[2017] NZSSAA 019

Reference No. SSA 141/16

IN THE MATTER of the Social Security Act 1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr C Joe - Member

Hearing at Wellington on 5 April 2017

Appearances

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

The Appellant in person

DECISION

Background

First issue – allocation of additional earnings to receipt of benefit

[1] This appeal raises three issues. The principle issue concerns how the appellant's entitlement to a benefit is calculated. The appellant is currently in receipt of Jobseeker Support; formerly, she received an Unemployment Benefit. The two types of benefit reflect the statutory entitlements at respective points in time; the Jobseeker Support entitlement generally replaces the Unemployment Benefit. The appellant's essential circumstances have been the same throughout.

[2] While the appellant has been without fulltime and regular work, she has been able to obtain part-time employment. The appellant's central

concern is that the Ministry allocates her employment income on a weekly basis. Accordingly, if she is in full-time employment for a week, she is likely to have no entitlement to Jobseeker Support for that week. However, the general principle is that beneficiaries are entitled to earn $80 per week without affecting their entitlement to Jobseeker Support.

[3] The appellant's concern is that if she worked for 52 weeks of the year receiving $80, she would earn $4,160 and that would not affect her benefit at all. However, if instead she earned the $4,160 over a period of weeks, then she would completely lose her entitlement to Jobseeker Support during those weeks. Accordingly, there is a significant disparity between the appellant's financial situation over a year compared with someone who earns the same amount of money but more evenly over the year.

[4] The issue for the Authority is to determine what the proper period for calculation of the abatement of Jobseeker Support should be.

Second Issue – Scope of the appeal

[5] The second issue is the scope of the matters in issue in this appeal. The appellant started the process leading to this appeal in a request dated 9 April 2016. She requested a review of the debt calculation procedures; she referred to historic debt affecting her and identified a debt accrual of $8,000 which related to a debt claimed to be established due to overpayment in the period 11 June 2009 to 29 June 2009, and also in a number of subsequent periods.

[6] For reasons the Ministry has not explained, the internal review that followed as a result of the appellant's request said that the decision being reviewed was an overpayment of $1,803.20 for the period 14 September 2015 to 3 January 2016. The decision was signed off by the Ministry's delegate on 30 May 2016. It was not a situation where the delegate decided some of the debt should not be reviewed, simply one where the delegate chose not to consider the whole request.

[7] The Benefits Review Committee accepted the partial review as the scope of the review requested, and said the decision being reviewed was:

> … to establish and recover an overpayment of $1,803.20 for Jobseeker Support for the period 14 September 2015

> to 3 January 2016. The applicant also wishes to review the Ministry's treatment of income – specifically the period of income assessment which resulted in the abovementioned overpayment.

[8] The description was wrong, the appellant wanted to review other periods also. It accordingly appears to be accepted that the appellant requested a review, the Ministry completed a review but failed to address all of the material issues raised, the Benefits Review Committee then perpetuated that error and also failed to consider all of the issues raised.

[9] The Ministry's view is that by failing to consider all of the matters in issue the Authority's jurisdiction does not extend to the matters that were not considered. The Ministry's justification for taking that view is that s 10A of the Act provides for a review of decisions made by the Chief Executive under delegation and s 10A(1B) has a time limitation; the application for review must be made within three months of receiving the notification of the decision. The Benefits Review Committee may extend the time allowed.

[10] In *Bocxe v Chief Executive of the Ministry of Social Development* (CIV 2008-485-001122, 1 October 2008) the High Court determined that:

> [33] Pursuant to the provisions of s 12J(1), it is not every decision of a Committee that is open to appeal. There has to be a decision or determination of the Chief Executive under one of the listed provisions. Moreover it has to be a decision or determination of the Chief Executive which has to be a decision or determination of the Chief Executive which has been confirmed or varied by a Committee, or that was made by the Chief Executive other than pursuant to a delegation. There is no right vested in an applicant or beneficiary to appeal a decision or determination of the Chief Executive which has been revoked by a Committee. Nor is the Chief Executive given a right of appeal. That is because the Committee is effectively acting in the Chief Executive's stead when it considers an application for review: *Arbuthnot* at [19].

