[2018] NZSSAA 56

Reference No. SSA 057/18

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

Mr G Pearson - Chairperson

Mr K Williams - Member

Mr C Joe - Member

Hearing at Wellington on 28 September 2018

Appearances

For the Appellant: Mr N Ellis (agent), with the appellant.

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

AMENDED DECISION

Background

[1] The decision issued on 31 October 2018 is recalled to correct a numerical error in the first paragraph of that decision which incorrectly recorded the amount of the overpayments in issue in this appeal.

[2] This appeal concerns recovery of overpayments:

[2.1] the first an overpayment of $381.27 to the male appellant, and

[2.2] the second an overpayment of $381.23 to the appellant's wife.

[3] The context is that the male appellant receives a supported living payment at half the married rate, with other support. During the period from February 2015 until June 2016, when the overpayments arose, his wife received the other half of the support at half the married rate. She did not lodge an appeal. The appellant's wife worked in remunerated employment, and the support available to the appellant and his wife depended on the level of income from that employment.

[4] The advocate for the appellant indicated that the appeal challenged both the establishment, and recovery of the overpayments. Each instance of overpayment; apart from $2.12, which concerned calculation of an entitlement due to disability, arose due to:

[4.1] payment of benefit support allowing for anticipated income earned by the appellant's wife;

[4.2] the appellant's wife earning more income than expected; and

[4.3] the appellant and his wife accurately reporting the income, but, at least in the Ministry's view, it being too late to prevent the overpayment.

[5] The parties both agree that the correct default methodology for the support received by the appellant and his wife is to ascertain entitlement over a 52-week period. For the appellant and his wife those periods ran through:

[5.1] 8 November 2013 to 6 November 2014;

[5.2] 7 November 2014 to 5 November 2015, and

[5.3] 6 November 2015 to 3 November 2016.

[6] They also agree that the overpayments were calculated based on eight determinations, in the period from 13 February 2015 to 22 December 2016, which related to shorter periods, apparently calculated on fortnightly rests (corresponding to pay periods), not the 52-week calculation.

[7] The Ministry indicated in its report produced under s 12K of the Social Security Act 1964 (the Act), that it understood the calculation of the level of the overpayment was not contentious. However, it said the appellant's position was that there should be no overpayment, as income was accurately reported during the year.

[8] The position in fact taken at the hearing for the appellant was that the Ministry had provided an assessment for the 52 weeks ending November 2015, but not for the period ending November 2016. The appellant did not accept the calculations, but provided no competing evidence of income or calculations. Accordingly, while the Ministry had

understood a 52-week calculation was not necessary, the appellant put that in issue at the hearing.

[9] The key argument for the appellant was that there should be no recovery of the calculated overpayments as the appellant received them in good faith, he and his wife took all necessary steps to report income promptly, and any overpayments were due to the Ministry's error.

[10] The task for the Authority is to determine whether there has been an overpayment, and, if so, whether it is recoverable.

The law

[11] In terms of whether there has been an overpayment, the principle of calculation based on 52 week periods is uncontentious. The general principles are discussed in *Molloy v Chief Executive of the Ministry of Social Development.*[1] In this case, r 2 and the schedule to the Social Security (Period of Assessment) Regulations 1996 (the Regulations), mandate 52 weeks as the default calculation period (the 52 week periods commence as from the date of commencement of a benefit, and the relevant periods are noted above).

[12] However, the Ministry pointed out that in r 2 of the Regulations, if an affected person agrees, then income may be calculated on weekly periods. Weekly calculations accumulated for 52 weeks, and alternatively a single calculation over 52 weeks may or may not produce the same result. There are a range of factors that are potentially relevant, and the outcome is not predictable without identifying the factors, and the sums of money in issue.

[13] Debt recovery is mandated by s 86 of the Act. There is a non-discretionary duty to take "all reasonably practicable steps to recover a debt" in s 86(1). There is, however, a mandatory prohibition on recovery in s 86(9A) and (9B). The scope of that prohibition on recovery is that it applies when:

[13.1] there was an error on the part of the Ministry; and

[13.2] the recipient did not intentionally contribute to an error; and

[13.3] the recipient received the money in good faith; and

[13.4] the recipient changed her or his position believing they were entitled to the payment; and

[1] *Molloy v Chief Executive of the Ministry of Social Development* [2013] NZHC 1233.

[13.5] recovery would be inequitable.

Discussion

The evidence

[14] The Ministry produced the documentary record and explained that its position is:

[14.1] The appellants were responsible for reporting their income, and could anticipate overpayments would occur if that did not happen.

