

[2017] NZSSAA 012

Reference No. SSA
105/16

IN THE MATTER of the Social Security Act
1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr C Joe - Member

Hearing at Nelson on 22 March 2017

Appearances

For Chief Executive of the Ministry of Social Development: Ms J Hume (agent)

The appellant: In person.

Background

[1] This appeal relates to what the Chief Executive claims is an overpayment of New Zealand Superannuation arising in the period between 29 November 2011 and 30 December 2011. The amount in dispute is \$1,553.92.

[2] There are two potential issues in the appeal. First, whether the overpayment exists or not, and second, if so, whether it can or should be recovered.

[3] Unfortunately, the procedural history of the matter is complicated. In essence, on 11 July 2012 a Benefits Review Committee held a hearing

regarding whether or not the original debt was correctly established. The Benefits Review Committee's decision was that the debt was correctly established.

- [4] At this point, the appellant took no steps (including not exercising his right to appeal), and the Chief Executive chose not to recover the overpayment. More than three years later, the Chief Executive decided that he would take steps to recover the overpayment. In the interim, the legislation relating to the Chief Executive's obligations and powers to recover debts had changed. Under the legislation that existed on 11 July 2012, the Chief Executive had some discretionary powers in relation to not recovering debts. New legislation significantly restricted the discretion, as from 7 July 2014.
- [5] Following the Chief Executive's decision to recover the debt after years of delay, the appellant sought a review of that decision. A Benefits Review Committee heard that issue and in a majority decision decided that the Chief Executive should recover the debt.
- [6] Accordingly, there are two Benefits Review Committee decisions:
- a. The original one relating to the establishment of the debt; and
 - b. The second relating to the belated decision to recover it.
- [7] The Chief Executive says that the appeal, to the extent that it relates to the establishment of the debt, is out of time. However, that objection cannot apply to the second Benefits Review Committee's decision.

The Scope of the Appeal

- [8] In our view, both the establishment of the debt and the decision to recover would have to be issues in the appeal if we are to make a just decision. At the time the debt was established in 2011, and confirmed in 2012, the Chief Executive had some general discretion in relation to recovery. The appellant could have disputed the exercise of Chief Executive's discretion under the then current legislation. Given that the Chief Executive, after a delay of more than three years, has belatedly decided to recover the debt, we consider it would be unjust if the

appellant cannot dispute the establishment of the debt, if he faces recovery of the debt.

- [9] The appellant made his decision not to appeal when he could rely on the former regime relating to recovery; the Chief Executive now says he must face a different regime. It would be unfair not to allow the appellant to pursue all of his remedies in what the Chief Executive says are different statutory circumstances. Potentially that could be through allowing a late appeal, or expanding the grounds of appeal in the current appeal.
- [10] As we explain below, the Authority has decided the Chief Executive wrongly decided to recover the debt, so we do not need to determine whether an appeal including the establishment of the debt is available. However, the fact the Chief Executive takes the position that the Appellant can no longer dispute liability, adds to the reasons against allowing him to seek recovery under the changed statutory regime.

The Legislation

- [11] The recovery of superannuation payments is governed by the Social Security Act 1964. Section 86(1) was replaced with effect from 7 July 2014 by the Social Security (Fraud Measures and Debt Recovery) Amendment Act 2014. The former s 86(1) allowed the Chief Executive to decide whether to pursue recovery. The amended legislation is different, it now provides:

The chief executive is under a duty imposed by this subsection to take all reasonably practicable steps to recover a debt referred to in s 85A.

- [12] The former s 86(9A) gave the Chief Executive a discretion to authorise the provisional writing off of a debt, which arose as a result of departmental error where the recipient of an overpayment had altered their position in reliance on the payment. The new s 9A and 9B alters the situation to a mandatory one where the Chief Executive “may not recover any sum”, which comes within those circumstances.
- [13] If the new form of the legislation, enacted some two and a half years after the debt was established, applied; then the Chief Executive has a statutory obligation to recover the debt. The question is whether the

amended legislation does compel the Chief Executive to recover all the historic debts that have not been subject to recovery action under the former legislation.

