[2016] NZSSAA 115

Reference No. SSA 179A/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 15 November 2016 and by video conference at Wellington on 17 November 2016.

APPEARANCES

Bo Xu for the appellant
Patira Suieva 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 and recover overpayments in respect of benefit paid to the appellant and his wife in the period 1 April 2012 to 31 March 2013.

Background

[2] The appellant is married. He and his wife have seven children of whom five remain living at home. The appellant's mother and sister also live in his household.

[3] At the time relevant to this appeal the appellant was in receipt of Sickness Benefit. In July 2013, he was transferred to Jobseeker Support.

[4] As a result of a data match in 2013, it was determined that the appellant had received income in addition to his benefit. It transpired that in the previous 12 months the appellant had income as a part-time real estate agent, from rental properties and from interest.

[5] The appellant and his wife personally own three rental properties on XXXX in Auckland. In addition, they are the directors and shareholders of a company called XXXX Limited. This company owns a rental property at XXXX, Auckland.

[6] At the request of the Ministry, the appellant provided accounts both for himself personally and XXXX Limited for the years ending 31 March 2012, 31 March 2013 and 31 March 2014.

[7] As a result of receipt of this information, the Ministry assessed the income of the appellant and his wife for the year ending 31 March 2013 as follows:

Real estate income	$14,976.46
Rental income	$13,911.61
Income from interest	$ 1,107.71
XXXX Limited	−$5,002.11
Total net profit/income to be charged	$24,993.67 = $480.64 per week

[8] This income was charged against his benefit entitlement in respect of the period 1 April 2012 to 31 March 2013 and resulted in a decision that the appellant and his wife had been overpaid $14,622.92 or $7,311.47 in respect of each partner.

[9] The appellant was advised of the decision to establish and recover the overpayment in June 2015. The appellant 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 appellant then appealed to this Authority.

[10] At the hearing of this matter, the appellant's position in relation to the calculation of his income was that both in relation to the year ending 31 March 2013 and in other income years, amounts for what are referred to as "running costs", shown in the depreciation schedules of the accounts provided, should have been deducted from the calculated income. These amounts are related to outgoings incurred on the rental properties during periods they were not occupied. The appellant submits that in the year in question, $13,284 should be deducted from the total income of $24,993.67 in calculating his income for benefit purposes.

Decision

[11] At the time relevant to this appeal, the appellant was in receipt of Jobseeker Support which is an income-tested benefit. Section 3 of the Act defines "income" in the following way:

> **income**, in relation to any person,—
>
> (a) means any money received or the value in money's worth of any interest acquired, before income tax, by the person which is not capital (except as hereinafter set out); and
>
> (b) includes, whether capital or not and as calculated before the deduction (where applicable) of income tax, any periodical payments made, and the value of any credits or services provided periodically, from any source for income-related purposes and used by the person for income-related purposes; and

[12] An inquiry into what constitutes income under the Social Security Act 1964 is an inquiry into what funds were available to the appellant and his family to meet their living expenses. For that reason, book entries in relation to depreciation and home office expenses which are deductible when assessing income for the purposes of the Income Tax Act will not generally be permitted when ascertaining income for the purposes of the Social Security Act 1964.

[13] The appellant did not dispute the adding back of depreciation amounts in assessing his entitlement to income at the hearing. We note the Ministry's treatment of depreciation was approved in *Hendrickson v Director-General of Social Welfare*[1] where the Court found "depreciation is a notional concept and is not to be deducted". The Authority has previously found that depreciation is in effect a book entry permitted for taxation purposes to allow a person in business to plan for the replacement of capital items needed to operate the business.[2] Where funds deducted for depreciation have in fact been used for income-related purposes, then the amount of that money must be treated as income for the purposes of the Social Security Act 1964. We are satisfied that the Chief Executive was correct to add back depreciation in this instance.

[14] A further matter to bear in mind is that in calculating income for the purposes of the Social Security Act 1964, losses from one stream of income cannot be offset against positive streams of income from another source: see *Carswell v Director-General of Social Welfare*.[3] So, for example, while the Chief Executive has allowed a rental loss from XXXX Limited to be deducted from the rental income received in the appellant's private name, it would not be appropriate to deduct a loss made in relation to rental income from the appellant's income as a real estate agent.

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1 HC Auckland AP 25-SW00, 12 June 2000 at [12].
2 [2014] NZSSAA 27.
3 HC Christchurch AP 132/98, 14 December 1999.

'Running costs'

[15] The main objection raised by the appellant in relation to the calculation of his income is that he alleges that costs incurred in relation to the rental properties during periods the properties were not occupied, should be deducted from the assessment of the rental income.

[16] We infer that the appellant's accountant was satisfied that for whatever reason the 'running costs' were not deductible for income tax purposes because they were not costs incurred in earning income. In effect, they are holding costs which are capital in nature.

[17] Section 64(3) of the Act provides for the deduction of any items by which the Chief Executive is satisfied the income is likely to be reduced. As a general rule, costs incurred in earning income will be deductible.

