

[2017] NZSSAA 035

Reference No. SSA 123/15

IN THE MATTER of the Social Security Act 1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

K Williams - Member

C Joe - Member

Hearing at Wellington on 14 March 2017

Appearances

XXXX and XXXX in person; G Howell, Lay Representative

R Signal for Chief Executive of the Ministry of Social Development

DECISION

[1] Mr XXXX and Mrs XXXX appeal the decision made on 10 October 2014 to establish and seek recovery of overpayments of benefit for the period 10 July 2009 to 5 October 2014 amounting to \$19,144.26 for Mr XXXX and \$19,152.06 for Mrs XXXX.

[2] These decisions were upheld by a Benefits Review Committee on 16 February 2015. Mr and Mrs XXXX filed their appeal on 5 June 2015.

[1] Mr Howell submits that the appeal has two elements. The first is that the overpayment should be revised on the basis that the appropriate main benefit for Mr XXXX is the invalid's benefit, or from July 2013 the supported living payment, as opposed to the sickness benefit/jobseeker support. It appears

that Mr Howell has persuaded the appellants to pursue this ground despite the fact that this issue has already been determined by a Medical Appeal Board which upheld the Ministry's decision that Mr XXXX does not qualify for an invalid benefit.

- [2] This ground had no prospect of success because, pursuant to s 12J(17) of the Social Security Act 1964, the Authority has no jurisdiction to hear and determine any appeal on medical grounds in respect of a supported living payment on the ground of sickness, injury or disability. Even if the Authority did have jurisdiction this ground of the appeal is barred by the well established principle that once an issue has been determined it cannot be pursued in a different forum. For this reason we have not addressed this ground of the appeal.

- [3] The only challenge available to the appellants to the Medical Appeal Board decision was judicial review. After the Medical Appeals Board delivered its decision Mr Howell indicated that the appellants were considering this course of action. The Authority directed Mr Howell to confirm by 8 November 2016 whether he intended to take judicial review proceedings. No such notification was received and this appeal was set down for hearing on 14 March 2017.

- [4] On 3 March 2017 Mr Howell said the judicial review issue was still under consideration. However the Authority directed the hearing of this appeal to proceed and also directed Mr Howell to indicate at the hearing whether judicial review proceedings would be commenced.

- [5] At the hearing Mr Howell confirmed that an application for judicial review would be filed. The hearing proceeded on the basis that if no application for review was filed within two weeks of the hearing date the Authority would determine the appeal.

- [6] The direction issued on 23 March 2017 records that after the hearing Mr Howell again sought further time to file for review. This application was declined. As no application for judicial review was filed by 28 March 2017 we proceeded to determine this appeal.

The case for the appellants

- [7] At the hearing the appellants relied on the submissions of Mr Howell dated 1 March 2017. The second element of the appeal is that the debt should not be recovered because Mr and Mrs XXXX did declare their income as required.

Mr Howell argues that the overpayment is due to departmental error. In relation to Mrs XXXX, Mr Howell states that she declared income and visited the Service Centre on numerous occasions to do so but the department failed to record those facts. Mrs XXXX says she did declare her wages but the information was ignored for months at a time. Mr XXXX says that he clearly indicated he was receiving ACC payments.

- [8] Mr Howell submits that all of the debt should be wiped due to the fault in the department's handling of the ACC information and the information about Mrs XXXX's earnings. In addition he points out that English is Mrs XXXX's second language and Mr XXXX is dyslexic. He says therefore they had difficulty understanding the forms and their obligations.
- [9] At the hearing Mr Howell confirmed that there was no dispute about the amounts recorded by the Ministry as payments received by Mr and Mrs XXXX.

The case for the Ministry

- [10] It is the Ministry's position that it did not make any error which caused or contributed to the overpayments to the appellants. The only error acknowledged by the Ministry is in charging of ACC payments however when it realised this error the Ministry wrote off the resulting overpayment.
- [11] The Ministry says that there is no dispute about the amount received by Mr XXXX for a permanent disability allowance from ACC between 10 July 2009 and 5 October 2014, nor is there any dispute about the income that Mrs XXXX earned or the income which the appellants received during this period by way of sickness benefit, jobseeker support, accommodation supplement and temporary GST assistance.
- [12] The Ministry submits that in accordance with s 71A of the Social Security Act 1964 the rate of any income tested benefit must be reduced by the amount of any weekly compensation received by the beneficiary. In relation to the income earned by Mrs XXXX the Ministry says there is no doubt about the amount she was paid during the relevant period.
- [13] The Ministry refers to the transcript of interviews with Mr and Mrs XXXX produced in the Section 12K Report for its submission that the appellants understood their obligations to declare any change in income. The Ministry also argues that the fact that Mr and Mrs XXXX did make some declarations

about changes to their income suggests that they were aware of their obligations.