[11] It necessarily followed that the decision to extend time to apply for a review was a decision of the Benefits Review Committee. Accordingly, being the Benefits Review Committee's own decision rather than a review of the Chief Executive's decision, no appeal lay from it.

[12] The Ministry's position is that the historic periods were not considered by the Benefits Review Committee; implicitly the Benefits Review

Committee had not extended time, therefore, it was necessary for a Benefits Review Committee to consider that issue if it was to be a live issue.

[13] For the appellant, the alternative view is that there is only one decision, which is the decision in response to the appellant's request for a review. If the Chief Executive failed to consider all of the matters put in issue, this failure to consider all of the matters is one of the things that this Authority can make a decision on. It is not a question of extending time; it is a question of the adequacy and correctness of the decision that is in issue.

[14] The Authority must decide which perspective is correct.

Third issue – recovery of debt

[15] The third matter in issue is whether or not the Chief Executive can, or should, recover all or any of the overpayments, to the extent that overpayments are established.

Discussion

Facts

[16] There was little that was contentious in relation to the facts. Accordingly, this decision will focus on the principles relating to the three matters in issue and refer to the material facts in the course of that consideration.

Allocation of additional income

[17] The issue raised by the appellant is an understandable one. The point she raises is a common feature of accounting systems. For practical purposes it is almost always necessary to account for payments and receipts on a periodic basis. Typically businesses and individuals will calculate income on an annual basis, both for tax and reporting purposes. There are exceptions; GST for example is calculated on a one, two or six-monthly period, and reports for public companies may be made quarterly.

[18] It is fallacious to think that the length of the reporting period makes no difference on the basis that simply adding the results together for successive periods will be the same as if results had been taken over the whole period. For example, a business may have a profitable period, and

later losses, which can never be set against profits for tax purposes. The business will have paid tax on the profit, whereas if the entire period was taxed as one, the losses could entirely offset the profits. The same principles apply to the appellant's situation, there is a real difference depending on whether her income is allocated to the week in which it is earned or, allocated to a longer period of time.

[19] It is inevitable that the appellant's additional income is allocated to a particular period, and it is inevitable it will result in differences from persons who earn income in a more regular pattern or have it allocated over a longer period. The question is over what period of time the legislation mandates the appellant's income should be spread over.

[20] The appellant has received Jobseeker Support; an income tested benefit as defined in s 3 of the Act. Income Test 3 as defined in s 3 applies. It is common ground that the appellant's circumstances are such that she does receive Jobseeker Support, and the effect of applying Income Test 3 is that the applicable rate of benefit must be reduced by 70 cents for every $1 of total income, to the extent the additional income is more than $80 a week.

[21] Schedule 9 of the Act sets the rates for Jobseeker Support. In this case Clause 1(b) is applicable, as the appellant is single, more than 25 years of age and does not have dependent children.

[22] The Ministry relies on the wording of Income Test 3 (as defined in s 3). The relevant wording is:

> **Income Test 3** means that the applicable rate of benefit must be reduced by 70 cents for every $1 of total income of the beneficiary and his or her spouse or partner which is more than, —
>
> ...
>
> (b) In any other case, $80 a week

[23] If the definitions of "income tested benefit" and Clause 1(b) of Schedule 9 of the Act which point to "Income Test 3" and hence the reference to "$80 a week" was the extent of the statutory indications, we would regard that as pointing to a weekly calculation. However, it would leave a good deal of ambiguity.

[24] However, we must also consider s 64(2A) and (2B), which provide as follows:

> (2A) Where, in relation to the rate of any benefit or additional benefit, reference is made in this Act or in any schedule of this Act or in Part 6 of the Veterans' Support Act 2014 or in the New Zealand Superannuation and Retirement Income Act 2001 to the weekly income of a person, such income shall, unless the context otherwise requires, be determined by dividing the person's total income over the appropriate number of weeks specified in regulations made under this Act (not exceeding 52 weeks) by the number of weeks in that period.
>
> (2B) For the purposes of determining a person's weekly income under subsection (2A), the chief executive may determine the period or periods to which any income relates, having regard to —
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> (a) the extent to which it was earned in that period or those periods; or
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> (b) the extent to which any other entitlement to it arose in, or in respect of, that period or those periods; or
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> (c) the period or periods for which it was otherwise received, acquired, paid, provided, or supplied.

