[2017] NZSSAA 057

Reference No. SSA 84/16
SSA 85/16, SSA 86/16

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of the United Kingdom 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 5 September 2017

Appearances

The Appellant in person

For Chief Executive of the Ministry of Social Development: R Signal

DECISION

Background

[1] This decision relates to three appeals. The three appeals relate to the following:

[a] A decision to suspend the appellant's jobseeker support benefit from 9 September 2015 because he was absent from New Zealand; the benefit resumed on 15 October 2015.

[b] A decision to establish and seek recovery of overpayments of jobseeker support, accommodation supplement and temporary additional support for the period from 27 July 2015 to 14 October 2015 because of employment income.

[c] A decision to establish and seek recovery of an overpayment of jobseeker support for the period 18 May 2015 to 12 July 2015 because of employment income.

[2] The appellant conceded that he was absent from New Zealand during the period 9 September to 15 October 2015 and, accordingly, not entitled to jobseeker support. He had explained that he pursued that appeal to highlight what he regarded as irregularities in the way in which the Ministry had identified and processed the discrepancy.

[3] The other two appeals relate to the familiar situation where a person has part-time employment and whether their benefit is abated, and if so, the degree of abatement is a matter to be determined on a weekly basis. The Ministry has various regimes in place that allow people to report income. It is not without some difficulties because the regime is inherently relatively complex. It requires calculations on a weekly basis and where a person works during the weekend, it is not usually possible to make adjustments for the week in question before the Ministry makes a benefit payment for that period. The Ministry has a number of reporting mechanisms to assist people to comply.

[4] The appellant's situation was that he and his partner had relocated to a provincial city in New Zealand. His partner has particular needs that required the appellant's support. The appellant is a registered nurse who specialised in paediatric nursing. The provincial city where he and his partner lived did not have a local employment opportunity as matters transpired, and accordingly it was necessary for the appellant to travel several hours by car to pursue employment opportunities in another city. The hours of work were not guaranteed, even when he travelled to take up an opportunity; whether he would only work a short period or a longer period was indeterminate.

[5] The appellant found the travel, his obligations to his partner, and his intermittent work opportunities demanding.

[6] The appellant's position is that he went to great lengths to ensure that there were no misunderstandings or errors relating to the employment income he received. He engaged with the Ministry's online reporting system, and, in addition, he reported to Ministry offices both in the region where he was working and the region where he was living; he also provided information to the Ministry by telephone.

[7] The appellant said that he provided clear information to the Ministry, but had considerable difficulty engaging with the Ministry's systems. He gave as an illustration the difficulty that his rate of pay varied depending whether he was working a weekend shift or a weekday shift. The Ministry's online reporting system, however, would not allow him to report that directly. He also said he experienced many difficulties with the online system where he logged on and did not know whether the hours of work had been correctly recorded. One of the fundamental difficulties which he faced was that the Ministry's system did not produce a receipt confirming the information he provided. That was so, whether he provided the information online or personally to staff in a Ministry office where they recorded it online.

[8] The appellant said he had done his best to keep track of wage slips, but they were provided in person when he was working, and he would not always receive them if he was not working at the time that they were distributed. He said that when he did receive the wage slips, he passed them on to Ministry staff.

[9] One of the issues relating to wage slips is that his employment records were prepared on a fortnightly basis; whereas, the Ministry would determine any adjustments to benefits on a weekly basis. Accordingly, it is not possible to be completely accurate with calculations without wage slips.

[10] The appellant said that he had endeavoured to monitor his benefit adjustments as best he could. However, in the absence of reports from the Ministry regarding the adjustments made, referenced to the hours he had worked, he found difficulty keeping track of the amounts. He accepted that potentially he had made some minor errors in reporting, but overall he was confident he had accurately reported how much he had earned.

The Ministry's Response

[11] The Ministry addressed each of the three issues arising in the appeals.

[12] In relation to the question of absence from New Zealand, the Ministry provided particulars. As discussed below this was not controversial.

[13] In relation to the calculation of the adjustments, the Ministry claimed it had undertaken a thorough process in which it had obtained information relating to the appellant's employment income and calculated the appropriate adjustments. The process was necessarily imperfect because the Ministry had only been able to obtain income information based on fortnightly rests, whereas the adjustments had to be made on a weekly basis. Spreading the income across two weeks may or may not have been in the appellant's favour. It has not been possible to obtain more accurate information.

[14] In relation to the third issue, namely the reporting of income to the Ministry, the Ministry produced various emails and other documentary material. The material, in significant respects, confirmed that the appellant had been having difficulties with the online reporting system. The record, for example, showed that he had logged on to the system on numerous occasions and been unsuccessful in logging data.

