

[2016] NZSSAA 097

Reference No. SSA 018/16

**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**

Mr R D Burnard - Chairperson  
Lady Tureiti Moxon - Member

**HEARING** at WELLINGTON on 20 October 2016

**APPEARANCES**

The appellant in person  
Ms Kirkham for Chief Executive of the Ministry of Social Development

**DECISION**

**Introduction**

[1] This is an appeal against a Ministry decision of 14 July 2014 confirmed by a Benefits Review Committee decision on 20 August 2015 in which the Ministry established and sought recovery of an overpayment of \$10,318.08 in respect of payments of New Zealand Superannuation made to Mrs XXXX for a period commencing 29 November 2013.

**Background**

[2] Mrs XXXX returned to New Zealand from Australia in XXXX 2013 and applied for and obtained New Zealand Superannuation. She had separated from her husband

who lived in Western Australia. Later that year she made a short return trip to Perth to discuss reconciliation with her husband. A decision was made to move to live with her husband again permanently and she left New Zealand on 29 November 2013.

[3] New Zealand Superannuation continued to be paid to her until 14 July 2014 when the Ministry stopped payments as a result of information received from a data check with the New Zealand Customs Service.

### **Decision of Benefits Review Committee**

[4] In the Committee's decision of 31 August 2015 the Committee held that Mrs XXXX had received payments of New Zealand Superannuation from 29 November 2013 to which she was not entitled and that recovery of the overpayment could not be waived under the provisions of s 86(9A) of the Social Security Act 1964 ("the Act").

### **Case for the appellant**

[5] Mrs XXXX travelled from XXXX to give evidence before the Authority in Wellington. She told us that she had visited WINZ on two occasions relevant to this appeal. When she first called at the XXXX office to clarify entitlement for superannuation payments whilst overseas she said that she had understood that she could be paid for four weeks whilst being out of New Zealand, but was informed that she could be absent for 26 weeks and still receive payments.

[6] After a visit to her husband in October 2013 she decided to try to continue with her marriage and on her return to New Zealand later that month she set about organising the renting of her house and attending to the other matters required in connection with her departure from New Zealand. She told us that she had a list of things she needed to do and on the list was to go to the WINZ office and tell them that she was going back to Australia permanently. She said that she remembered quite vividly doing this – she hated paying parking fees and drove down the road to the Pak 'n Save car park before approaching the WINZ office. She spoke to a lady at the front desk and said that she was going back to Australia permanently and was told that "that would be recorded and payment would stop in 26 weeks". Mrs XXXX said she had no reason to question this advice.

[7] In essence the appellant's case was that she believed she was entitled to the 26 weeks' payment and was therefore not surprised to be receiving the money into her Westpac account in New Zealand on a regular basis.

## **Case for the Ministry**

[8] Ms Kirkham representing the Chief Executive relied on the provisions of a report completed under s 12K(4)(e) of the Act by another appeals officer. The Ministry took the position that Mrs XXXX must have been aware of her obligations to advise the Ministry of her permanent departure from New Zealand and overlooked doing so.

[9] The Ministry report dealt with recovery of the overpayment submitting that there had been no error by any officer of the Ministry. It was stated that as there had been no fault by the Ministry the other limbs under s 86(9A) did not need to be considered.

## **Authority's findings**

[10] The Authority considers that no issue arises as to whether or not an overpayment was made – the provisions of s 21 of the New Zealand Superannuation and Retirement Income Act 2001 apply. This section reads:

### **21 Effect of absence from New Zealand on New Zealand superannuation**

A person is not entitled to New Zealand superannuation while that person is absent from New Zealand except as provided in sections 22 to 35 or in any agreement or convention adopted under section 19 of the Social Welfare (Reciprocity Agreements, and New Zealand Artificial Limb Service) Act 1990.

