

[2019] NZSSAA 17

Reference No. SSA 120/18

IN THE MATTER of the Social Security Act 2018

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

C Joe - Member

Hearing at AUCKLAND on 19 February 2019

Appearances

The appellant in person and her partner, **XXXX**

Ms N Jaura, agent for the Ministry of Social Development

DECISION

Background

[1] **XXXX** (“the appellant”) appeals the decision of 30 June 2018 to establish an overpayment of Unsupported Child’s Benefit of \$46,280.23 for the period from 5 August 2016 to 18 February 2018 and to recover the full amount of this overpayment from the arrears of Orphan’s Benefit that was paid for the same period.

[2] On 29 October 2012, the appellant applied for and was granted Unsupported Child’s Benefit for three children in her care. At the time of this application, the children’s mother had died and their father, the appellant’s brother, was in prison. He died on 4 August 2016 and the next day the appellant applied for

and was granted an advance payment of benefit to assist with the cost of attending his tangi. The appellant argues that this application should have alerted the Ministry to the fact that the children were orphans.

- [3] However, the appellant continued to receive Unsupported Child's Benefit. On 21 April 2017, the Ministry sent the appellant a letter stating this benefit would cease if certain information the Ministry had requested was not provided. The appellant then completed and signed a "confirming our circumstances" form for the period from 25 April 2016 to 23 April 2017. She did not provide any information that indicated the children were orphans.
- [4] On 20 February 2018, the appellant gave the Ministry a copy of the children's father's death certificate and asked that they be granted an Orphan's Benefit to correctly reflect their situation.
- [5] The Ministry then cancelled the Unsupported Child's Benefit from 19 February 2018, the first available date, and granted the Orphan's Benefit from the same date. There was no difference in the rate of payment.
- [6] The appellant sought a review of this decision asking that the Orphan's Benefit be backdated to 5 August 2016. On 28 June 2018, a Benefits Review Committee recommended that the Orphan's Benefit be backdated to 5 August 2016 and an Establishment Grant be paid for the children. The Ministry then cancelled Unsupported Child's Benefit from this date and established an overpayment of \$46,820.23. It granted the Orphan's Benefit from the same date, creating arrears of the same amount as the overpayment. The Ministry also granted an Establishment Grant of \$750 for two of the children. An Establishment Grant for the third child had been paid on 17 November 2017.
- [7] The appellant then sought a review of the decision to recover the overpayment from the arrears. This decision was upheld by a Benefits Review Committee and is the decision now under appeal.

Relevant law

- [8] The Social Security Act 1964 ("the Act") was in force at the time that this decision was made.¹ Section 72(a) of the Act provides that no person is entitled

¹ This Act has been replaced by the Social Security Act 2018 which came into force on 26 November 2018.

to receive more than one benefit in his or her own right, other than where certain exceptions apply. None of the exceptions are relevant to this appeal.

- [9] Section 80(1) of the Act provides that, except in certain circumstances which do not apply to this appellant, a benefit commences on the latter of either the date the applicant became entitled to receive it or the date the application for it was received.
- [10] Section 80(13) provides that a benefit commences on the day on which it was granted if the person has become eligible for the benefit while receiving another benefit and the benefit is granted instead of that other benefit.
- [11] Section 80AA of the Act provides that:

80AA Minister may allow back-dating of benefit where earlier failure to grant it based on error

- (1) With the consent of the Minister (given in relation to a particular applicant or applicants of a stated kind or description) a benefit (or a benefit of a stated kind) may commence at a time earlier than the time an application for it was made.
- (2) The Minister must not give consent unless satisfied that—
- (a) in the case of a particular applicant, the particular applicant—
- (i) could not reasonably have been expected to apply at the earlier time because of some erroneous action or inaction on the part of the department; or
- (ii) at or before the earlier time, tried to apply or applied incompletely, and did not proceed because of some erroneous action or inaction on the part of the department; or
- (b) in the case of applicants of a stated kind or description,—
- (i) applicants of that kind or description could not reasonably have been expected to apply at earlier times because of some erroneous action or inaction on the part of the department in relation to applicants of that kind or description; or
- (ii) at earlier times, some applicants of that kind or description tried to apply or applied incompletely, and did not proceed because of some erroneous action or inaction on the part of the department.
- (3) For the purposes of subsection (2), examples of erroneous action or inaction are—
- (a) giving wrong advice:
- (b) erroneously failing or refusing to provide information, help, or some document or form.

...