[14.2] Generally, income needed to be reported by the end of Friday for the week ending Sunday, to get an accurate quantification and payment of benefit for the payment for the period ending that week. In some cases, manual intervention on Monday could result in a correct payment when reports were made as late as Monday.

[14.3] The appellant's wife worked at weekends, and generally reported her income promptly and accurately. There was some variation in how prompt she was, though the Ministry was not critical of that.

[15] In relation to the quantification of the overpayments, we understand that:

[15.1] there has been a calculation for the 52 weeks ending 5 November 2015; but

[15.2] there has not been a calculation of the 52 weeks ending 3 November 2016; however,

[15.3] the appellant contests the quantum of the overpayments, but provided neither a 52 week or weekly calculation to demonstrate there was no overpayment.

[16] The appellant said he and his wife complied with reporting his wife's income. However, family responsibilities sometimes made that difficult to do as promptly as they would have liked. He said the Ministry's systems were not ideal, and there were variations in practice among staff. For example, some frontline staff would take reports in person, and others would say that the reports had to be made online.

Evaluation of the evidence

[17] It is the appellant and his wife who have complete details of the income they earned. They have not provided evidence to show that the Ministry's calculation of the overpayments overstates the quantum, either using a 52 week or weekly calculation basis. Essentially, the approach for the appellant was to say that the figures were unreliable without providing evidence to support that position.

[18] In relation to the reporting of income we find no basis for finding fault on the part of the Ministry, or for the appellant to think that adjustments would not be required. The reality is that the Ministry relies on a self-reporting regime to adjust benefit payments during a 52-week (or other) period, it is imperfect as it is susceptible to human frailty and error. There are cases where these errors are sufficient to engage s 86(9A) and (9B) of the Act. This is not a case where that is so. The appellant should have been aware that unless his wife's income was reported accurately on Friday in any week, adjustments would need to be made for that period. It was not always possible to make the reports on Friday, as his wife's hours of work over the weekend were not certain at that point. Sometimes, for good reason, there were some significant delays in reporting. It was inevitable there would later be adjustments at the end of the current 52-week period, or under weekly calculations if agreed.

[19] In this case, we find no error on the part of the Ministry that was material to the overpayments. Any discrepancies simply arose due to a regime that pays benefits as soon as practicable, and accordingly needs to make adjustments after the event. The appellant and his wife could not have believed they were entitled to overpayments, as they lived continuously under this regime, where they reported income, and there were adjustments made subsequently.

[20] This is not a case where the Ministry expressly or by implication caused the appellant or his wife to believe interim adjustments would wholly or substantially negate the need for end of period adjustments.

Leave reserved

[21] We reserve leave for the appellant to provide evidence that the overpayments have not been calculated correctly. On the evidence before us, we could not find that the overpayments were probably overstated. We understand that the calculations were performed to align with fortnightly pay periods. In some cases, there are differences in the quantum over 52 weeks if the calculation accumulates interim calculations. We have no evidence that applies in this case.

[22] The appellant is entitled to have the calculations performed over the 52 week periods discussed, and, on a discretionary basis, weekly periods.

[23] We reserve leave for the appellant to provide:

[23.1] evidence of income to show there has been an excessive calculation of the overpayments based on a 52-week calculation; and/or

[23.2] evidence to support the use of the discretion to use weekly calculations, and proof of the relevant income and benefit entitlements using weekly calculations.

[24] Any material is to be filed with the Authority, and served on the Ministry on or before 28 November 2018.

[25] We have allowed this additional evidence as there was some misunderstanding between the parties regarding the need for a 52-week calculation until the hearing. Neither party provided a foundation to show the point is a material issue in this case, and it is likely it is not material. However, given the misunderstanding we will provide an opportunity to address the point if the appellant wishes to pursue it.

Decision

[26] We have set out the statutory requirements for the calculation of the debt, and requirements for the debt not to be recovered. In this case, we cannot find on the material before us that there is probably an overstatement of the amounts overpaid, or that the statutory requirements for non-recovery have been met. Accordingly, the appeal must be dismissed on the evidence before the Authority.

[27] The appeal will be dismissed at 5:00 pm on 28 November 2018, unless the appellant has filed further material on or before that date. If there is further material, that is, on its face, sufficient to reach a different conclusion the Authority will convene a telephone conference to discuss how it will evaluate the material. If the material does not reach that threshold, the Authority will issue an order stating why, and issue an order dismissing the appeal.

Dated at **Wellington** this 31st day of October 2018

G Pearson
Chair

K Williams
Member

C Joe JP
Member