

[2018] NZSSAA 46

Reference No. SSA 077/16

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 Benefits
Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

K Williams - Member

DECISION ON THE PAPERS

Background

- [1] XXXX (the appellant) appeals the decision by the Chief Executive on 19 October 2015 to establish overpayments of invalid's benefit, supported living payment and disability allowance for the period from 9 January 2014 to 7 January 2015. This decision was upheld by a Benefits Review Committee on 1 April 2016. By this time, the period over which the overpayments were established had been extended, for the reasons that follow.
- [2] The appeal was filed on 13 June 2016 and part heard by the previous Deputy Chair of the Authority in December 2016. As recorded in the direction issued on 22 February 2017, the Deputy Chair's term ended before he could complete the hearing. Therefore, this appeal is reheard. The parties agreed that the Authority should determine this appeal on the basis of their written submissions.
- [3] The appellant is aged 65. She received an invalid's benefit from 15 January 2009 until 14 July 2013 when a change to the legislation changed the appropriate benefit to a supported living payment. She also received a disability allowance. On 18 November 2014, when she completed a personal details form, the appellant stated that she had received a commission payment of \$36,000 from her employer, XXXX. The Ministry subsequently accepted that

this payment was commission payable for the previous four years' work organising an annual equestrian tour in France.

- [4] The appellant stated that she used these funds to pay off her mortgage and a lawyer's bill. The case manager recorded this information but failed to review the appellant's benefit entitlement at this time.
- [5] On 4 August 2015, the appellant stated on a review form that she received income from share dividends and work for XXXX.
- [6] On 29 September 2015, the Ministry reviewed the appellant's benefit entitlement and concluded that she had not been entitled to receive any benefit in the previous review year, from 9 January 2014 to 7 January 2015, and established an overpayment. The appellant sought a review of this decision. In the course of the review, the Ministry deposited a sum of \$4,000.75 into the appellant's bank account in error. She repaid this sum immediately when the Ministry asked her to do so.
- [7] The calculation of the overpayment now sought by the Ministry is contained in its section 12K report. The appellant does not challenge the calculation of the overpayment other than to question why there have been different assessments of the amount of the overpayment.

Relevant law

- [8] Income is defined in the Social Security Act 1964 (the Act) as:

income, in relation to any person,—

(a) means any money received or the value in money's worth of any interest acquired, before income tax, by the person which is not capital (except as hereinafter set out); and

(b) includes, whether capital or not and as calculated before the deduction (where applicable) of income tax, any periodical payments made, and the value of any credits or services provided periodically, from any source for income-related purposes and used by the person for income-related purposes; and

- [9] The only exception to recovery of overpayments is provided for in s 86(9A) of the Act as follows:

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—
- (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.
- (9B) In subsection (9A), **error**—
- (a) means—
 - (i) the provision of incorrect information by an officer of the department;
 - (ii) any erroneous act or omission of an officer of the department that occurs during an investigation under section 12;
 - (iii) any other erroneous act or omission of an officer of the department; but
 - (b) does not include the simple act of making a payment to which the recipient is not entitled if that act is not caused, wholly or partly, by any erroneous act or omission of an officer of the department.

The case for the appellant

- [10] The appellant states that she was told by Work and Income New Zealand (WINZ) officers that if she did not use the money she earned to “live on” it would not affect her benefit. She submits that because the money she earned from employment and shares was paid to her mortgage and legal fees, other than an amount retained to pay tax, this income should have no bearing on her benefit entitlement.
- [11] The appellant also stated that she had legal advice that the law of restitution applies. As she changed her position in the belief that she was entitled to retain the amount of the overpayment, she says she is not obliged to repay it. She states that she used the money and it no longer exists.
- [12] The appellant argues that she has done nothing wrong and has always declared her income as required. She points to her immediate refund of the erroneous

payment as proof of her honesty. She also states that it was not possible to know what she would earn in advance of the equestrian tour. She said that not long after she went on a benefit she told WINZ that she was interested in doing part time work and met with an employment officer. She says she is working in a way that suits her health condition, cystic fibrosis, and knew she had to declare her income. She questions why the Ministry changed the amount of the overpayment several times.

