

[2016] NZSSAA 083

Reference No. SSA 051/16

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX & XXXX** of
XXXX 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 27 July 2016

APPEARANCES

The appellants in person
Ms Patira Siueva for the Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellants (Mr and Mrs XXXX) appeal against a decision of the Chief Executive upheld by a Benefits Review Committee, to establish and recover overpayments of Unemployment Benefit, Jobseeker Support, Accommodation Supplement and Temporary Additional Support paid in respect of the period 25 March 2013 to 3 November 2013 amounting to \$1,251.13 for Mr XXXX and \$1,250.94 for his wife.

[2] The issue in this case is whether the debt should be recovered pursuant to the provisions of s 86(9A) of the Social Security Act 1964.

Background

[3] The appellants (Mr and Mrs XXXX) are a married couple. They have six children. Five of the six children suffer from health issues. Mrs XXXX also has problems with her health.

[4] At the time relevant to this appeal, Mr XXXX was in receipt of Unemployment Benefit, which later became called Jobseeker Support. In March 2013, he obtained casual employment driving a water delivery truck. On 26 February 2013, he informed his case manager that he had commenced work. Mr XXXXs' case manager apparently advised him of the need to ring through his hours and rate of pay. He says that his case manager instructed him to ring her phone number by Monday morning to advise his hours. He was advised that he should ring through the hours at the end of his first two weeks and she would adjust his benefit accordingly. The case manager also indicated that she would not apply an income charge against his benefit in the first two weeks of his employment to assist the family in the period prior to him receiving his first pay.

[5] In 2015, a backdated review of the appellants' entitlement to benefit was carried out. As a result of this review, overpayments were established.

[6] The appellants 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. The appellants then appealed to this Authority.

[7] Mr XXXX told the Authority that as far as he was concerned he gave the case manager the information he was required to give, ringing in his hours and pay rate at the end of each fortnight. He often needed to leave a message on his case manager's phone. He assumed that the necessary adjustments were being made to his benefit. Mr XXXX said that he was not aware as to whether or not he was getting the full benefit payment or not because his wife was responsible for dealing with banking and benefit matters. On a recent occasion, his wife had drawn his attention to the fact that a payment received from the Ministry was not right. He said that he had given the Ministry a number to do a trace of calls from his phone but it was subsequently realised that his phone was an unlisted phone number due to his previous occupation and the Ministry would not therefore be able to trace the phone calls. Mr XXXX said that he had not been made aware until recently of the Ministry's 0800 number. He had never received letters from the Ministry advising of changes in his payments. He would like the Authority to request copies of video surveillance of his appointments with his case manager.

- [8] On behalf of the Ministry, Ms Sieuva noted that:
- (i) the Ministry does not have a record of Mr XXXX declaring his income on a regular basis.
 - (ii) the Ministry had attempted to find the scanned payslips but had not been able to do so. That was not to say that Mr XXXX did not provide his payslips.
 - (iii) it was acknowledged that on two occasions it appeared that income had been added to the appellants' record but there was no record of the contact.
 - (iv) Mr XXXXs' case manager did not send out letters when there were changes to his income, even when the Ministry had a record of notification.
 - (v) if Mr XXXX did not know what he was receiving in his bank account it cannot be said he received the payments in good faith.
 - (vi) Mr XXXX told the investigator that he declared income weekly. At the hearing before the Authority he said that he contacted the case manager and reported his income every fortnight.
 - (vii) it was accepted that full contact notes had not been included in the Section 12K Report.

Decision

Calculation of debt

[9] In a case such as this, there are two matters to be considered by the Authority. The first is whether or not the overpayment has been correctly established. The second question is whether or not any resulting debt should be recovered.

[10] The appellants did not draw attention to any issues relating to the calculation of the overpayment. We therefore accept that the calculation of the overpayment was correct.

Recovery of debt s 86(9A)

[11] The issue for the Authority then is whether or not the debts should be recovered.

[12] 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 enables the Chief Executive 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.

[13] 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 or omission by an officer of the Ministry.

[14] 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.

[15] The first issue we must consider is whether or not the overpayments have occurred as a result of an error on the part of the Ministry. It was unfortunate that the case manager in this case was not called to give evidence. We have a number of concerns about the circumstances in which the debt occurred in this case; they are as follows:

- (i) Mr XXXX said that he had been told to declare his income when he received his payslip. This would have meant that his income was always declared in arrears with the risk that there would always be overpayments.

- (ii) There are two instances where his payments have been amended to take into account income but there is no record of Mr XXXX declaring income. This suggests that there may be other gaps in the Ministry's records.
- (iii) We have been informed by the Ministry that letters were never sent to the appellants advising of changes in benefit payments as a result of the addition of income when it has been recorded. Had this occurred Mr XXXX and his wife would have had a better understanding of how their income declarations were affecting their benefit entitlement. It may also have helped to alert them to whether the Ministry were accurately recording changes of income.
- (iv) Mr XXXX says that his case manager scanned copies of payslip whenever he went for a regular interview every four to six weeks. The Ministry records now available indicate that Mr XXXX did in fact have regular appointments with case managers. As many of these were work focussed it is difficult to believe that Mr XXXX was not asked what work he was doing and his income from that work at those appointments.
- (v) We are also prepared to accept that Mr XXXX may have left messages on his case manager's telephone and that they were not actioned.
- (vi) An error occurred on 4 March 2013 in making an effective date for charging income as at 25 March instead of 25 February.

