[2017] NZSSAA 002

Reference No. SSA 028/15

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of Australia against a decision of a Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Ms M Wallace - Chairperson
Mr K Williams - Member

DECISION ON THE PAPERS

Introduction

[1] The appellant appeals against a decision of the Chief Executive, upheld by a Benefits Review Committee, to establish and recover an overpayment of New Zealand Superannuation paid to the appellant between 30 June 2008 and 19 June 2012 amounting to $22,246.14.

Background

[2] The appellant has been paid New Zealand Superannuation in Australia under the terms of the reciprocal agreement between New Zealand and Australia since 9 March 2007.

[3] In June 2012, the Ministry received advice from Centrelink that a review of the notional rate of Australian Age Pension payable to the appellant had been carried out from 30 June 2008. As a result, there were changes in those rates from 30 June 2008 and the appellant had no entitlement to the Australian Age Pension from 31 August 2008.

[4] Following receipt of this information, the Ministry carried out a review of the appellant's entitlement to New Zealand Superannuation in respect of the period 30 June 2008 to 19 June 2012. An overpayment amounting to $22,294.42 was established.

[5] 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.

[6] The appellant has explained that she applied for the Australian Age Pension following her husband being made redundant and being reduced to part-time employment. The appellant said that at the time of her application she submitted all of her details including rental property details, assets and her husband's wages. Later in 2007 her husband was fortunate enough to get full-time employment. Centrelink were informed of this and a full assessment of their income and assets was provided. The appellant says that her husband's fortnightly wage was fixed at that time. The appellant says that her husband continued to provide a yearly assessment of his income and their assets between 2008 until 2010. In 2010, he went on to shift work causing his income to vary. At one point, the appellant states, they did not advise the change in his income until his review in 2011. In an email dated 2 December 2013 from the appellant, she stated that "we overlooked declaring this" (Mr XXXX's earnings). She says the 2012 review was the first time her husband's income had been questioned despite reviews being submitted to Centrelink on a regular basis. In addition, the appellant submits that she and her husband were unaware of the Centrelink rules around "deeming income" in assessing income on a rental property.

Decision

[7] 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 s 19 of the Social Welfare (Reciprocity Agreements, and New Zealand Artificial Limb Service) Act 1990.

[8] In this particular case, the New Zealand Government has a reciprocal agreement on social welfare with the Government of Australia. This agreement provides for the payment of New Zealand Superannuation in Australia and governs the circumstances in which it can be paid and the way the rate payable is calculated.[1]

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1 See Schedule 1 of the Social Welfare (Reciprocity with Australia) Order 2002.

[9] Article 9 sets out the way in which the rate of New Zealand Superannuation payable is to be ascertained. The rate of New Zealand Superannuation is calculated pursuant to a formula.

[10] Article 9.4 of the Agreement then provides that regardless of the rate calculated pursuant to the formula, the New Zealand Government must not pay more than the rate of the Australian Age Pension that would have been payable to the person if he or she was entitled to receive an Australian Age Pension but not entitled to receive New Zealand Superannuation. The effect of this provision is that if the rate of Australian Age Pension is nil then the rate of New Zealand Superannuation payable is also nil. The reason for this requirement is to ensure that recipients of New Zealand Superannuation in Australia do not receive more than recipients of Australian Age Pension in Australia who are not entitled to New Zealand Superannuation.

[11] Australian Age Pension is income and asset tested. At the time relevant to this appeal, the appellant's husband was in employment. In addition, we understand he received a pension from the United Kingdom and under the Australian rules for assessing entitlement to the Australian Age Pension 'deemed income' from a rental property was to be taken into account in assessing the appellant's eligibility for an Australian Age Pension.

[12] As a result of contact between the appellant's husband and Centrelink, in June 2012, Centrelink determined that the couple's income significantly exceeded the income limit for entitlement to the Australian Age Pension. They immediately suspended the appellant's entitlement. A backdated review was subsequently carried out, as a result of which, it was determined that while the appellant had a partial entitlement to the Australian Age Pension from 30 June 2008 to 31 August 2008, from 31 August 2008, she had no entitlement.

[13] When the Ministry became aware of the situation in 2012 it conducted a backdated review and established a debt. The most up-to-date assessment is set out at exhibit 13 of the s 12K report with further explanation contained in paragraphs 5.14 and 5.16.

[14] The appellant has not disputed the calculation of the debt.

[15] We must then consider whether or not the debt should be recovered.

Recovery – s 86(9A)

[16] It is the primary position of the appellant that the amount of the debt should be reduced taking into account the circumstances in which the overpayment arose and the personal situation of herself and her husband.

[17] 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;

(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.

[18] 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 by an officer of the Ministry.