Discussion

The period of time the appellant was out of New Zealand

[15] The appellant accepts that the appeal relating to the time he was out of New Zealand cannot succeed. He acknowledged that he had brought this appeal as it was part of the matrix of confusion and difficulty that had related to him reporting his circumstances to the Ministry. Accordingly, the appeal in relation to this ground must be dismissed.

Accuracy of the adjustments

[16] The best information that is available is the calculations which the Ministry undertook based on fortnightly rests. We acknowledge that it seems clear that the appellant had in fact supplied more accurate information to the Ministry but that information has been lost. The Ministry acknowledged that if the appellant had in fact worked during only one of the two weeks in issue that would reduce the arrears to the extent of $2,261.62. The Ministry's position is that s 64(2B) should be applied, which gives the Chief Executive some flexibility in calculation of weekly income.

[17] The overpayments consisted of $1,902.94 established on 4 November 2015 and $569.25 established on 5 November 2015. The Ministry, however, has taken the position that:

> The decision dates and amounts referred to in the appellant's review have been highlighted and can be seen that the periods concerned overlap with those of decisions made on other days.
>
> The Ministry submits then that it is not really practicable to try and isolate these two decisions without reference to the other decisions made throughout the whole period in question.

[18] We accepted that submission from the Ministry. It follows that it is necessary for this Authority to make a decision covering the whole of the payments identified by the Ministry. This follows the principle in *Margison v Chief Executive of the Department of Work and Income*:[1]

> 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.

[19] The Supreme Court also considered the nature of proceedings before the Authority in *Arbuthnot v Chief Executive of the Department of Work and Income.*[2] The Supreme Court also noted that there is nothing to prevent the Chief Executive from asking the Authority to consider any matter which may support the decision under appeal; the Authority must consider all relevant matters.

[20] In these circumstances, we must accept the strength of the Chief Executive's position that it is necessary to consider all of the overpayments and do so. The Chief Executive identified that the extent of the overpayments in issue were $4,891.98. They were comprised of job seeker support from 4 May 2015 to 1 November 2015 amounting to $3,227.42, accommodation supplement from 4 May 2015 to 1 November 2015 amounting to $782 and temporary additional support from 4 May 2015 to 1 November 2015 amounting to $882.56.

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1 HC Auckland, AP.141-SW00, 6 August 2001 at [27].

2 [2007] NZSC 55.

[21] To give dimension and perspective to the accuracy of the calculation, it is appropriate to recognise that the Ministry accepts that if the appellant had only worked during one week of every two weeks, with the same amount of income, the total of $4,891.98 would be reduced by $2,261.62.

[22] Given that the information is imperfect, we do not accept that the Ministry's approach to the calculation is fair, or represents the most accurate figure on the balance of probabilities. The amount should be discounted at least to give some recognition to the fact that given that the appellant was working at a location that involved several hours of travel (in the order of 12 hours driving for the return trip). It would appear that in a significant number of the fortnightly periods he would have worked only during one of the weeks.

[23] On that basis, we would, as an approximation, allow a reduction to the extent of half of the $2,261.62 that the Ministry accepts would be allowed if the most favourable situation in terms of working only one of two weeks without exception applied.

[24] For reasons we are about to discuss this issue is not critical.

Recovery

[25] The recovery of overpayments is governed by s 86 of the Social Security Act 1964. Section 86(1) imposes a duty to take all practicable steps to recover debts referred to s 85A. However, that general obligation is subject to the terms of s 86(9A), which provides:

> 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 for the chief executive; and
>
> (b) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

[26] That is the crux of the appellant's case.

[27] The appellant is a paediatric nurse. Obviously, he is a highly skilled professional who is able to assimilate and process information, including

measurements and quantities. At the particular time, the appellant was in a very stressful and demanding situation, where his partner required exceptional support. He was unable to obtain work in the city where he lived; and had to engage in very demanding travel to supplement his income.

[28] The appellant gave compelling evidence that he reported his income online to the best of his ability. He faced difficulties such as a computer system which failed to anticipate that he would be paid at a different rate when he worked weekend shifts. He found that the system would fail to produce a receipt to identify what had been received into the system. He identified that his attempts to login and remain logged in would often fail. The appellant said to address those difficulties; he personally attended at the Ministry's offices. He obviously knew the staff in more than one of the Ministry's offices. He was also familiar with the information that they could get up on their screens and that he had discussed that with them on numerous occasions. He also reported that he had regularly engaged in telephone communications with other Ministry officials.

[29] The appellant said that he had handed over his time sheets to Ministry officials; they have apparently been misplaced. The appellant said that he had reported all his income, but acknowledged that there could have been some element of human error which resulted in some small discrepancies. He was confident, however, that what he had reported was accurate.

