[2019] NZSSAA 20

Reference No. SSA 158/18

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an appeal by **XXXX** of Auckland 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 Auckland on 11 March 2019

Appearances

The appellant in person

P Leaupepe, counsel for the Ministry of Social Development

DECISION

Background

[1] XXXX (the appellant) appeals the decision of 23 July 2018, upheld by a Benefits Review Committee, to establish and seek recovery of an overpayment of $637.35 for the period from 4 December 2017 to 24 December 2017. The appellant has repaid $95 of this amount and the balance is $542.35. The Ministry established the overpayment because it said that during the relevant period the appellant earned over the income limit for the rate of Jobseeker Support that she was receiving at the time.

[2] The appellant was a 21-year-old student when she was diagnosed with depression in 2012. She moved home to live with family in Hamilton. At the end of 2014, she returned to Auckland and, in the new year, her study. Although she was studying part time, a doctor's certificate confirming her condition meant that

she was able to receive Student Allowance. At hearing, the Ministry accepted that the reference in its report to full-time study during this period was an error and should refer to limited full-time study.

[3] During 2015/2016, the appellant had a part-time job. However, as this became difficult and added to the stress that she was suffering in her private life, she resigned in September 2016. In early 2017, changes to her medication caused side effects and it was difficult for her to work. During this time, she saw a doctor, psychiatrist, and a counsellor.

[4] In the second half of 2017, the appellant again began to look for part-time work. She was unable to find suitable work in Hamilton where she was living at the time but eventually got a short-term contract through Student Job Search in Auckland. Although this work was advertised as being approximately 20 hours per week, she was offered up to 50 hours for the two weeks leading up to Christmas. She subsequently asked to reduce her hours as she was concerned about her ability to cope. In the end, she managed three weeks' work.

[5] On 12 December 2017, the appellant's file was noted with a record that she had commenced casual part-time work and that she was advised to update her income details on My MSD. A further note on 10 January 2018 recorded that in a follow-up meeting the appellant was reminded to declare her income from this employment. She did not provide any information to the Ministry and it was through the information sharing programme between Inland Revenue and the Ministry that the Ministry identified that the appellant had earnings from employment.

[6] The appellant subsequently agreed to have her income averaged over the month for the purpose of benefit reassessment. However, she subsequently sought a review of this decision and provided her pay slips. The original overpayment was reduced to $637.35. The appellant proceeded with a review of this decision which was upheld.

Relevant law

[7] Section 88M of the Social Security Act 1964 (the Act)[1] provides for the payment of Jobseeker Support. Schedule 9 of the Act defines the rates to be paid subject to the appropriate income test. The Social Security (Period of Income Assessment) Regulations 1996 (the Regulations) requires that a person receiving

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[1] Replaced on 28 November 2018 by the Social Security Act 2018. See s 17 and Part 1 of Schedule 4.

Jobseeker Support paid at the rate in Clause 1(b) of Schedule 9 of the Act must have their income determined on a weekly basis. Clause 1(b) applies to a single person with no dependents.

The case for the appellant

[8] The appellant accepts that the regulations which apply to her required her income to be determined on a weekly basis. However, she said that she believed that the amount she earned would be calculated over a 52-week period. She understood that people whose income was calculated over 52 weeks were given this provision to increase their potential earnings before benefit deductions, and to take into account the impact of illness or other obligations such as child care which may affect their ability to work.

[9] The appellant said that although she was not receiving Supported Living Payment at the relevant time, in hindsight she may have been entitled to this benefit. She said that at the time her psychiatrist stated that she had the capacity to work 15 hours a week or more for the next two years. However, she said that the doctors were careful not to tell her that she would not be able to manage full-time work because they were trying to be optimistic as well as realistic.

[10] She explained that, prior to the December 2017 short-term contract, she had worked an average of 5.38 hours per week for the past two years and had completed two university papers, despite attempting four papers. She said that she had tried to push herself in the hopes of eventually maintaining the same workload she had before depression became a serious hindrance, but had failed several papers despite her efforts.

[11] Overall, in the two years prior to December 2017 and the four years before that, the appellant worked less than 15 hours a week. She therefore argued that it was inequitable to calculate her income for a short period on a weekly basis when she was in the same position as someone receiving Supported Living Payment. If her income was calculated over a 52-week period, it would fall well below the $80 per week threshold before any deduction applied.

