

[2017] NZSSAA 008

Reference No. SSA 129/16

IN THE MATTER of the Social Security Act
1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr K Williams - Member

Mr C Joe - Member

Hearing at Wellington on 13 March 2017

Appearances

For Chief Executive: Mr G Moore, MSD, Wellington.

For the Appellant: Mr G Howell, Benefits Rights Service, Wellington

DECISION

Overview

- [1] The essential facts in this matter are not in dispute. Mr and Mrs XXXX (“the appellants”) are a married couple who have no dependents and receive a non-beneficiary Accommodation Supplement. This Accommodation Supplement was granted with effect from 13 September 2013.
- [2] The appellants left New Zealand on XX August 2014. The Ministry became aware of their departure from New Zealand, and suspended the Accommodation Supplement as from 6 October 2014.

- [3] The Ministry took the view that due to the interval before the Ministry was able to take action to suspend the Accommodation Supplement payments there had been an overpayment of \$116.07 to each of the appellants. The Ministry's position is that it could correctly pay the Accommodation Supplement only during the first 28 days the appellants were absent from New Zealand. The overpayment relates to the period of time after 28 days until the Ministry stopped the payments.
- [4] The parties accept that the appellants did not notify the Ministry they were leaving New Zealand for a period prior to departure. The reason for the travel overseas was due to the female appellant's mother, who lives overseas, being unwell. The appellants had at some point contacted their advocate, intending that the advocate would forward information to the Ministry. There is some lack of clarity as to when they first made that request.
- [5] The questions for the Authority are:
- a. Whether, in fact, the Accommodation Supplement could or should have continued to be paid, notwithstanding the appellants being temporarily outside of New Zealand after 28 days; and if not
 - b. Whether the Ministry has any powers to write-off or not recover the debt relating to the overpayment.

The Legislation

- [6] The starting point when considering the legislation is s 77 of the Social Security Act 1964 ("the Act"). The section deals generally with the consequence of a person entitled to a benefit being absent from New Zealand. Section 77(1) has the effect of providing that while a beneficiary is absent from New Zealand, a benefit is only payable if allowed under another subsection of s 77, or certain other provisions that do not apply in this case. The parties have primarily considered that s 77(2) determines the outcome in this matter. That provision states:
- (2) A benefit is payable to a beneficiary in respect of any 1 or more absences of the beneficiary from

New Zealand equal to or shorter than 4 weeks in total in any 52-week period if —

- (a) the benefit is not a benefit of a kind specified in subsection (2A); and
- (b) the benefit would, but for those 1 or more absences, be payable to the beneficiary; and
- (c) the chief executive is satisfied that the 1 or more absences do not affect the beneficiary's eligibility for the benefit.

[7] Section 77(2A) covers a range of benefits, for example Sole Parent Support, Supported Living Payments and others. For present purposes, it is sufficient to observe that s 77(2A) does not include an Accommodation Supplement. Accordingly, if an Accommodation Supplement is a "benefit" then the prohibition in s 77(1) applies, and the parties accept the terms of s 77(2) provide relief allowing the payment for the first 28 days. The Ministry has allowed the appellants the full four weeks in this case.

[8] Although the argument for the appellants did not rely on it, the Ministry recognised that s 77(3AA) provides some discretion for the Chief Executive to allow a benefit to be paid for absences of longer than four weeks. The Ministry, however, also referred to s 77(6), which imposes an obligation on a person to give notice before leaving New Zealand and s 77(8) which does allow the exercise of discretion to continue payment beyond 28 days, even when notice was not given. However, s 77(8) has a significant threshold in that both the beneficiary's absence from New Zealand and the failure to notify an Officer of the Department before leaving must be justified for "1 or more good and sufficient humanitarian reasons". The "humanitarian reasons" are defined by Regulation.

[9] The other dimension of the appeal is whether or not the Ministry has any power to remit or write-off the overpayment beyond 28 days. Section 86(9A) of the Act essentially provides that the Chief Executive may not recover a debt to the extent it was caused wholly or partly by an error to which the person owing the debt did not intentionally contribute, if they received the money in good faith, changed their position believing they were entitled to the money, and it would be inequitable to require recovery. However s 86(9A) is subject to a

definition of “error” in s 86(9B). In essence that definition confines the material error to departmental error.