- [12] Section 81 allows the Ministry to review any benefit in order to ascertain whether the beneficiary remains entitled to receive it, or whether the beneficiary may be entitled to receive that benefit or not at the rate at which the benefit was payable.
- [13] Section 81(3) allows the Ministry to cancel a benefit and replace it with a more appropriate entitlement from the date of cancellation. In *Chief Executive of the Department of Work and Income and Vicary*² the High Court held that s 81(3) did not allow retrospective substitution of one benefit for another.
- [14] 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.

² *Chief Executive of the Department of Work and Income and Vicary* [2001] NZHC 276.

The case for the appellant

- [15] The appellant submits that the Ministry made an error by paying Unsupported Child's Benefit instead of Orphan's Benefit from the date on which the children's father died. Therefore, the appellant says that the Ministry is barred by s 86(9A) of the Act from recovering the overpayment of \$46,280.23. The appellant says she is not responsible for the debt and it is not her mistake.
- [16] She says that when she applied for assistance to attend her brother's tangi, the Ministry should have realised that the children were orphans and changed the applicable benefit to the Orphan's Benefit. She accepts that the amount of the benefit is the same and that she has now received the Establishment Grant in respect of each child. However, she argues that the mechanism by which the debt was created was unlawful and therefore cannot be recovered.
- [17] The appellant accepted that she did not make a written application for the Orphan's Benefit or provide her brother's death certificate until February 2018. However, she said that when she did ask about the Orphan's Benefit she was told it made no difference because it was paid at the same rate.
- [18] XXXX argued that s 80AA should have been applied to rectify the situation not s 81. He said that applying the incorrect provision made the creation of the debt unlawful. He said that it was insulting that the correct benefit had not been provided at the time and that the Ministry did not acknowledge that the children were orphans from the date on which their father died.

The case for the Ministry

- [19] The Ministry says that the Orphan's Benefit was backdated at the request of the appellant. The Ministry told the appellant and her partner that there would be no change to the rate of payment as both benefits are paid at the same rate.
- [20] Ms Jaura said that the reason that the Ministry had to create the overpayment of Unsupported Child's Benefit when it backdated the Orphan's Benefit was because a person is prohibited from receiving two benefits by s 72 of the Act and they had to be offset. Essentially, this was an administrative exercise carried out because the appellant was insistent that she wanted the Orphan's Benefit backdated to correctly reflect the children's situation.

- [21] The Ministry says that the appellant could have corrected the situation when she applied for assistance to attend the tangi however there is no record to show that she explained the relationship between her brother who died and the three children who were in her care. She also failed to correct the anomaly when she completed the “Confirming Your Circumstances” form in April 2017.
- [22] The Ministry therefore submits that the overpayment was not caused by any error on its behalf and s 86(9A) does not apply.

Discussion

- [23] The issue we must decide is when the appellant became entitled to Orphan’s Benefit, whether it should be paid retrospectively and, if so, whether the Ministry is entitled to recover the amount of Unsupported Child’s Benefit the appellant received from 5 August 2016 to 18 February 2018.
- [24] The fact that the appellant applied for assistance to attend the tangi of her brother was not sufficient in our view to either notify the Ministry that the status of the children had changed or constitute an application for Orphan’s Benefit. There is no evidence to suggest that the appellant informed the Ministry that the children in her care were orphans before February 2018. We are satisfied that from 18 February 2018 the appellant was entitled to receive Orphan’s Benefit for the three children in her care and that this benefit was more appropriate than Unsupported Child’s Benefit.
- [25] Section 81(3) allows one benefit to be cancelled and replaced with the more appropriate benefit. The High Court concluded in *Vicary* that “date of cancellation” in this section means the date on which the Chief Executive cancels the earlier benefit and that the cancellation of the earlier benefit and the contemporaneous granting of the new benefit cannot apply retrospectively.³ Therefore, Orphan’s Benefit cannot be granted retrospectively; the date of cancellation of Unsupported Child’s Benefit and the commencement of Orphan’s Benefit is 18 February 2018.
- [26] As the amount of both benefits was the same, there is no overpayment of Unsupported Child’s Benefit to be recovered by the Ministry. The appellant has received the correct entitlement throughout the relevant period.

³ At [36] and [39].

[27] We explained to the appellant at the hearing that we are not reviewing the process by which the Ministry and the Benefits Review Committee reached their decision or applied the Act at the time. However, we observe that the Ministry endeavoured to grant the appellant's request to amend the type of benefit by retrospectively creating an "overpayment" of Unsupported Child's Benefit and offsetting this against "arrears" of Orphan's Benefit. It was a complicated and unusual approach which was well intentioned but inconsistent with the law.

Order

[28] The appeal is dismissed.

Dated at Wellington this 28th day of March 2019

S Pezaro
Deputy Chair

K Williams
Member

C Joe
Member