[12] The appellant agreed that she was asked to declare her income by her case manager and that she did not do so. She said that she knew her job was for a fixed term and thought that it would be averaged and fall within the $80 per week threshold. She said she did not receive any explanation as to how her earnings for the relevant period would be dealt with. She said while she now accepted that she could have put it to the test and declared her earnings for that period, and

that she had a hunch that it would affect her benefit, she thought it was fair for it to be based on the past 12 months where she had not had any earnings. She said she did not know that her work capacity medical certificate had expired in January 2017.

[13] The appellant believed she could deduct the expenses she incurred in working. She said that she remained living in Hamilton so that she could attend appointments with the psychologist however, as the job was in Auckland, she incurred transport costs and part-time accommodation costs because she stayed in Auckland during the week. She said that her accommodation was $100 per week but she had no evidence to support these costs, or the cost of transport.

[14] The appellant also said that she thought because her income for the relevant period would change each week that it would be calculated after she had stopped working.

[15] In respect of whether the Ministry is entitled to recover the overpayment, the appellant said that she believed there was an error on her part as she had not provided information regarding her additional costs in carrying out this work. She said that the error meant that she did not benefit from having these costs deducted.

[16] The appellant said that a debt of over $600 was a significant amount of money to someone in her financial position. She said that in order to maintain an independent lifestyle she had had to become very frugal and had a limited ability to save, contribute to Kiwisaver, travel, or pay off her student loan.

The case for the Ministry

[17] Mr Leaupepe said that the appellant's income had to be calculated on a weekly basis in accordance with the Regulations and s 64(2A) of the Act. Schedule 9 of the Act provides that the rate payable to a single beneficiary without a dependent child is subject to Income Test 3.

[18] In relation to a Supported Living Payment or Capacity to Work medical certificate, Mr Leaupepe said that the appellant did not have a medical certificate at the time confirming that she could not work more than 15 hours per week, and in any event did work more than this and knew that she could do so.

[19] He also said that the Ministry was not informed of any work-related costs but that her travel to Hamilton would not be treated as work-related.

[20] The Ministry accepted that it had some discretion about ascertaining a weekly income under s 64(2B) of the Act, however it considered that the primary consideration was the period in which the income was earned by the appellant. Although her contract was from 4 December 2017 to the end of January 2018, she only worked for three weeks between 4 December 2017 and 24 December 2017. As the appellant had no earnings for the remainder of her contractual period, the Ministry assessed her benefit on the basis of those weeks in which she did have earnings.

[21] The Ministry also said that the appellant did not comply with her obligations under the Act to notify a change of circumstance which includes a change in income, and that she did not advise the Ministry of her earnings until there was a data match with Inland Revenue.

[22] In relation to whether it is entitled to recover the debt, the Ministry said that as s 86(9A) only applies where the Ministry has made an error, this provision did not assist the appellant. The Ministry submits that therefore it has no discretion not to recover the overpayment.

[23] The Ministry recommended that the appellant apply retrospectively to her local WINZ office for an Accommodation Supplement for that period as it had no ability to offset a debt against a hypothetical entitlement.

Discussion

[24] We consider it is unfortunate in the appellant's case not to be able to apply her earnings to the full period, up to a maximum of 52 weeks, during which she was in receipt of Jobseeker Support with medical deferral.

[25] We were impressed by the appellant's determination to continue her studies, to maintain her independence and to work where possible. We found her genuine in her belief that her earnings for this period of time would be averaged rather than applied to the period she was employed. There is no dispute that she did not know exactly what she would be earning and that in fact the contract was for only 20 hours per week. While she attempted to do more, and in fact did so, she quickly realised that this was not manageable for her at this time.

[26] It is also clear that were it possible to retrospectively establish entitlement to Supported Living Payment she would have qualified. It appears that she was caught between the best intentions of medical practitioners, her own

determination to be independent, and the reality of the depression from which she suffered at the time.

[27] For these reasons, the appeal cannot succeed.

Order

[28] The appeal is dismissed.

Dated at **Wellington** this 1st day of April 2019

S Pezaro
Deputy Chair

K Williams
Member

C Joe
Member