- [14] It is the Ministry's position that as it made no error s 86(9A) of the Act is of no assistance to the appellants. This section provides that:

Debts caused wholly or partly by errors to which debtors did not intentionally contribute

(9A) The chief executive may not recover any sum comprising that part of a debt that was caused wholly or partly by an error to which the debtor did not intentionally contribute if—

(a) the debtor—

(i) received that sum in good faith; and

(ii) changed his or her position in the belief that he or she was entitled to that sum and would not have to pay or repay that sum to the chief executive; and

(b) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

Relevant law

- [15] The appellants accept that the sickness benefit and jobseeker support which they received are income tested benefits. Income is defined in s 3 of the Act as follows:

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;

- [16] An exception is provided for any money received by way of an independence allowance under the Accident Rehabilitation and Compensation Insurance Act 1992 or Accident Insurance Act 1998, or any impairment lump sum received

under the Accident Compensation Act 2001. However the law is clear that ACC weekly compensation payments, which are not independence allowances, are included in this definition of income.¹ For this reason the Ministry was correct to include Mr XXXX's weekly ACC payments in the calculation of income.

Discussion

- [17] The issues we need to address are:
- (a) Did the appellants receive an overpayment between 10 July 2009 and 5 October 2014?
 - (b) If so, is the overpayment calculated by the Ministry correct?
 - (c) Is the Ministry entitled to recovery any overpayment?
- [18] Although Mr Howell stated in his submissions that there was no detailed breakdown of the debt, at hearing he accepted that the amounts calculated by the Ministry as being received by the appellants are not in dispute.
- [19] As we have no jurisdiction to consider the ground of appeal relating to Mr XXXX's main benefit, the remaining arguments for the appellants are that:
- (a) they did advise the Ministry when Mr XXXX's ACC payments changed.
 - (b) Mrs XXXX under-declared her income "only by degree" and attempted to declare her actual income.
 - (c) pursuant to s 86(9A) it would be inequitable for the Ministry to recover the overpayment because it was caused by an error of the Ministry.
- [20] We heard from Mr and Mrs XXXX at the hearing. Mrs XXXX confirmed that she was on a benefit and working for wages. She said she did not know that she had to declare how much she had worked.
- [21] Given the information provided to the appellants over the years by the Ministry and the obligations that the appellants signed we do not accept that it was

¹ *Bramwell v Director-General of Social Welfare* HC Auckland AP28-SW00, 28 June 2000; upheld by Court of Appeal in *Bramwell v Director-General of Social Welfare* [2001] NZAR 890.

reasonable for them to believe that they were entitled to the same level of benefits no matter what their income.

- [22] We accept that there were times when the appellants reported changes to their income. The issue we have considered is whether they provided all the information which they knew was required by the Ministry. Both appellants confirmed in their interviews that they had read and understood their obligations to report any change.
- [23] Despite the fact that Mr XXXX has dyslexia and English is not Mrs XXXX's first language, we are satisfied that they must have known that they were obliged to report any change in their income. As recorded above, at the hearing they indicated that they had met their obligations on some occasions however they said they had not really paid attention to the importance and purpose of these obligations.
- [24] We conclude that the appellants must have known when their income increased, either due to a change in Mr XXXX's ACC payments or Mrs XXXX's income, that they were not entitled to receive the same amount in benefits.
- [25] The appellants have not identified any occasion when they reported an increase in their income that the Ministry failed to take into account. We conclude that the Ministry did not make any errors which contributed to the overpayments. As a result, the exception in s 86(9A) to recovery by the Ministry does not assist the appellants.

Decision

- [26] For these reasons the appeal is dismissed.
- [27] Mr XXXX is liable to pay the Ministry of Social Development the sum of \$19,144.36.
- [28] Mrs XXXX is liable to pay the Ministry of Social Development the sum of \$19,152.06.

Dated at Wellington this 4th day of July 2017

S Pezaro
Deputy Chair

K Williams
Member

C Joe JP
Member