[25] Accordingly, the statutory scheme is that there is a definitive indication of the period for calculation in the regulations. In this case, the Social Security (Period of Income Assessment) Regulations 1996 apply. Regulation 2 directs attention to the Schedule of the Regulations. The structure of the Schedule is to provide that for a series of support and benefits the calculation is over 52 weeks, and in other cases one week. Accordingly, the question is whether the appellant comes within the 52 week or one week category.

[26] In the 52 week category Jobseeker Support is included only when paid at the rates under Clause 1(ab), (ba) or (c) of Schedule 9 of the Act. None of the three categories apply to the appellant. The 1 week category includes "Any other benefit", so this does include the specific jobseeker support category that the appellant receives.

[27] The applicability of those provisions was traversed in some detail at the hearing, and the Ministry has set out its position in writing subsequent to the hearing.

[28] In these circumstances, the Authority must conclude that there is a specific legislative mandate requiring that the calculation is to be on a weekly basis.

[29] There remains the discretion in s 64(2B), it addresses the need to consider how to apply income, notwithstanding that the calculations are weekly. In some cases, income is received for periods of work that will not accord with the weekly calculation. Say, for example, if a person is paid monthly in arrears and works an equal number of days each week, then the payment can be spread evenly over the four weeks.

[30] The Ministry appropriately acknowledged that it is necessary to exercise some flexibility in that regard. In addition to employment income, the appellant also received some income from providing contracting services. The evidence was that the Ministry did spread the period over which it allocated the contracting income as far as it could reasonably do so. The appellant did not endeavour to identify any unfairness regarding that process.

[31] The employment income fell into clearly defined periods of time, and again no issue was or could be taken with that process.

[32] Accordingly, we are satisfied that the Ministry's position as to the allocation of income is correct, and the relevant legislation does not allow for any other outcome.

The scope of the review

[33] The Chief Executive's response to the appellant's request for a review of her total liability for arrears which she lodged on 9 April 2016 is the only decision this Authority can, and will, review. It appears that initially the Chief Executive's delegate, and then the Benefits Review Committee, chose to only review part of the time period for which the review was requested. Potentially, they might have said that they could or would not review earlier periods, because the debt had been established and the time for review had expired, and they chose not to exercise their

discretion to allow an extension of time. However, that is not what occurred. Instead, the process was a response to the request for a review. Instead of dealing with the whole of the issue raised, the Chief Executive's delegate and the Benefits Review Committee failed to deal with the complete request. It is within the jurisdiction of this Authority to decide whether their decision regarding the review was correct or not, including the scope of the matters they considered.

[34] That is quite a different matter from the situation in *Bocxe v Chief Executive of the Ministry of Social Development* (CIV 2008-485-001122, 1 October 2008) where a Benefits Review Committee declined to extend time. It is a common matter in this jurisdiction to consider issues that the Chief Executive and the Benefit Review Committee have failed to address. In *Margison v Chief Executive of the Department of Work and Income*[1], Justice Laurenson commented:

> On an appeal to an Authority I am satisfied that once the Authority is faced with an appeal it is empowered by the inquisitorial nature of its function, its original power of decision and its full range of remedies, to seek out the issues raised by the appellant's case and determine these afresh and establish whether the appellant can provide the justification for doing so or not.

[35] The Supreme Court also considered the nature of proceedings before the Authority in *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55. It was resolute in requiring the Authority to reach the correct view on the facts, rather than being constrained by the earlier processes:[2]

> There is nothing in s 12M to prevent the Chief Executive from then asking the Authority to consider any matter which may support the decision which is under appeal. Indeed, the thrust of the section is quite the other way: that the Authority is to consider all relevant matters.
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> ..
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> In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.

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1 *Margison v Chief Executive of the Department of Work and Income* HC Auckland AP.141-SW00, 6 August 2001 at [27].

2 *Arbuthnot* at [20]–[26].

> …
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> The duty of the Authority was to reach the legally correct conclusion on the question before it, applying the law to the facts as it found them upon the rehearing without concerning itself about the conclusion reached by the BRC …

[36] The Chief Executive's delegate and a Benefits Review Committee cannot limit the scope of that process by failing to consider all the issues raised by an appellant when they seek a review. It is incumbent on those decision-makers to address the issues; if the decision is that some issues are not reviewable then they must say so, and potentially the issue will be resolved within the scope of the *Boxce* case.

