this rule in s 22(b) in circumstances where the person's absence exceeds 30 weeks, and the Chief Executive is satisfied that the absence beyond 30 weeks is due to circumstances beyond the person's control that he or she could not reasonably have foreseen before departure.

[15] The appellant said that when he left New Zealand he anticipated that he would be returning to New Zealand in June for a medical appointment. However, this did not eventuate as his condition improved and his surgeon did not remind him about the need to attend the appointment. It was in those circumstances that he overlooked the requirements relating to his New Zealand Superannuation. The Authority has previously found that a circumstance beyond the control of an individual implies the intervention of an unexpected event such as illness, accident, unavailability of transport, or the like.¹ The appellant did not describe himself as being forgetful. However, in an earlier submission to the Ministry, he claimed to be an elderly person suffering from Alzheimer's, despite the fact he is a lecturer at a university. [If the appellant is prone to forgetfulness as he claims in one of his submissions, then it was clearly something that he could have anticipated before his departure]. The exception

¹ [2009] NZSSAA 42.

is for people who are genuinely prevented, usually by some external event, from returning within 30 weeks. Properly organising oneself to ensure obligations are met is within the control of the individual. We do not consider that forgetfulness can be regarded as a circumstance beyond the appellant's control that he could not have reasonably foreseen before departure.

[16] The appellant was first told of the need to advise of any travel overseas when he was granted New Zealand Superannuation in 2011. It appears that while he routinely travels overseas, he has not regularly advised Work and Income of his travel. The appellant failed to inform the Ministry of his impending departure from New Zealand for a year's study leave prior to his departure. It is clear that the appellant knew of the need to inform Work and Income of departures overseas. We find his explanation for failing to advise the Ministry of his departure overseas unconvincing.

[17] We are not satisfied that the appellant was entitled to be paid for the first 26 weeks of his absence from New Zealand. We accept that the Chief Executive was correct to review the appellant's entitlement to benefit in respect of the period 1 March 2015 to 22 September 2015 and to establish an overpayment.

Recovery of debt

[18] 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 states that the Chief Executive may not recover a debt in circumstances where:

- (a) the debt was wholly or partly caused as a result of an error;
- (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.

[19] Pursuant to s 86(9B) of the Act, the term "error" means:

- (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 or omission of an officer of the Ministry.

[20] 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.

[21] The first matter we must consider is whether or not there was an error on the part of the Ministry.

[22] There is no dispute in this case that the appellant did not advise the Ministry of his departure overseas. Nor did the appellant advise the Ministry that he would not be returning to New Zealand within 26 weeks when his medical appointment did not take place in New Zealand.

[23] The appellant points to the Ministry writing to him by ordinary mail when it became aware that he had travelled out of New Zealand on 2 September 2015. However, as the appellant had not advised the Ministry of his departure overseas, his overseas address, or that he had not returned to New Zealand, we fail to understand what the appellant thought the Ministry should do.

[24] We are not satisfied that the debt arose as a result of an error on the part of the Ministry. Therefore we are not able to direct that the debt not be recovered pursuant to the provisions of s 86(9A) of the Act.

Application for portability

[25] A further circumstance in which a person can be paid New Zealand Superannuation while they are overseas is contained in s 26 of the New Zealand Superannuation and Retirement Income Act 2001. Section 26 allows a person to be paid New Zealand Superannuation overseas if they are residing in a country which does not have a reciprocal agreement or convention with New Zealand.

[26] The appellant was residing in Australia for the duration of his study leave. Australia is a country with which New Zealand has a reciprocal agreement. The appellant may have been able to apply for New Zealand Superannuation to be paid to him in Australia under the reciprocal agreement, but he is not able to apply for portability under s 26.

[27] We are satisfied that the Chief Executive was correct to decline the appellant's application for portable superannuation in Australia as it is a country with which New Zealand has a reciprocal agreement.

[28] The appeal is dismissed.

DATED at WELLINGTON this 11th day of July 2016

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member

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