[16] We are in no doubt that the overpayment has at least in part been caused by multiple errors by an officer of the Ministry.

[17] There is no evidence to suggest that the appellants intentionally contributed to those errors.

[18] We are then required to consider whether or not the appellants received the payments of benefit in good faith. This is a more difficult question. To receive a payment of benefit in good faith, a beneficiary must have received the payment believing that they were entitled to the amount received. For example, if it is apparent to a beneficiary that their benefit payment has not been adjusted to take account of earnings when it should have been, it cannot be said that the beneficiary received the payment believing that they were entitled to the full amount. To receive a benefit in good faith, it is simply not sufficient for the beneficiary to say that they were unaware of the amount received.

[19] Where a payment has been made by mistake, whether it be by a bank, a business owner or a government department, it does not automatically follow that that payment or the full amount of that payment can be retained by the recipient. The person must have a genuine belief that they were entitled to the full amount they received.

[20] Mr XXXX said that he was unaware of what the Ministry were paying as his wife was responsible for attending to financial matters. He relied on the case manager to ensure the correct amount was paid. Mrs XXXX did not attend the hearing and did not participate in the hearing, arranged by telephone to give her an opportunity to present her position on this point to the Authority. She has now provided an email stating:

“I was understanding that it was the correct amount as the manager was doing the calculations of my husband’s wages each fortnight. The amounts paid to us were about the same each week. If there was a large amount then I would have known we were overpaid but our payments were nearly the same every payment.”

[21] Mr XXXX received wages ranging from \$132 to \$720 for a week’s work in the period concerned. He rarely, if ever, received the same amount of wages two weeks in a row.

[22] The benefit payments made to the appellants did not fluctuate significantly until August 2013.

[23] In the period 25 March to 28 July, there were very few changes in the benefit rates paid to the appellants apart from two weeks, being the weeks ending 28 April and 26 May 2013. This was the case even though Mr XXXXs’ wages ranged from \$132 for one week to \$624. For example, in the week ending 2 June 2013, the appellant had no wages in the week ending 9 June, the appellant received \$300 in wages, and in the week ending 16 June, he received wages of \$444, but there was no change in the benefit paid in any of those weeks. In the period from 22 April 2013 to 29 July 2013, the benefit payments reduced only twice, even though the appellant’s wages were as much as \$624 in one week.

[24] When there are fluctuations in benefit payments, and the fluctuations are small, it is understandable that a beneficiary may not appreciate their benefit has not been adjusted appropriately. However, we have some difficulty accepting that a beneficiary would believe that they would continue to be entitled to the same amount of benefit in the weeks they were receiving over \$300 or \$400 per week in wages as the weeks in which they received much lower amounts. The appellants were not new to the benefit system. They must have realised they were receiving more than they were entitled to receive in some weeks.

[25] In the week ending 18 August 2013, the Ministry began charging \$336 per week against the appellants' benefit every week. The appellants' benefit payments dropped and benefit was consistently paid at a lower rate from the week ending 18 August 2013 to the week ending 13 October 2013. However, again the appellants' wages fluctuated between \$294 and \$720 but the benefit payments remained the same.

[26] We accept that there may have been some weeks when the appellants thought they were receiving the correct amount. But we are not satisfied that they believed they were entitled to the full amount paid in other weeks.

[27] We have considered the weeks where the appellants could genuinely have believed the amounts they were receiving was correct. The overpayments which occurred in the period 25 March 2013 to 28 July 2013 occurred where there was in effect no reduction in the benefit rate paid, apart from the two weeks where no overpayment occurred in any event. We do not accept the appellants received the payments of benefit made in the period 25 March 2013 to 28 July 2013 believing they were entitled to the full amount. We cannot, therefore, direct that the debts that occurred in these weeks not be recovered pursuant to the provisions of s 86(9A).

[28] The overpayments in the period 29 July 2013 to 3 November (with the exception of the week commencing 30 September 2013), occurred in circumstances where there was a reduction in the benefit paid. We are prepared to accept that the appellant received the payments in this period believing they were entitled to the amounts paid, with the exception of the week commencing 30 September 2013 when Mr XXXX receives wages of \$720.

[29] We are then required to consider whether or not the money received in those weeks was used by the appellants believing it would not have to be repaid. We are satisfied that the money was used for the basic living expenses of the appellants and their family.

[30] Finally, we must consider whether or not in all the circumstances, including the appellants' financial circumstances, it would be inequitable to require recovery of the overpayments in these five weeks. The appellants own their own home. It is subject to a mortgage. They have six children, five of whom have severe allergies. The children are home schooled. Mrs XXXX is also in poor health. We have already concluded that a significant contributing factor to the overpayment in this case was caused by Ministry error.

[31] We consider it would be inequitable in all the circumstances, including the appellants' financial circumstances, to require repayment of the debts which have

arisen in the period 29 July 2013 to 3 November 2013, with the exception of the week ending 30 September 2013.

[32] The debts in respect of the period 25 March 2013 to 28 July 2013, and for the week ending 30 September 2013 are to be recovered. The appeal as it relates to this period is dismissed.

[33] The appeal is allowed in relation to the overpayments created in the period 29 July 2013 to 3 November 2013, with the exception of the week commencing 30 September 2013. The debts in this period are not to be recovered.

DATED at WELLINGTON this 29th day of August 2016

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member