

**IN THE MATTER**

of the Social Security Act 1964

**AND**

**IN THE MATTER**

of an appeal by **XXXX** of  
Wellington against a decision of  
a Benefits Review Committee

**BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY**

Mr R D Burnard - Chairperson  
Mr K Williams - Member  
Lady Tureiti Moxon - Member

**HEARING** at WELLINGTON on 16 November 2016

**APPEARANCES**

Mr Calder for the appellant  
Mr P Frost and Ms Self for the Chief Executive of the Ministry of Social Development

**DECISION**

**Introduction**

[1] This is an appeal against a decision of a Benefits Review Committee on 18 February 2014, which upheld a Ministry decision to establish and seek recovery of overpayments of Accommodation Supplement, Temporary Additional Support and Invalid's Benefit paid to Ms XXXX during a period from 29 January 2007 to 11 August 2013 totalling \$64,733.37.

**Background**

[2] Ms XXXX was granted weekly non-beneficiary assistance from 29 January 2007 but the circumstances giving rise to this appeal arose from her completion of an

Accommodation Supplement application, a Disability Allowance application and a Temporary Additional Support application on 5 February 2007.

[3] During the course of an investigation by the Ministry into Ms XXXX's arrangements with her former husband the Ministry ascertained that the mortgage costs on the property where Ms XXXX lived were paid by her husband. Ms XXXX's benefit history was extensively reviewed and eventually a decision was made in the Ministry to seek recovery of the overpayments which are the subject of this appeal.

### **Case for the appellant**

[4] Ms XXXX gave evidence. She said that she had been told by a WINZ employee to "record on the forms what my husband and I both paid for the mortgage, rates and insurance". In respect of the Temporary Additional Support application she said "I now accept that I honestly but mistakenly recorded the mortgage which XXXX was making, albeit from our joint account". Ms XXXX said that she received the money in good faith and had spent it in reliance on her belief that she was entitled to it. She said that she could not afford to repay the overpayment and produced documentation of her financial position.

### **Case for the Ministry**

[5] A lengthy report was presented to the Authority under s 12K(4)(e) of the Social Security Act 1964 ("the Act") accompanied by some 1,276 pages of documentation. The full history of Ms XXXX's dealings with the Ministry were set out in the report and calculations of the overpayments presented. The Ministry took the position that had Ms XXXX set out her circumstances correctly in the documentation she completed the overpayments would not have been made and that it was appropriate that recovery should be sought from her.

### **The Authority's findings**

[6] Mr Calder representing Ms XXXX told the Authority that he accepted that Ms XXXX had been overpaid and no issues arose as to the calculation of the sums claimed from her. He contended that the Chief Executive of the Ministry could not recover the overpayments by reason of s 86(9A) of the Act which reads:

(9A) The chief executive may not recover any sum comprising that part of a debt that was caused wholly or partly by an error to which the debtor did not intentionally contribute if—

(a) the debtor—

- (i) received that sum in good faith; and
- (ii) changed his or her position in the belief that he or she was entitled to that sum and would not have to pay or repay that sum to the chief executive; and
- (b) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

[7] The word "error" in 9A is the subject of a special definition in (9B) which reads:

(9B) In subsection (9A), **error**—

- (a) means—
  - (i) the provision of incorrect information by an officer of the department:
  - (ii) any erroneous act or omission of an officer of the department that occurs during an investigation under section 12:
  - (iii) any other erroneous act or omission of an officer of the department; but
- (b) does not include the simple act of making a payment to which the recipient is not entitled if that act is not caused, wholly or partly, by any erroneous act or omission of an officer of the department.

[8] In his final submissions Mr Calder identified two errors which he submitted prevented recovery by the Ministry. First was an error by a female WINZ employee who it was said advised Ms XXXX to record on the Accommodation Supplement and Temporary Additional Support application forms the payments both she and her husband were making on the property.

[9] Secondly it was contended that there was an error of omission in the forms in that they did not adequately advise what was included as income "where reference was made to that word in the documents".

[10] Dealing with the first alleged error Ms XXXX at paragraph 10 of her prepared statement to the Authority recorded that the WINZ employee "told me to record on the forms what my husband and I both paid for the mortgage, rates and insurance". The implication from this statement was that Ms XXXX considered that the WINZ employee knew that both she and her husband were making payments towards the expenses of the property.

