

[2021] NZSSAA 10

Reference No. SSA 97/19

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an appeal by **XXXX** of
Brisbane against a decision of
the Chief Executive of the
Ministry of Social Development
that has been confirmed or
varied by a Benefits Review
Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

C Joe - Member

Hearings on 12 March 2020 at Wellington; 9 June 2020 in Auckland

Appearances by audio link:

The appellant in person

N Palmer, counsel for the Ministry of Social Development

AMENDED DECISION

The decision issued on 31 March 2021 is recalled and replaced with this decision which amends the error in paragraph [6] by replacing the reference to the Social Security Act 2018 with r 208(1) of the Social Security Regulations 2018.

The appeal

[1] **XXXX** (the appellant) appeals the decision on 28 February 2019 by the Ministry of Social Development to establish and seek recovery of an overpayment of \$3,309.12 of portable New Zealand Superannuation (NZS). The Ministry

included a schedule showing how this sum is calculated in its submissions filed on 25 May 2020 and the appellant accepts this calculation. However, he says that he did not cause the overpayment to occur and should not be liable to repay the Ministry. Liability for the repayment is the sole issue in this appeal. The issue we must decide is whether the Ministry is entitled to recover that overpayment.

Background

- [2] On 8 June 2016 the appellant was granted portable NZS to Australia, effective from 21 February 2016. In the letter confirming his entitlement, the Ministry explained that NZS would be paid based on the lower of either the notional rate which is the amount that the appellant would be entitled to under the Australian Age Pension or the NZ proportional rate which is based on the number of months that a person has lived in New Zealand between the ages of 20 and 65. The letter confirmed that the Ministry would reassess the appellant's entitlement to NZS whenever the notional rate of Australian Age Pension changed.

- [3] On 18 February 2019 the Ministry's International Services received advice from Centrelink International in Australia that the appellant's Australian Age Pension payments stopped from 2 November 2018 because Centrelink assessed his wife's application and found that their combined assets exceeded the threshold for entitlement. Centrelink reassessed the appellant's notional rate under the Australian Age Pension scheme and confirmed payment rate changes between 1 August 2018 to 13 November 2018. When the Ministry received this information, it conducted a backdated review and concluded that the appellant had received more than his entitlement of NZS, establishing the overpayment.

The parties' positions

- [4] The parties agree that the appellant applied to Centrelink Australia for an assessment of entitlement in August 2018, three months before his wife became eligible for the Australian Age Pension and that Centrelink did not determine his wife's application for more than six months after it was filed. The parties also agree that the appellant provided updated information on assets and income as required to Centrelink.

- [5] In evidence the appellant said that he accepted that there would be some time lag between any review by Centrelink of his entitlement and the required

readjustment by the Ministry. However, he considers that the delay by Centrelink was unreasonable. He argues that Centrelink's decision to set aside the overpayment it established, presumably because it accepted it had not made the assessment in a timely manner, set a precedent for the Ministry. The appellant submits the Ministry should do the same. Although he accepts that the Ministry did not make any error or contribute to the situation, he said that as he has not caused the situation he should not be liable for the repayment.

- [6] For the Ministry Mr Palmer submitted that, despite the delay by the Australian authorities in advising the Ministry of the change in entitlement, the Ministry is bound to readjust an entitlement when it is advised under the reciprocal agreement with Australia. He said that the Ministry does not have the discretion to decide not to recover an overpayment unless the criteria in r 208(1) of the Social Security Regulations 2018 apply. The threshold test is that the overpayment must have been made due to an error by the Ministry. Where the Ministry is not in error, it is bound to recover the overpayment.
- [7] Mr Palmer said the Ministry dealt promptly with the information it received from Centrelink, writing to the appellant within 10 days of receiving Centrelink's notice of the change in his entitlement.

Discussion

- [8] We accept that the appellant promptly took all steps required of him to declare his income and assets, and those of his wife, in order to establish his entitlement to portable NZS. We also accept that the delay by Centrelink in assessing his entitlement was not due to either his actions or those of the Ministry.
- [9] The provision that allows for such an overpayment not to be recovered requires the overpayment to have been made due to an error by the Ministry. That is not the situation in this case. The appellant submitted that the Ministry is bound by the decision of Centrelink not to recover the overpayment it made as a result of the delay, however that decision is not binding on the Ministry, as was explained at the hearing.
- [10] The appellant said he understood that the information provided to Centrelink would affect his entitlement but was not sure of the extent. Although the unanticipated delay by Centrelink in concluding its assessment meant the

appellant received more than his entitlement for six months, the fact that he was overpaid was not unexpected.

[11] We inevitably conclude that in the absence of any error by Ministry there is no legal basis for the appellant to retain the overpayment of NZS. He is liable to repay the amount of \$3,309.12 to the Ministry.

Order

[12] The appeal is dismissed.

Dated at Wellington this 1st day of April 2021

S Pezaro
Deputy Chair

C Joe
Member