[37] In this case, we have considered the issue regarding the allocation of additional income and found that the appellant could not successfully challenge the Chief Executive's approach. Accordingly, we have not identified a basis on which the appellant can successfully challenge the amount of the debt the Chief Executive claims has been established.

Recovery of the debt

[38] There is no suggestion that the appellant has been dishonest in her dealings with the department; she has reported income. However, she has done so after she has been paid the Unemployment Benefit or Jobseeker Support. The Ministry currently has a series of relatively sophisticated methods of reporting income within the week it is earned, to avoid overpayments. It includes online reporting, a smartphone app, telephone calls, in person to a case manager and voice messages. Some of which require the person reporting to be able to afford the technology. If income is reported by Friday, the correct payments will be made the following week. Since 2009, the appellant has made strenuous efforts to try and keep the Ministry up to date regarding her weekly earnings, but it has not worked.

[39] She now has a significant accumulated debt, if she was able to find work it would be manageable, but without any additional income it is very difficult for her to successfully reduce the outstanding balance.

[40] The recovery of overpayments is governed by s 86(1) which has been in its current form since 7 July 2014. The former s 86(1) allowed the Chief

Executive to decide whether to pursue recovery. The amended legislation is different; it now provides that "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".

[41] 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 errors where the recipient of an overpayment had altered their position in reliance on the payment. The new ss 86(9A) and 86(9B) alters the situation to a mandatory one where the Chief Executive "may not recover any sum", which comes within those circumstances.

[42] Some of the debt the appellant sought to review arose prior to the current legislation, and some since it has been in place.

[43] The appellant's primary argument has been that the misallocation of her additional income was a departmental error, and accordingly, the arrears should not be recovered. For the reasons we have discussed we do not consider that is the case.

[44] It inevitably follows that the debt that has been imposed since 7 July 2014 is under the new regime, and we have no ability to make a different decision regarding its recovery.

[45] We do have jurisdiction to take a different decision from the Chief Executive, who, along with the Benefits Review Committee, did not exercise the discretion regarding collection of the pre 7 July 2014 debt in the appellant's favour.

[46] However, at this point, the Chief Executive has only sought to recover the debt at a modest rate, and did indicate that if that rate was causing hardship he would reconsider the rate of collection. If the Chief Executive took steps to take recovery action that did cause hardship, there would potentially be grounds for a review and, if necessary, an appeal to this Authority. However, the appellant has not established grounds in this appeal. Unless there is a change, modest instalments are unlikely to be an inappropriate exercise of discretion in the appellant's present circumstances.

Decision

[47] The appeal is dismissed.

Observation

[48] The appellant presented her appeal coherently and skilfully. She explained, with significant insight that one of the reasons for bringing the appeal was to highlight the unfairness of dealing with income on a weekly basis. She was particularly concerned that the approach incentivised people such as herself to seek casual work, rather than blocks of full time employment. There is a significant financial disincentive due to the weekly calculation of abatement of entitlement for fulltime work in blocks rather than regular casual work.

[49] The appellant convincingly contended that the transition to full time work was often made much easier if a person could demonstrate recent continuous blocks of fulltime work; it demonstrated capacity to a potential employer, which casual work did not necessarily convey.

[50] It would appear that the weekly period for calculation has been set mainly because Jobseeker Support is intended as short term support. Some of the benefits, where an annual allocation is permitted, appear to have regard to the irregularity of expenditure over longer periods. For example, dependent children have needs such as school uniforms and the like which require a wider consideration for an equitable outcome. In some cases, persons with dependent children have a 52 week allocation of additional income. The appellant has usefully highlighted that there may be other policy considerations that are relevant; however, these are not matters for the Authority. The Authority does not have either the wider perspective to evaluate them, or empirical evidence to make reasoned and sound judgements on such issues. Our decision necessarily turns on the law, and we are satisfied that the law does mandate weekly allocation of additional income in the appellant's situation.

Dated at **Wellington** this 1st day of May 2017

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G Pearson
Chairperson

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C Joe JP
Member