- [10] The appellant also relies on s 86(1). That provision provides that the Chief Executive is under a duty imposed by that subsection to take all reasonably practicable steps to recover a debt. Prior to 7 July 2014, that provision did give the Chief Executive discretion to decide whether or not to recover the debt. The discretion was removed through an amendment to the Act.

Discussion

The position of the parties

- [11] At the hearing, the appellant’s advocate took the position that the issues turned on s 77(1) and (2) rather than s 77(6) – (8).

- [12] It was the Ministry that expanded the consideration to s 77(6), (7) and (8). As noted, those provisions provide some discretion to allow payments for a period beyond 28 days, even when a person entitled to a benefit has failed to provide timely notification of their absence from New Zealand. The Ministry however made it clear that their view was that the appellants’ circumstances did not meet the criteria for extending the period for payment of the Accommodation Supplement beyond 28 days. Given that:

- a. The appellants and their advocate did not argue for the application of s 77(6) – (8),
- b. Neither¹ of the appellants attended the hearing to provide evidence to support an argument that the period could be extended by discretion beyond 28 days,
- c. The materials do not establish they could successfully advance that position;

Our view is that there is nothing to justify further enquiry into the potential to extend the period for payment beyond 28 days. It is not necessary to consider this element further.

¹ Mr Howell explained that one of the appellant was unwell.

[13] Accordingly, the only issues to resolve are the application of s 77(1) and (2), and the provisions relating to the writing-off or non recovery of debt in sections 86(9A) and (9B), and 86(1). The appellants contended that they applied favourably, and the Chief Executive contended they allow no discretionary relief in this case.

Applying the law to the facts – section 77(2)

[14] In essence, the argument made by the appellants' advocate is that s 77(2) applies only to principal benefits. He means in the sense that these particular appellants are entitled to an Accommodation Supplement, but not as a supplement to other benefits, for example they do not receive a Supported Living Payment, or Jobseeker Support payment that has the Accommodation Supplement paid in addition to that primary benefit. The advocate observed that in such circumstances, as is reflected in the Ministry's Section 12K Report, that the appellants receive "a non-beneficiary Accommodation Supplement". However, the informal description of the appellants' status as non-beneficiaries cannot determine the interpretation of the legislation.

[15] The primary effect of s 77(1) is to preclude the payment of a benefit unless there is specific provision to pay it while the recipient is outside New Zealand. The appellants have to rely on s 77(2) to receive any entitlement to a benefit when outside New Zealand. The argument for the appellants was that the word "benefit" did not encompass the Accommodation Supplement in this case. If that were correct, then s 77(1) would not apply and it is not necessary for s 77(2) to provide an exception. There would simply be no prohibition on them receiving their Accommodation Supplement when outside New Zealand. However, the word "benefit" is defined in s 3 of the Act to include "an accommodation supplement payable under section 61EA". That is the benefit in question in this case. It inevitably follows that s 77(1) applies, and the Chief Executive accepts that s 77(2) applies. For the reasons discussed, there is no adequate foundation in the material before the Authority to support the exceptional discretionary relief requiring defined humanitarian reasons to extend the period beyond 28 days. It inevitably follows that the overpayment has been established.

Applying the law to the facts – recovery of overpayments

- [16] The Ministry's position in relation to the recovery of overpayments is uncomplicated. Section s 86(9A) provides certain circumstances in which a debt may not be recoverable; however, in this case s 86(9A) effectively requires that there be a departmental error. The appellants have not been able to identify anything in the nature of a departmental error. Accordingly, they cannot have the benefit of s 86(9A).
- [17] We find the appellants have not been able to identify any departmental error; they did not refer to any factor that could be categorised in that way.
- [18] The appellants also relied on s 86(1). However, in its material form, which applied as from 7 July 2014, s 86(1) of the Act simply does not give the Chief Executive a discretion whether or not to recover a debt. Instead, it contains a direction that he do so. As the appellants did not leave New Zealand until XX August 2014, the current form of the legislation must apply, and in the absence of a discretion not to recover a debt, it cannot assist them.

Decision

- [19] The appeal is dismissed, and the decision of the Benefits Review Committee is confirmed.

Dated at Wellington this 24th day of March 2017

G Pearson
Chairperson

K Williams
Member

C Joe JP
Member