Discussion

- [14] The Chief Executive contends that the new form of the legislation requires him to recover the debt in issue in this appeal. However, for a period of more than three years after the debt was established, the Chief Executive took no recovery action. That was an appropriate course to take under the then current legislation, where the Chief Executive held a discretion not to recover the debt.
- [15] If we were exercising that discretion under the then current legislation, we would have made the same decision.
- [16] The only justification the Chief Executive has advanced to support his position is that he changed his mind about the recovery of the debt and decided to pursue it after the new legislation was in place. The argument for the Chief Executive is that because he made a decision to recover the debt after the new legislation came into effect, the new legislation now governs his actions, and accordingly, this Authority's decision.
- [17] The logic in the Chief Executive's argument is flawed. This Authority, pursuant to section 12M(7), may reverse the decision or determination appealed against. The decision in question under the second Benefits Review Committee is the Chief Executive's decision to seek to recover the debt.
- [18] If we reverse that decision, the recovery of this debt is the same as the innumerable debts the Chief Executive did not recover prior to 7 July 2014. Plainly, the amended legislation was not intended to require the Chief Executive to set about recovering all historic debts he and the former holders of his office decided not to collect under the then current legislation.
- [19] The Chief Executive's argument in this appeal relies on the transitional provisions in the Social Security (Forward Measures and Debt Recovery) Amendment Act 2014. The key provisions are amendments

to Schedule 32 of the Social Security Act 1964. It suffices to say that the general effect of the amended clause 19 of Schedule 32 is that the new recovery provisions will apply to all recoveries, whether or not the entitlement or liability arose before or after the commencement of the amendment on 7 July 2014. However, to avoid creating a mandatory obligation to recover all historic debts, a new clause 20 of Schedule 32 limits the effect of clause 19. Otherwise, the Chief Executive would be required under his mandatory duty to seek out all debts, no matter how old, and set about recovering them under his new mandatory duty. The new clause 20 provides, in its material parts, that the existing position in relation to recovery need not be amended under the new regime (section 86(1BA)) until the Chief Executive determines “as soon as reasonably practicable after [the new legislation commenced] to amend, review or replace” the existing position. It of course does not mandate that the Chief Executive must amend, review or replace.

- [20] We have to decide whether, in this case, the Chief Executive was right to alter the existing position, namely that for some three and a half years his decision was not to recover the debt.
- [21] The Benefits Review Committee's decision was a minority decision. The Benefits Review Committee's decision on the action to recover the debt included a brief reference to the dissenting members' view. The dissenting members' view was that “due to a significant delay in communication relating to the recovery of the overpayment, and the stressful relationship the applicant reports he had with his local Work and Income office” the debt should not be recovered.
- [22] In our view, the minority reasoning is correct. However, we would add that the relatively small amount of money, the extended period of time during which the Chief Executive took no action, the Chief Executive's claim the appellant lost his opportunity to bring an appeal under the former recovery provisions, as well as the minority members' reasons, all strongly point to it being wrong in principle and inequitable for the Chief Executive to decide to take steps to recover this debt after the change in legislation.
- [23] Accordingly, we exercise our power over the Chief Executive's decision to recover this debt, and reverse his decision; it is not to be recovered.

Accordingly, the debt is in the same position as the innumerable other debts the Chief Executive has not attempted to recover.

Decision

[24] The appeal is allowed. The decision to seek recovery of an overpayment of \$1,553.92 relating to the overpayment of New Zealand Superannuation from 29 November 2011 to 30 December 2011 is wrong, and reversed. The debt may not be recovered.

Dated at Wellington this 5th day of April 2017

G Pearson
Chairperson

C Joe JP
Member