[30] The appellant was the only witness who gave evidence on oath at the hearing. Despite being on notice of the appellant's claims, the Ministry did not call any witnesses. The Ministry did produce a large volume of paper. None of that paper, on its face, was inconsistent with what the appellant said. For example, the Ministry produced an email from a person who it might be supposed to have some knowledge of information technology systems within the Ministry. That unauthenticated document indicated that indeed the appellant had in a particular period attempted to log in to the system and failed to upload data on many of those occasions. That was entirely consistent with what the appellant said.

[31] At the hearing, the Authority made it very clear to the Ministry that it was not entitled to simply disbelieve the appellant. The appellant had given a plausible, coherent and, in our view, apparently entirely honest account of his dealings with the Ministry. That account amounted to a statement that he had accurately reported his income throughout the whole period; the Ministry's systems had failed to report what had been recorded, information had been lost,

notwithstanding the appellant's high level of competence and skill, he had been quite unable to successfully log his income with the Ministry.

[32] The Ministry's agent made it clear to the Authority that he failed to understand that when evidence is: plausible, given on oath, and not put in issue; then this Authority has no grounds to simply disregard the evidence. The Authority pointed out that unless the agent chose to cross-examine the appellant, and do so effectively, the Ministry should expect that the Authority would accept the appellant's evidence. The agent's response was to initially suggest that he would engage the Authority for the rest of the day by questioning the appellant regarding every single instance of income that he earned. The Authority told the agent if he considered that was the best way forward he should embark upon the process. That was subject to the Authority exercising control to ensure cross-examination was relevant to the resolution of the proceeding. As it transpired, the agent only put some of the matters in issue, and none of the cross-examination could be a basis for calling into question the accuracy and honesty of the appellant's evidence.

[33] The main thrust of the challenge that the Ministry's agent pursued with the appellant's evidence was to claim that the discrepancies were so large that the appellant must have known that the position was not correct. Accordingly, the agent claimed the appellant must have been at fault, and the Authority could conclude that the appellant could not have received the funds in good faith.

[34] Some dimension and perspective is provided in relation to the agent's essential contention. The total amount in issue is $4,891.98. The Ministry accepts that of that sum, $2,261.62 would not be owed if the appellant had worked only one of the weeks in the fortnightly periods. Furthermore, the appellant is entitled to take account of the fact that he had attempted to report the information online, he had on numerous occasions attempted to reconcile the figures with staff in the Ministry offices, and he had entered into numerous discussions by telephone. Combining the sensitivity of the earning periods, the repeated engagement with the Ministry, and the fact that the appellant had other pressures to deal with in his life we are satisfied that:

[a] the full extent of the revised assessment of $4,891.98 (subject to our view that it is overstated) was caused wholly or partly by an error on the part of the Ministry to which the appellant did not contribute intentionally or otherwise;

[b] the appellant received all of the money in good faith;

[c] the appellant changed his position in the belief that he was entitled to the whole of that sum, and did not expect to have to repay that sum to the Chief Executive given his understanding regarding that he had reported his income.

[d] it would be inequitable in all the circumstances, including the fact that the appellant was facing significant financial hardship, to permit recovery. One of the matters contributing to the appellant's financial hardship was that he faced the costs of extensive travel so that he could supplement his income. The modest return from the income after those costs, and the irregular nature of the work available to him put him in a very difficult situation.

[35] In these circumstances, we are satisfied that the Chief Executive may not recover any of the overpaid benefit of $4,891.98.

Observation

[36] It is entirely appropriate for the Ministry to choose to present records, and rely on cross-examining a witness with reference to those records. However, it was evident at the hearing that the Ministry's agent had little appreciation of the obligation that this Authority has when making evidential findings. It cannot simply ignore evidence, unless it is implausible, inconsistent with other evidence or can be impugned for some other reason. If cross-examination does not demonstrate deficiencies in the oral evidence for an appellant, or the deficiencies are not manifest on the face of the evidence (including the record), then the Authority is obliged to accept the evidence. There was no competing evidence, given that nothing adverse emerged when the Ministry's agent completed his cross-examination without putting any significant inconsistencies in the written material to the appellant. We found the appellant's evidence to be honest, frank and believable.

Decision

[37] The appeals relating to the overpayments are allowed:

[a] The total benefit overpayment of $4,891.98 is reduced by $1,130.81 leaving a balance of $3,761.17 as the probable total benefit overpaid; and

[b] The Authority directs that the Chief Executive may not recover any of the sum comprising that debt.

[38] The direction that the debt is not recoverable applies to the whole of the debt, and is not dependent on the reduction in quantum.

[39] The appeal relating to suspension of benefit while absent from New Zealand is dismissed.

Dated at **Wellington** this 10th day of October 2017

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G Pearson
Chairperson

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K Williams
Member

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C Joe JP
Member