The case for the Chief Executive

- [13] The Ministry originally calculated the amount of the overpayment as \$14,189.78. It then decided to spread the commission payments over four previous years rather than charge the payment to one review year, which reduced the overpayment to \$11,322.86. The Benefits Review Committee concluded that the correct amount of the overpayment was \$10,578.25.
- [14] In its section 12K report, issued on 6 October 2016, the Ministry seeks recovery of \$13,160.88 in [6.19] of the report and \$13,280.88 in [6.21] of the report. Exhibit 17 is a letter dated 5 October 2016 from the WINZ service centre to the appellant stating that the overpayment is \$13,160.88, taking into account repayments of \$120.
- [15] An undated schedule (Exhibit 18) shows the overpayment for the period from 27 December 2010 to 21 December 2014 as \$13,496.48. It appears from the section 12K report that the Ministry reviewed the appellant's entitlement and its calculations again after the Benefits Review Committee issued its determination.
- [16] The Ministry relies on its records of payments made to the appellant and confirmation from XXXX of the amount paid to the appellant in the relevant period. The Ministry states that the transition of the appellant's invalid's benefit to supported living payment has not had any impact on the situation for the appellant.
- [17] The Ministry submits that the commission payments and income from shares received by the appellant fit within the definition of income in s 3 of the Act. The Ministry considered whether the commission payments could be considered as capital, which is excluded from the definition of income, but concluded that the commission payments were brokerage services and within the definition of income as money received or value in monies worth. The Ministry considers

that the share dividends clearly fall within the definition of income. The Ministry assessed the appellant's income against the applicable income tests.

- [18] The Ministry accepted that the debt for the period from 17 November 2014 to 21 December 2014 should not be recovered because the case manager failed to take immediate action to suspend the appellant's benefit when she advised the case manager of the commission payment on 18 November 2014. The sum of \$215.60 was therefore deducted by the Ministry from the overpayment. The Ministry applied Income Test 1 to the balance.
- [19] The Ministry contends that the appellant was aware of her obligation to advise changes in her circumstances, including any income earned from employment. This is because she had previously declared income from other commissions received from the same firm. The Ministry noted that although the appellant declared small commission payments, approximately \$3,000, she gave no indication that she may receive a larger commission payment for ongoing work.
- [20] The Ministry does not accept that the common law of restitution assists the appellant because the Act specifically provides for the recovery of overpayment of benefits. It considered whether it should exercise the discretion in s 86(9A) of the Act not to recover the overpayment. The Ministry accepts that the appellant may not have known how much commission she was likely to be paid and that she received the overpayment in good faith at the time.
- [21] However, the Ministry submits that the limited exception to the right to recovery of an overpayment in s 86(9A) of the Act does not apply in the appellant's case. The first step for the exercise of this discretion is that part of the debt was caused by an error to which the debtor did not intentionally contribute. The Ministry submits that it did nothing to cause the overpayment. It does not accept that it advised the appellant that if she used the money to pay mortgage or legal fees, this would not count as income.

Discussion

- [22] The appellant has not pointed to any error by the Ministry which has caused the overpayment. We do not accept her assertion that she was told that if she spent commission and share dividends on something other than "living expenses", this money would not count as income. It is not supported by any documentary records and is inconsistent with the appellant's declaration during annual benefit reviews of small commission payments prior to the \$36,000 payment.

- [23] The earlier declarations indicate that the appellant knew that the commission she received was relevant to the Ministry's assessment of her income for benefit entitlement purposes. We are not satisfied that she has provided any basis on which she could reasonably have assumed that income she earned by way of commission or share dividends would not qualify as income under the Act.
- [24] While we accept that the appellant received varying assessments of the amount that the Ministry says it overpaid, she has not disputed the Ministry's final calculations.
- [25] Accordingly, we conclude that as there was no error by the Ministry in overpaying the appellant, s 86(9A) does not assist her.
- [26] The Act is clear and there is no basis for applying restitution law in this case, and, even if there were, it would not assist the appellant.
- [27] For these reasons, we are satisfied that the appellant was overpaid for the period from 27 December 2011 to 21 December 2014. The Ministry's final calculation of the overpayment of \$13,280.88 is correct and the Ministry is entitled to recover this sum.

Dated at Wellington this 20th day of September 2018

S Pezaro
Deputy Chair

K Williams
Member