[11] On the material before the Authority it appears that the hearing before us was the first occasion on which Ms XXXX has contended that she was told by the WINZ employee to include the payments that both she and her husband made on the property. We note:

- (i) The first reference the Authority has found in the documentation relating to this issue is the transcript of an interview with an investigator for the Ministry of Social Development on 24 July 2013 where an allegation was being put to Ms XXXX, who was accompanied by an advocate, that she was receiving a single rate Invalid's Benefit whilst still living with her husband. In the references to this topic on pages 826, 835, 841 and 842 no statement was made by Ms XXXX that a WINZ employee had told her to include payments that both she and her husband made on the property in the Ministry's documentation. This interview lasted for one and a half hours.
- (ii) A second interview on 13 August 2013 also contains references to the forms completed by Ms XXXX at pages 987 and 1007–1024 where extensive questioning is recorded about the material Ms XXXX had recorded in the forms. There is no mention in the transcript of Ms XXXX stating that the WINZ employee had told her to include payments from both Ms XXXX and her husband on the property.
- (iii) At page 975 during the second interview with the investigator reference is made to a written statement Ms XXXX had provided WINZ on 27 June 2012. In that statement it is recorded "my husband does not provide financial assistance for me and we are not living in the nature of marriage ...". Again no reference is made in that statement to a WINZ employee advising her to include both her husband's and her payments on the property in the application forms.
- (iv) In the Benefits Review Committee decision of 18 February 2014 which is the subject of this appeal, the Committee records that Ms XXXX accompanied by her advocate was present at the hearing and that her case was that she "believes that in the Work and Income reviews she has answered the questions relating to the Accommodation Supplement correctly". The Committee also records "the applicant did not advise Work and Income that her former husband paid the mortgage repayments as Work and Income did not ask". It appears that at that hearing Ms XXXX was not contending that she had been given specific advice by a WINZ employee, simply that she had not been asked about who was paying the mortgage.
- (v) In the notice of appeal dated 19 February 2015 completed by her advocate Ms XXXX's grounds for appeal are that she "completed the forms provided by Work and Income in good faith and received the

assistance for her accommodation costs believing the payment to be correct". No reference is made to advice from the Ministry employee regarding the completion of the forms.

- (vi) During the course of cross-examination by the Ministry's counsel at the hearing before the Authority Ms XXXX stated "I didn't say to the case manager that he was paying the mortgage".

[12] Having reviewed this material and observed Ms XXXX's demeanour during the course of the hearing the Authority does not accept her evidence that the Ministry employee told her to record payments from both Ms XXXX and her husband for the mortgage, rates and insurance on the property. The debt in our opinion was not caused wholly or partly by a provision to Ms XXXX of incorrect information by the WINZ employee with whom she dealt at the time the relevant forms were completed.

[13] The second error alleged by Mr Calder on Ms XXXX's behalf is that the Ministry in its forms "do not adequately advise applicants of the specific meaning of "income" and their obligations to disclose outgoings paid by former partners". Mr Calder dealt with the examples of income listed on the forms which he said comfortably fit with the common and ordinary meaning of income but do not mention outgoings paid by a former partner. That is the position with the parts of the forms referred to by Mr Calder but we note that "maintenance payments" are listed as one of the examples of income in the Accommodation Supplement application (page 46) and the Disability Allowance application (page 54) both of which were completed by Ms XXXX.

[14] The wording of s 86(9B) in the definition of "error" requires consideration as to whether at (a)(iii) there was an "erroneous act or omission of an officer of the Department" as (i) and (ii) do not apply. In order to uphold Mr Calder's submission the Authority would need to conclude that the overpayments were caused wholly or partly by an error of the officer or officers in the Department who created the forms by not adequately advising applicants of the meaning of income and their obligation to disclose outgoings paid by former partners. The Authority has concluded that this is simply not the case. The overpayments have been caused by Ms XXXX's regrettable answers to specific questions in the forms. Whilst she said at paragraph 15 of her prepared statement that she "honestly but mistakenly recorded the mortgage payments ..." the plain fact is that in her application for Temporary Additional Support on 5 February 2007 in answer to the question "please give details of your costs" she recorded the payment to the National Bank. In the Accommodation Supplement application alongside a statement "please bring something that proves how much you pay for mortgage, insurance etc she listed two mortgages to the National Bank.

[15] Had Ms XXXX answered the questions correctly the Ministry would not have made the payments to her. The overpayments were caused by Ms XXXX incorrectly completing the forms. In summary we consider that the Chief Executive is not prevented from recovering the overpayments by reason of s 86(9A) of the Act.

[16] The Authority notes that under s 85A of the Act overpayments of benefits are debts due to the Crown and must be recovered. There is a limited discretion in s 86(1) of the Act and in s 86A. The appellant has not shown any circumstances which would justify the application of the discretion in those sections not to recover the overpayments.

### **Conclusion**

[17] For these reasons the appeal is dismissed.

**DATED** at WELLINGTON this 22<sup>nd</sup> day of December 2016

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Mr R D Burnard  
Chairperson

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Mr K Williams  
Member

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Lady Tureiti Moxon  
Member