

[2018] NZSSAA 26

Reference No. SSAA 162/16

IN THE MATTER of the Social Security Act 1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

C Joe - Member

Hearing at Whangarei on 23 May 2018

Appearances

XXXX in person; XXXX, his wife, as agent

P. Siueva, agent for the Ministry of Social Development

INTERIM DECISION

[1] This appeal arises from the Supported Living Payment (SLP) paid to the appellant as the full-time carer of his disabled son, N. N is 30 years old and suffers from significant medical and developmental issues. Developmentally he is around three to four years; he experiences seizures; all his personal needs must be taken care of by others. He requires constant monitoring of his health and behaviour day and night and, on one occasion, caused a significant fire during the night.

[2] We began hearing this appeal on 23 May 2018 but there was insufficient time to complete the hearing. This interim decision addresses the issues we identified at the hearing about the scope of this appeal and sets a timetable for the parties to provide further evidence and submissions.

- [3] The appeal, as filed, was against the decision to deduct from the appellant's Supported Living Payment (SLP) his wife's United Kingdom State Pension (UKSP) and to recover an overpayment of \$7,638.94 for the period 2 April 2015 to 29 May 2016.
- [4] As recorded in the directions issued after pre-hearing telephone conferences, the appellant withdrew his challenge to the Ministry's decision to deduct the appellant's wife's UKSP from his SLP entitlement. The appellant's submissions filed prior to the hearing and his evidence focussed on the issue of whether or not the Ministry is entitled to recover the overpayment.
- [5] After we heard from the appellant, we asked why he decided to withdraw that part of the appeal against the decision to deduct the UKSP. The response was because agents of the Ministry told the appellant that he "couldn't beat s 70".
- [6] We expressed concern that the appellant was persuaded to withdraw his appeal because he and his wife felt convinced by statements made by Ministry officers that the law is so well settled that they had no prospect of success. Our concern is not the accuracy of this advice; it is that the Ministry gave legal advice to an unrepresented appellant, intending to discourage them from pursuing their appeal.
- [7] Although the Ministry is not represented by counsel in these proceedings, when it advises an appellant on his prospect of success it is giving legal advice. There is nothing to suggest this advice was given by one of the Ministry's lawyers but if it was, that person would be in breach of their professional obligations under the Lawyers and Conveyancers Act 2006. If the Ministry's agent was unqualified, there is also a potential breach of the Lawyers and Conveyancers Act 2006, which restricts people other than lawyers giving advice relating to tribunal proceedings.
- [8] A further concern is that the body of case law on s 70 relates to the application of s 70 to entitlement to New Zealand Superannuation. While s 70 captures other benefits payable under the Social Security Act 1964, as far as we are aware the application of s 70 has not been considered in relation to a beneficiary receiving SLP as a carer, as is the case with this appellant.
- [9] In addition to our concern about the advice given by the Ministry, we also expressed concern at the hearing that the Ministry had not considered s 70(2)

of the Act which gives the Chief Executive a discretion as to the date on to commence deduction of an overseas pension from a New Zealand benefit. The appellant and his wife were unaware of this provision but the onus is on the Ministry to properly consider each application. The law is very clear regarding the Chief Executive's duties, and staff at all levels within the Ministry of Social Development must understand that law to perform their duties.

[10] The nature of the Chief Executive's duties is concisely summarised by Dunningham J in *Crequer v Chief Executive of the Ministry of Social Development* [2016] NZHC 943:

[48] The role of the Chief Executive in performing his functions and powers under the Act has been considered in previous decisions. They have emphasised that, under s 12, it is for the Chief Executive and those acting with his authority, to determine what benefits should be granted to a claimant.¹ In doing that, there is a requirement for the Chief Executive, or his delegate, to ensure that the correct benefit or benefits are paid and in making that determination, to be "pro-active in seeing to welfare, and not defensive or bureaucratic".²

[9] It was open to the Ministry to consider whether the discretion in s 70(2) should be exercised in this case and we consider that in the circumstances it had a duty to do so. The Authority is deemed by the Act to be a Commission of Inquiry under the Commissions of Inquiry Act 1908 and has inquisitorial powers. The High Court has made it clear that whether or not the appellant identifies all the relevant issues, the Authority has the duty to consider them. In *Margison v Chief Executive of the Department of Work and Income*³ Justice Laurenson commented:

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.

