

[2017] NZSSAA 043

Reference No. SSA 064/16

IN THE MATTER of the Social Security Act 1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

K Williams - Member

Hearing at Tauranga on 12 July 2017

Appearances

The appellant by telephone from Gibraltar

P Suieva, agent for the Ministry of Social Development

DECISION

- [1] Mr XXXX appeals the decision to establish and recover a debt arising from payments of New Zealand superannuation (NZS) when he was absent from New Zealand for a period exceeding 26 weeks. This decision was upheld by a Benefits Review Committee on 15 February 2016.
- [2] Mr XXXX was in receipt of NZS from 28 November 2011. He accepts that on 20 October 2014 he contacted Work and Income International Services and said that he was considering sailing overseas for a few years. He indicated that he would fly to Gibraltar and sail from there. Mr XXXX was given information about the requirement to be ordinarily resident in New Zealand in relation to NZS and information about the effect on his NZS entitlement of any overseas pension he may be entitled to receive. The contingencies of s 70 of the Social Security Act 1964 (the Act) were explained to him. Mr XXXX was told to inform his case manager when his travel plans were finalised.

- [3] On 8 December 2014 the Ministry wrote to Mr XXXX asking him to confirm that the information they held about him was correct and remind him of his obligation to advise any changes in his circumstances, including any intention to travel overseas.
- [4] On 12 September 2015 the appellant's name came up in a data match with New Zealand Customs Service as having left the country on 12 March 2015. The Ministry then wrote to Mr XXXX about his overseas travel and asked him to confirm that the Customs' record of his departure was correct. This letter was returned from the box number that Mr XXXX had provided. In order to avoid further overpayment the Ministry suspended Mr XXXX's NZS payments from 23 September 2015.
- [5] The Ministry seeks recovery of the payments made between 13 March 2015 and 22 September 2015. The amount overpaid was \$10,359.23; at the date of hearing this sum had reduced to \$7,013.60.

Relevant law

- [6] The New Zealand Superannuation and Retirement Income Act 2001 (NZSRI) contains provisions concerning the effect of absence from New Zealand on payment of NZS.¹
- [7] Under s 21 a person is not entitled to payment of NZS while they are absent from New Zealand unless they can bring themselves within any of the exceptions contained in ss 22 to 29 of NZSRI. Section 22 provides that a person may be paid NZS for the first 26 weeks of any temporary absence if their absence does not exceed 30 weeks. As Mr XXXX did not return within 30 weeks this discretion is not applicable.
- [8] Section 26 of NZSRI allows payment of NZS overseas to a country whose government does not have a reciprocal agreement with New Zealand when the person intends to travel for a period longer than 26 weeks but not reside in any country other than New Zealand. Section 26B provides that a person is not entitled to be paid NZS under s 26 unless the person makes an application for portability before leaving New Zealand.

¹ New Zealand Superannuation and Retirement Income Act 2001, ss 21 to 35.

The case for the appellant

- [9] Mr XXXX accepts that he did not notify the Ministry before he left New Zealand and therefore failed to meet the requirements for portability. He agrees with the calculation of the amount now owing. However he asks for leniency because he says he had recently separated and was dealing with issues with his two children and his own health. His eldest daughter had relationship problems and his youngest was about 12 at the time.
- [10] Mr XXXX also argued that s 86(9A) of the Act whereby the Ministry has a discretion not to recover a debt should apply.
- [11] Mr XXXX said that he asked his ex-wife to notify the Ministry on his behalf that he had left the country but she did not do so. He said in evidence that he asked her to do this after he had left because he had not done it himself.
- [12] Mr XXXX's evidence is contradicted by an email on the file that he wrote to the Ministry on 20 November 2015. In this e-mail he states that he had contacted his ex-wife, XXXX, who confirmed that she did contact the Ministry to notify it that he would be sailing in the Mediterranean from Gibraltar around mid to end of July 2015. However in evidence Mr XXXX said that he now accepted that she had not contacted the Ministry as she told him and "probably at that time she was not honest".
- [13] Ms XXXX, as she called herself, gave evidence for Mr XXXX. She said that Mr XXXX asked her to contact the Ministry before he left and after he had been away for a couple of months. She accepted that she told Mr XXXX she had contacted the Ministry when she had not done so.

The case for the Ministry

- [14] The Ministry submits that Mr XXXX was not entitled to portable NZS for the relevant period as he did not make the required application. The Ministry submits that it is entitled to recover the overpayment as the criteria in s 86(9A) of the Act are not met. These criteria are cumulative and the first requirement is that the overpayment has been caused by an error of the Ministry; as there was no error by the Ministry it is submitted that there is no basis for the Ministry deciding not to recover the overpayment.

Discussion

- [15] Mr XXXX accepts that he was made aware of his obligations when he first enquired with the Ministry about what would happen if he sailed to Gibraltar. The Act sets out the requirements for payment of overseas NZS and there does not appear to be any discretion as to whether these requirements are imposed. However for the reasons that follow, even if there was such a discretion, this is not a case where we consider it should be exercised.
- [16] Mr XXXX accepts that he did not personally notify the Ministry that he would be absent from New Zealand. The separation that he says was affecting him at the time occurred, according to his submissions, some five years before he left New Zealand for Gibraltar. He had injuries and health issues in 2012 and 2013. He had an accident in 2014 where he broke his left foot and leg and had surgery on his elbow in 2015. We do not accept that these events affected Mr XXXX to the extent that he was unable to make his travel plans known to the Ministry.
- [17] In reaching this conclusion we have taken into consideration that, at the relevant time, Mr XXXX was well enough to plan his sailing trip around Gibraltar and make the necessary arrangements which apparently included taking his youngest daughter with him. In evidence he had no plausible explanation for what he described as his inability to meet his obligations to the Ministry nor could he explain why he was unable to contact the Ministry himself when he was able to instruct his ex wife to do so.
- [18] Mr XXXX's reliance on the evidence of his ex-wife does not assist him. She confirmed that she told him that she had notified the Ministry when she had not done so. We conclude that as she was not honest to him, her evidence on this issue is unreliable. Further Mr XXXX's evidence conflicts with that of his ex wife. His evidence was that he asked her to notify the Ministry after he had left the country; she stated that he did so both before and after he left.
- [19] We are not satisfied that anyone contacted the Ministry on Mr XXXX's behalf to notify his absence. Certainly the Ministry has no record of any contact being made.
- [20] We conclude that Mr XXXX was not entitled to receive NZS from 13 March 2015, the date on which he left New Zealand. Therefore he was overpaid between 13 March 2015 and 22 September 2015.

- [21] As the overpayment was not due to any error by the Ministry the debt is to be recovered.
- [22] The Ministry of Social Development is entitled to recover the debt of \$7,013.60 that remains outstanding from this period.
- [23] The appeal is dismissed.

Dated at Wellington this 26th day of July 2017

S Pezaro
Deputy chair

K Williams
Member