[18] If costs cannot be viewed as costs incurred in incurring income for tax purposes then it would not be appropriate for them to be considered to be costs incurred in earning income and, therefore, deductible for the purposes of calculating income under the Social Security Act 1964. If the costs were deducted from income earned in a different period, in effect, the social security system would be subsidising the appellant's investment strategy. We are not satisfied that the amount of 'running costs' referred to in the depreciation schedule should be deducted from the assessment of income. We accept that the Ministry's assessment of the appellant's income of $24,993.67 was correct.

Calculation of debt

[19] Once the appellant's income was established, it was appropriate that the Chief Executive review the appellant's entitlement to benefit and establish an overpayment.

[20] We do not have any submissions from the appellant in relation to the calculation of the overpayment. Therefore, we accept that the overpayment based on income of $24,993.67 was correct.

Recovery of debt

[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 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.

[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) 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.

[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] The first issue the Authority must consider is whether or not the overpayment that has arisen is a result of an error on the part of an officer of the Ministry. Following the hearing of this matter, at which the appellant pointed out that he had clearly advised the Ministry that he was receiving rental income during the period concerned, the Ministry have accepted that part of the overpayment was due to Ministry error and that the debt resulting from that error should not be recovered. As a result, the debt has been recalculated on the basis that the rental income has been completely excluded from the assessment. The income from interest has also apparently been excluded for reasons not explained. The debt has now been assessed on the basis of the appellant's income as a real estate agent of $14,976.46 or $288 per week. This has resulted in a reduction of the total debt to $7,341.92, being $3,693.97 owed by the appellant and $3,647.97 owed by his wife.

[25] The Ministry say that it made no error in relation to the appellant's income as a real estate agent because it was not aware of this income until after the data match.

[26] The appellant presented evidence of providing an IRD Summary of Earnings form to the Ministry on 9 June 2011 which included income from XXXX Limited (appellant's exhibit 2B). This particular document has a Work and Income date stamp on it. He has also provided copies of GST returns which he says were provided to the Ministry,

showing earnings from real estate sales during 2012. These documents are not date stamped but the Ministry did not specifically reject this claim.

[27] In a benefit re-application form dated 28 November 2013, the appellant has indicated that he had income from driving school, rentals and also notes "see attached letter from IRD". This letter was not included in the Section 12K Report and we are, therefore, not aware of its contents.

[28] We have not been provided with any other application or re-application forms relating to the appellant's Sickness Benefit in the period 2010 – 31 March 2014. This is most unsatisfactory.

[29] While we have no confirmation the GST returns were provided to the Ministry, there can be no doubt about exhibit 2B. The document relates to income received in the year ending 31 March 2010. It demonstrates the appellant had informed the Ministry of his income as a real estate agent. We would have thought that at some point this income would have been taken into account in assessing his benefit entitlement in the year ending 31 March 2010, and assessing prospective income for the year ending 31 March 2011.

[30] Given the lack of evidence of what the appellant actually told the Ministry at the time of his review immediately prior to the benefit year concerned, we think it reasonable to infer that the Ministry were aware that the appellant worked as a real estate agent and failed to take this into account in assessing his benefit entitlement in the 2012/2013 year. As a result, the overpayment occurred at least in part as a result of an error by the Ministry.

[31] It is possible that the appellant's failure to provide formal accounts for the years ending 31 March 2011, 2012 and 2013 contributed to the problem. This is a matter that the Ministry ought to have been pursuing with the appellant but there is no evidence that it did so until after the data match. The appellant said that the failure to have his accounts done was due to lack of funds to pay for the accountant's costs, but that he had, in any event, kept the Ministry informed through the provision of GST returns. We are not satisfied on the balance of probabilities that the appellant intentionally contributed to the overpayment.

[32] We are then required to consider whether or not the appellant and his wife received the payments of benefit in good faith. The question is whether he and his wife received the payments of benefit believing that they were entitled to them.

[33] We do not accept that the appellant and his wife could have received real estate income of $14,976.46 and believed that there would be no impact on his benefit

entitlement. Furthermore, the appellant received rental income as well as his real estate income. The total was $24,993.67. It is implausible that he could have received this amount of income and not expect that his benefit entitlement would remain unchanged. We are not satisfied that the appellant received the full amount of benefit payments during the year in question believing that he was entitled to the full amount. As a result, we are not able to direct that the debt not be recovered, pursuant to the provisions of s 86(9A) of the Social Security Act 1964.

[34] If we are wrong in that regard, then we would also have to consider whether or not it would be inequitable in all the circumstances, including the appellant's financial circumstances, to require recovery. The appellant and his wife have substantial assets. We are not satisfied that in all the circumstances, including the appellant's financial circumstances, it would be inequitable to require recovery of the debt. We could not, therefore, direct that the debt not be recovered on that basis.

[35] The appeal is allowed to the extent that the Chief Executive has agreed not to recover part of the debt. The debt is reduced to a total of $7,341.92. This debt is to be recovered.

[36] In all other respects the appeal is dismissed.

DATED at WELLINGTON this 23rd day of December 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