[2021] NZSSAA 1

Reference No. SSA 22/20

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an appeal by **XXXX** of Auckland against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

J Ryall - Member

Hearing at Auckland on 9 November 2020

Appearances

The appellant in person

A Katona, agent for the Ministry of Social Development

DECISION

Background

[1] XXXX (the appellant) appeals the decision of the Ministry of Social Development on 12 February 2019 to establish and recover an overpayment of Supported Living Payment (SLP) of $8,719.80 for the period 20 September 2017 to 18 September 2018 (the relevant period) due to excess income. This decision was upheld by a Benefits Review Committee on 19 November 2019.

[2] The appellant is a 55-year-old single woman who is a Housing New Zealand tenant. Since 2005 she received Sickness Benefit, then Invalid's Benefit and then in July 2013 Supported Living Payment. She experiences mental health issues, as well as musculoskeletal disorders.

[3] The appellant presented as a person determined to have an active life despite the challenges she faces. At the hearing she produced a reference from QT, the CEO of [Organisation]. QT is well known in the South Auckland community where he has worked for 30 years. He stated that he planned to attend the hearing in support of the appellant but was required to attend a community meeting. He has known the appellant for three years through her engagement in the community and around her welfare. He stated that he always found the appellant to be open and honest and that she always tried to be resilient and take responsibility for herself. He believed she intended to do the right thing at the right time for the right reasons. He stated he did not believe she has sought to deceive or defraud anyone.

[4] At the outset of the hearing Ms Katona confirmed that the Ministry did not consider the appellant had dishonestly failed to declare income. The parties agree that the irregular nature of the appellant's work created difficulties which she had not anticipated in calculating her income for benefit purposes as she:

[4.1] Was not given clear advice about the implications of earning while on a benefit.

[4.2] Did not understand that the net earnings she declared were treated as gross income.

[4.3] Was not clear on the period over which her income would be assessed.

[4.4] Did not understand the rate at which tax would be applied to her earnings.

[4.5] Did not realise that, after she paid the cost of getting to work, she was not financially better off by working.

[5] The appellant agrees that on 22 January 2018 she advised the Ministry that she started work in October 2017 and on 31 January 2018 she provided what she said was her final payslip from [Employer] for the period ending 28 January 2018. She agrees that she did not declare income between that date and the end of March 2018. She says the reason she did not declare her earnings at this stage was because she did not know if she would have further work or if she could manage the job in future.

[6] On 1 June 2018 the appellant attended an appointment with the Ministry and stated that she estimated her average income in the future to be $350 a week from [Employer]. She was given the option of declaring her income weekly but opted to declare it on an annual basis. The appellant said that when she provided the estimate of $350, it was her net income and she intended it to be understood as such. However, the Ministry calculated her declared income as a gross amount of $18,200, or $350 gross per week.

[7] The appellant's benefit entitlement is reviewed on an annual basis from 20 September each year. As recorded in the Ministry's report, it reviewed the appellant's income and reassessed her benefit entitlement between 20 July 2018 and 6 November 2018 after requesting income verification to complete an annual review. On 12 February 2019, in the absence of a response from the appellant, the Ministry estimated her annual earnings for the review period as $24,341.30 and concluded that the appellant had been overpaid $8,719.80.

[8] After the first telephone conference convened by the Authority on 22 June 2020, the appellant agreed to get the information from the recruitment agency to confirm her earnings between 23 January 2018 to 31 March 2018 and 1 September 2018 to 18 September 2018. When this information was received the Ministry calculated that the total income earned by the appellant for the relevant period was $26,666 which would increase the appellant's overpayment by $1,627.08. However, at the hearing Ms Katona confirmed that the Ministry was not seeking repayment of this additional amount.

The issues

[9] The issues we must decide are whether an overpayment has been established and, if so the amount of that overpayment and whether the Ministry is entitled to recover it.

Relevant law

[10] Income is defined in part 2 of schedule 3 of the Act; Clause 3 of the schedule defines income as before income tax, meaning gross income.

[11] Section 113 of the Social Security Act 2018 (the Act) requires a beneficiary to notify the Ministry without delay of a change in their circumstances which could affect the rate of benefit.