¹ *Chief Executive of the Department of Work and Income v Scoble* [2001] NZAR 1011 (HC) n 12, at [29].

² *Hall v Director-General Social Welfare* [1997] NZFLR 902 (HC) n 13, at 912.

³ *Margison v Chief Executive of the Department of Work and Income* HC Auckland AP.141-SW00, 6 August 2001 at [27].

- [10] The Supreme Court also considered the nature of proceedings before the Authority in *Arbuthnot v Chief Executive of the Department of Work and Income*⁴. It was resolute in requiring the Authority to reach the correct view on the facts, rather than being constrained by the earlier processes:⁵

There is nothing in s 12M to prevent the Chief Executive from then asking the Authority to consider any matter which may support the decision which is under appeal. Indeed, the thrust of the section is quite the other way: that the Authority is to consider all relevant matters.

...

The duty of the Authority was to reach the legally correct conclusion on the question before it, applying the law to the facts as it found them upon the rehearing without concerning itself about the conclusion reached by the BRC ...

- [11] Accordingly, we are satisfied that it is appropriate in the circumstances of the appeal before us to consider the application of s 70 of the Act in the appellant's circumstances, and in particular whether s 70(2) has appropriate application in these proceedings.
- [12] We note that in the hearing Ms Siueva gave, as an example of the s 70(2) discretion, the date of application for an overseas pension being set as the date on which deduction commenced. However, the discretion can also be exercised by setting a date in the future that is contingent on certain events.

The application of s 86(9A)

- [13] The issue of what payments constituted the overpayment was addressed at the hearing. The appellant's submissions at the hearing were focussed on whether the Ministry had made any error that disentitled it to recover the overpayment under s 86(9A) which provides that:

Section 86(9A)

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—

⁴ [2007] NZSC 55.

⁵ *Ibid* at [20]–[26].

- (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.

[14] The Ministry's position was that it had made no error, however, if the Authority found that there was an error, the Ministry submits that the requirement in s 9A(a)(i) for the appellant to receive a sum of money was not met and therefore the subsequent requirements of this section were not satisfied.

[15] The Ministry based this submission on its assertion that the overpayment is the amount of the appellant's wife's UKSP which was paid directly to the Ministry. However, Ms Siueva subsequently agreed that the overpayment must be the alleged overpayment of the benefit, in this case the SLP, paid to the appellant during the relevant period.

[16] Section 86(9A)(b) requires consideration of whether in the debtor's financial circumstances it is equitable to permit recovery. We explained to the appellant that the documents referred to in the following orders must be provided if they wish us to consider the Ministry's entitlement to recovery.

Summary

[17] For the reasons given the scope of this appeal is reinstated to the original notice of appeal. The appeal is against the Ministry's decision to deduct the amount of the appellant's wife's UKSP from his SLP and to establish and recover an overpayment.

[18] We record that, as we said at the hearing, our decision to extend the scope of this appeal is in no way predictive of the outcome. We drew the parties' attention to our power to refer to the Chief Executive for further consideration the whole or any part of the matter to which an appeal relates. We explained this provision to the appellant in the hearing as being a provision which allows anomalies in the Act to be identified, even where an appeal does not succeed.

Orders

[19] The following orders are made:

[19.1] The scope of the notice of appeal filed on 8 December 2016 is reinstated to include the decision to deduct the appellant's wife's UKSP from the appellant's SLP entitlement.

[19.2] The parties are to make submissions on the application of s 70 of the Act and, in particular on s 70(2) (**attached**) in accordance with the following timetable:

- (a) Any submissions by the Ministry in addition to those in the s 12K report on the application of s 70 or s 86(9A) are to be filed and served on the appellant by 5 June 2018.
- (b) Any further submissions in response by the appellant are to be filed and served on the Ministry by 15 June 2018.
- (c) By 15 June 2018 the appellant is to provide either tax returns or a statement from an accountant in relation to his wife's company for the years ending 31 March 2016, 31 March 2017 and 31 March 2018 and a statement as to the appellant's household assets and liabilities for the same period.
- (d) By 15 June 2018 the appellant is to provide a schedule showing the average cost of care for the son N.
- (e) The hearing is adjourned to Friday 22 June 2018 at 10.30 am. for a full day.

Dated at Wellington this 28th day of May 2018

S Pezaro
Deputy Chair

C Joe JP
Member