[19] 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.

[20] The first question to be considered is whether or not the debt was caused wholly or partly as a result of an error to which the debtor did not intentionally contribute. 'Error' can include incorrect information given by an officer of the department or a failure to provide information.

[21] The position of the Ministry is that the overpayment has arisen as a result of the operation of the reciprocal agreement and that it simply acted on the advice of Centrelink within a reasonable timeframe of receiving the revised information about the appellant's eligibility for an Australian Age Pension. An error by Centrelink is not an error by an officer of the Ministry.

[22] The appellant and her husband say they did not fully understand how deemed income was taken into account in the assessment of their entitlement to the Australian Age Pension. Further, they did not understand how small fluctuations in Mr XXXX's wages would affect their entitlements. They admit that they did not inform Centrelink of fluctuations in Mr XXXX's wages, but consider they have done nothing wrong.

[23] The letter advising the appellant of the grant of Australian Age Pension to her clearly states that she must advise Centrelink of any changes in the combined income of herself and her partner. Centrelink advises that this information is contained in most letters to beneficiaries. They also advise that deemed income has been taken into account in the appellant's case since the initial grant of a concession card in 2001.

[24] Although the appellant says that her husband's income was reported annually to Centrelink, Centrelink's records indicate no contact with the appellant or her husband between 21 October 2009 and 11 May 2012, when, in an interview with Mr XXXX regarding his bonus pension, the appellant's correct financial circumstances became known to Centrelink. Centrelink say that there was no annual review system in place relevant to the appellant's situation at the time relating to the overpayment and the obligation was placed on customers to notify any change in their income.

[25] Between 6 November 2008 and 21 October 2009, there were a number of communications between Centrelink and the appellant regarding her financial circumstances. We have received no clear explanation as to why accurate information about the income of the appellant during this period was not obtained and the notional rate of Australian Age Pension was not adjusted to a nil rate during 2009. A communication from Centrelink suggests that the appellant and her husband advised of income in relation to superannuation and bank accounts etc, but never in relation to earnings. This does not appear to be correct. The contacts on 15 May 2009 and 12 August 2008 suggest the appellant provided notes relating to information about earnings on those occasions. We are surprised given the level of communication with Centrelink during this period that accurate information was not obtained about Mr XXXX's wages. It is also surprising that Centrelink apparently made no attempt to verify the appellant's income between the end of 2009 and 2012.

[26] It appears that, in fact, at the time the appellant was first considered to be eligible for the Australian Age Pension in 2007, Mr XXXX was in part-time employment. He moved into full-time employment in 2008 and shift work at some point after that. There are some inconsistencies in the information provided by the appellant about when this actually happened – in some correspondence it is said to be 2010 and at other times 2011. The appellant says that it was when Mr XXXX moved to shift work that they failed to report fluctuations in his earnings but annual income was reported. She also points out that in the years 2008, 2009 and 2010 her husband's increase in earnings income was not large. The appellant's assertion that her husband's annual earnings were provided to Centrelink is at odds with the information from Centrelink that there was no contact with the appellant between the end of 2009 and 2012.

[27] Significantly, a Centrelink record states that there was a coding error in the appellant's record. Apparently, as a result of this error, no debt was established by Centrelink when the appellant's correct circumstances came to light in 2012. Precisely what this coding error was has not been explained although Centrelink was requested by the Appeals Office to do so. This is unsatisfactory. We conclude that there was an error by Centrelink which has at least in part caused the debt.

[28] In some circumstances, officers of Centrelink may be regarded as agents for officers of the Ministry in New Zealand but we are not satisfied that this is one of those situations. We infer that the collection and storage of information about the appellant's circumstances by Centrelink was for the purpose of granting benefits, including Old Age Pension in Australia. Advice relating to the information held was passed on at various times to the New Zealand Ministry pursuant to the terms of the reciprocal agreement, but Centrelink was not acting on behalf of the Ministry in the processes in this case. We accept therefore that on this occasion an error by Centrelink could not amount to an error by an officer of the Ministry pursuant to the provisions of s 86(9A).

[29] We have considered whether the appellant was given sufficient information by the Ministry in New Zealand about the effect that changes in the Australian notional rate as a result of the Australian income and asset tests, would affect her entitlement to New Zealand Superannuation. We have not been provided with a copy of the original letter advising the appellant of the grant of New Zealand Superannuation to her or the relevant forms but have been advised that recipients of New Zealand Superannuation in Australia are advised that the rate payable is dependent on the Australian rate of benefit payable. In addition, letters received by the appellant from Work and Income on 24 February 2009, 21 August 2009, 9 October 2009 and 28 October 2009 would have alerted the appellant to the fact that a change in the notional rate of the Australian Age Pension payable to her would affect her entitlement to New Zealand Superannuation, and that an overpayment may occur. The letter of 21 August 2009, for example, advised of an overpayment as a result of a change in the Australian notional rate.