[11] Section 22 of that Act which is also relevant reads:

### **22 First 26 weeks of certain temporary absences**

New Zealand superannuation that would otherwise be payable to a person (other than a person who is receiving New Zealand superannuation overseas under section 26) is payable in respect of the first 26 weeks of any absence from New Zealand if—

- (a) the person's absence does not exceed 30 weeks; or
- (b) the person's absence exceeds 30 weeks and the chief executive is satisfied that the absence beyond 30 weeks is due to circumstances beyond that person's control that he or she could not reasonably have foreseen before departure.

[12] Plainly Mrs XXXX was absent from New Zealand for a period exceeding 30 weeks after 29 November 2013 and was thus not entitled to be paid New Zealand Superannuation from that date.

[13] The central issue for the Authority however is whether or not the Chief Executive may recover the debt. Section 85A of the Act provides that payments in excess of the amount to which a person is entitled constitute debts to the Crown. The

Chief Executive may not recover such a debt in certain circumstances as provided by s 86(9A) which reads:

**86 Recovery of payments made in excess of authorised rates**

- (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.

[14] “Error” for the purposes of this section is defined in s 86(9B) as follows:

- (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.

[15] In this case the error relied on Mrs XXXX is the information she says she was given that her decision to leave New Zealand permanently would be recorded and New Zealand Superannuation payments would be stopped after 26 weeks.

[16] Mrs XXXX gave evidence under oath. The Authority had a good opportunity to observe her demeanour and concluded that her evidence was truthful. No officer was called from the Ministry's XXXX office. We note that at paragraph 7.11 of the Section 12K Report it is asserted that when Mrs XXXX came to arrange her affairs in order to move to Australia permanently she “may have overlooked advising the Ministry”. We consider Mrs XXXXs' evidence of making a list of the things she had to do and calling at the XXXX office and her recollection of the conversation had a ring of truth about it

and that an error was made by the provision to her of incorrect information by an officer of the department. We are also satisfied that she did not intentionally contribute to that error.

[17] Turning to the issues which arise under s 86(9A) the Authority considers that the payments made for 26 weeks after 29 November 2013 were received by Mrs XXXX in good faith as she believed, following her conversation with an officer of the department, that she was entitled to payment over that period. Payments after the 26 weeks however were not received in good faith because Mrs XXXX must have known that she was not entitled to the payments after the expiration of the 26 week period.

[18] We are also satisfied that Mrs XXXX changed her position in the belief that she was entitled to the 26 weeks of payment and would not have to repay that money back. She told us, and we accept her evidence, that she had an unusual arrangement with her husband whereby she paid for her own expenses whilst living with him and as time went on used whatever money was available to her from New Zealand Superannuation and the net rental from her house at XXXX to save money for her return to New Zealand, which involved not only an air fare but arranging a container for her belongings.

[19] Mrs XXXX relies on New Zealand Superannuation for her income and spoke of having to go to the soup kitchen if she had to repay the alleged debt. Having regard to all the circumstances, including her financial position as outlined to the Authority, we consider it would be inequitable to permit recovery of the superannuation payments made for 26 weeks from 29 November 2013.

[20] Our decision however does not extend to the payments for the short period following the expiration of the 26 weeks. It could not be said that Mrs XXXX received payment for the period beyond the 26 weeks in good faith as on her own account she cannot have believed that she was entitled to that sum.

[21] Accordingly the Authority has decided to allow this appeal in part and finds that the Chief Executive is not entitled to recover superannuation payments for 26 weeks from 29 November 2013 from Mrs XXXX. The balance of the payments, which will need to be calculated by the Ministry, is recoverable. Once that balance has been established Mrs XXXX should be notified of the amount outstanding and the Authority recommends that a rate of repayment be negotiated which is reasonable once Mrs XXXX has provided budget information to the Ministry, the payments being by way of weekly deduction from her New Zealand Superannuation.

**Conclusion**

[22] For the reasons given the Ministry above the appeal is allowed in part. The alleged overpayment is to be reduced to the amount representing the payments made following the 26 week period from 29 November 2013.

**DATED** at WELLINGTON this 18<sup>th</sup> day of November 2016

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Mr R D Burnard  
Chairperson

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Lady Tureiti Moxon  
Member