[12] Pursuant to s 444(2)(b)(i) of the Act, regulations may provide for exceptions to the duty imposed by s 362 of the Act on the Ministry to recover debts if a debt is caused wholly or partly by errors to which the debtor did not intentionally contribute. Regulations 208(1) and (2) in the Social Security Regulations 2018 are relevant:

> **208 Debts caused wholly or partly by errors to which debtors did not intentionally contribute**
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> (1) MSD cannot recover under the Act a 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 the debtor's position in the belief that the debtor was entitled to that sum and would not have to pay or repay that sum to MSD; and
>
> (b) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.
>
> (2) In this regulation, **error**—
>
> (a) means—
>
> (i) the provision of incorrect information by MSD:
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> (ii) any erroneous act or omission of MSD that occurs during an inquiry under section 298 of the Act:
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> (iii) any other erroneous act or omission of MSD; but
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> (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 MSD.

The case for the appellant

[13] At the pre-hearing telephone conference, the appellant raised three issues in addition to the overpayment. She questioned whether during the relevant period her Income Related Rent was increased, her student loan repayment was increased, and if she was taxed at the secondary tax rate.

[14] The Ministry filed submissions addressing these points and at the hearing the appellant accepted that her payslips correctly recorded her income from employment during the relevant period. She said she did not dispute the Ministry's calculation of the amount of the overpayment however she said the Ministry failed to give her information about two important issues, that her income

was assessed on the gross figure and the timing of her annual review. This failure contributed to the overpayment. The debt meant 'she had worked for nothing' and 'she just wanted it reduced'.

[15] The appellant said she had temporary work through [Employer] between October 2017 and October 2018; some weeks there was no work; other weeks she worked variable hours. Her payslips show that her hours varied from 4.5 to 60 hours per week. The work was at a rubbish dump on the North Shore of Auckland, handling and sorting rubbish. She travelled to her workplace each day in her own car from South Auckland. She left home around 6.00 a.m. as it took an hour to travel to work. The petrol cost her $120 per week. The appellant said that being at work and socialising with other people was better for her mental health than being at home on her own, even though it was not easy to do the work with her physical health issues.

[16] The appellant said she decided to declare her income on an annual basis because it was too difficult to declare it each week with irregular hours. She said when the Ministry said she could earn $18,000 per year she assumed this was a net figure. That is to say, the amount of income she received. Therefore, when she told the Ministry she expected to earn $350 per week, she understood that to be the net amount. The appellant said at no time in her interviews with the Ministry was she asked if the figures she provided were net or gross and she was not told that the Ministry was using gross figures. As a result, the appellant assumed that, if her income from employment was under $18,000 net per annum, it would be under the threshold for losing her benefit.

[17] The appellant says she was not told that 'annual income' meant a year from the date her benefit started and therefore her 'annual' review would occur on 20 September each year. She thought her income was calculated on the financial year and that, as she agreed in March to declare her income annually, her earnings would be calculated in relation to her benefit for the financial year beginning 1 April 2018.

[18] She said in the relevant period she dealt with three different government departments – the Ministry, Inland Revenue, and Studylink as well as the employment agency.

The case for the Ministry

[19] The Ministry's position is that, once the appellant chose to have her entitlement calculated on an annual basis, it was required to base its assessment of the amount of benefit she was entitled to receive by assessing her income for the 52-week period calculated from the date her benefit was first granted. The relevant period for the appellant is 20 September 2017 to 18 September 2018. The total income at the end of that period is averaged over the previous 52 weeks to determine what the appellant was entitled to receive during that period.

[20] When the Ministry made the decision under appeal, the appellant had not provided her income information for the full 52-week period under review, so it based this decision on an estimate. As recorded, the appellant provided the missing information and the Ministry decided not to collect the additional sum it said was overpaid.

[21] In its report,[1] the Ministry accepted that the appellant made contact three times during the relevant period to declare her income – 22 January 2018, 1 June 2018 and 13 August 2018. On 22 January 2018 she provided a pay slip to that date and said that she had worked from October 2017. She also told the Ministry her employment had ended although she subsequently accepted work from the agency during the period that followed.

[22] On 1 June 2018 she attended a face to face meeting with WINZ and advised that her annual income would be $18,500 with an average weekly income of $355.77. The Ministry provided the screen shot recording this conversation which stated that the appellant advised *"she can happily estimate that she may earn $350 gross per week = $18200 per year…Client happy to know that she will get $82.00 after HNZ rent paid with income being $350 gross average per week".*

[23] Although in this screen shot, and in the report, the Ministry said the appellant provided a gross weekly estimate, at the hearing Ms Katona accepted there was no evidence the appellant had been told clearly that the assessment of her income was based on the gross figure or that the information she provided of her income would be treated as the gross amount.