[30] We are not satisfied that the debt arose as a result of the Ministry in New Zealand failing to inform the appellant that changes in the rate of the Australian Age Pension payable to the appellant would affect her entitlement to New Zealand Superannuation. Rather, we consider that the overpayment occurred as a result of the decision of the appellant and her husband not to provide accurate information to Centrelink Australia about regular fluctuations in Mr XXXX's income and a coding error by Centrelink.

[31] As we are not satisfied that the debt in this case occurred as a result of an error by an officer of the Ministry, we cannot direct that the debt not be recovered pursuant to the provisions of s 86(9A) of the Social Security Act 1964.

Recovery s 86(1)

[32] Sections 86(1) and 86A of the Act give the Chief Executive a discretion to take steps to recover a debt. Section 86(1) applies to debtors who are still in receipt of benefit. Section 86A applies to debtors who have sources of income other than benefit. In our view, the principles will be the same whether the recovery action is under s 86(1) or s 86A. It is also important to understand that it is a discretion to take action to recover a debt. It does not result in the debt being written-off.

[33] Parliament has specified the circumstances in which a debt should not be recovered in s 86(9A). The occasions that the Chief Executive should exercise his discretion to take no steps to recover a debt or debts which does not meet the criteria of s 86(9A) must be limited.[2]

[34] The considerations to be taken into account in exercising the discretion include the Chief Executive's obligations under the Public Finance Act 1989 to make only payments authorised by law, and under the State Sector Act 1988 for the economic and efficient running of the Ministry. The context of the Social Security Act 1964 and the impact of recovery on the debtor, taking into account the International Convention on Economic, Social and Cultural Rights, are also relevant.

[35] The circumstances in which the discretion should be exercised have been considered by the High Court on a number of occasions in the context of s 86(1). The circumstances have been described as "extraordinary",[3] "unusual",[4] and as "rare and unusual",[5] but these are not tests.[6]

[36] The appellant says that she and her husband did not knowingly mislead anyone. The appellant is now aged 77 years. Mr XXXX is aged 75 years. They request that the debt be reduced and suggest that it should at least be reduced to include only the period when Mr XXXX went on to shift payments.

[37] For the reasons previously outlined, it appears that, at least in part, the debt arose as a result of an error by Centrelink. An error by Centrelink is a matter which we consider to be relevant to the exercise of the discretion under s 86(1). Particularly when it appears that as a result of the Centrelink error, a decision was made not to establish or recover any debt in relation to the Australian Age Pension.

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[2] *Director-General of Social Welfare v Attrill* [1998] NZAR 368 (HC).
[3] *McConkey v Director-General of Work & Income New Zealand* HC Wellington AP277-00, 20 August 2002.
[4] *Cowley v Chief Executive of the Ministry of Social Development* HC Wellington CIV-2008-485-381, 1 September 2008.
[5] *Osborne v Chief Executive of the Ministry of Social Development* [2010] 1 NZLR 559 (HC).
[6] *Van Kleef v Chief Executive of the Ministry of Social Development* [2013] NZHC 387 (HC).

[38] In addition, some of the uncertainty around the precise circumstances in which the debt in the period prior to 2010 arose has occurred partly because of the delay in this matter being considered. In the first instance, there was a delay by the appellant and her husband in pursuing the matter. There was also a delay of 18 months by the Ministry in preparing a Section 12K Report for the Authority. This delay is simply unacceptable.

[39] Balanced against these matters, it is clear that the appellant and her husband bear some responsibility for the debt by failing to regularly report income. They now have total income of $1,541.50 per fortnight and total expenses of $1,833 per fortnight. The budget they have provided includes significant amounts for discretionary spending such as restaurants, alcohol, cigarettes, donations, entertainment, gifts and holidays. We consider that the appellant and her husband are in a position to make modest repayments.

[40] Taking into account all of the circumstances, we direct that the Chief Executive take no steps to recover the debt in respect of the period 30 June 2008 to 31 December 2009, that being ten weeks after the last recorded contact between the appellant and her husband and Centrelink, apart from the debt already recovered in respect of that period. In respect of the period 1 January 2010 to 19 June 2012, the Chief Executive is directed to take steps to recover the debt by instalment.

[41] The Chief Executive is to recalculate the amount to be recovered and advise the appellant and her husband.

[42] The appeal is allowed in part.

DATED at WELLINGTON this 30th day of January 2017

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Ms M Wallace
Chairperson

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Mr K Williams
Member