Analysis

Is there an overpayment?

[1] At [6.34].

[24] The appellant accepts that she was overpaid and does not dispute the Ministry's calculation of the amount. We do recognise the appellant is not well placed to perform the calculation, and if we identified any obvious discrepancy we would consider it further. However, it seems the issues arise from a misunderstanding concerning gross taxable income and the income the appellant received. We have no reason to doubt the amount has been quantified correctly by the Ministry. We therefore consider whether the Ministry is bound to recover the overpayment.

Was the overpayment caused by an error to which the appellant did not intentionally contribute?

[25] The screen shot of the Ministry's record of the meeting with the appellant on 1 June 2018 is consistent with the appellant's evidence to the extent that the amount the Ministry recorded as her estimated earning uses the same figures the appellant says she provided. The difference is whether her estimated weekly and annual income was intended to be exclusive or inclusive of income tax.

[26] To put the issue in context, we note many people do not have a good understanding of the measurement of income and the relationship between tax and the social security system. Commonly people do not understand that the main social security benefits are taxed, and have PAYE deducted before they are paid. It is of course usually understood by employees that employment income usually has tax, student loans repayments, child support and some other liabilities deducted. However, we find it is far from common for beneficiaries and other members of the community to understand the relationship between income, tax and other deductions, and income tested benefit entitlements. Indeed, until the High Court's decision in *F v Chief Executive of the Ministry of Social Development* [2018] NZHC 1607[2] the Ministry of Social Development maintained repayable loans were income. We make those observations as we must evaluate the plausibility of the appellant's evidence and consider what is reasonable for the Ministry of Social Development to do in terms of facilitating the accurate reporting of income for income tested benefits.

[27] We are satisfied the evidence in this case establishes the Ministry failed to ensure that the appellant understood that her annual entitlement would be based on her gross income, not the amount she received after tax. There is no evidence that when the appellant provided her estimate, the Ministry checked her

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2 *F v Chief Executive of the Ministry of Social Development* [2018] NZHC 1607.

understanding of the way that amount would be treated or that it was explained to her that she needed to estimate her gross income. In circumstances where a person is in receipt of a benefit, we find it unsurprising for them to consider the amount of money they receive from employment as their focus. In this case we have no reason to doubt the appellant's evidence that she understood that was the money the Ministry of Social Development wanted to know about.

[28] We are also satisfied that the officer in the Ministry of Social Development who engaged with the appellant did not explain that she needed to report her total income, before tax and other deductions. Given the importance of the issue for the appellant, having the appellant refer to or produce a wage slip, check her records on MyIR with Inland Revenue, or in some other way ensure she reported the correct amount seems to us an essential precaution. Certainly, we are satisfied for the appellant steps of that kind were apparent and necessary. The reality of the communication failure is demonstrated to us by the fact the appellant understood she had effectively engaged in onerous work for a year for no financial reward when these matters were explained to her.

[29] Our evaluation is reinforced by the content of the letters sent by the Ministry to the appellant asking the appellant to provide information for a review of her income. They do not make a distinction between gross and net income (Exhibits 11 dated 18 September 2018 and Exhibit 12 dated 3 October 2018 are examples). The first letter is at the end of the relevant period and the second outside of it. However, these are form letters, which we assume are indicative of the information the Ministry conveys in writing to beneficiaries about their obligations. The lack of key information is consistent with the appellant's personal dealings with officials regarding her personal obligations.

[30] Both letters refer to information provided by Inland Revenue that the appellant has received 'income' with no qualification as to whether the gross or net income figure is relevant. Although Exhibit 11 asks the appellant to make contact if her "gross income" has changed, the term is neither clear not likely to inform the appellant that it was concerned with her before tax income. "Gross income" could refer to the annual rather than weekly income, income before expenses, or before tax income.

[31] We conclude that the Ministry's failure to explain the distinction between before and after tax income for the purposes of the information it required from the appellant, and its failure to explain the period of her annual review, was an

erroneous act or omission and therefore an error as defined in reg 208(2)(b) of the Regulations.

[32] For these reasons, we are satisfied that the appellant did not intentionally cause or contribute to the debt to the extent that it arose from the difference between her net income and her gross income for the period 20 September 2017 to 18 September 2018, other than the two periods for which she failed to provide information until after the decision under appeal was made – 23 January 2018 to 31 March 2018 and 1 September 2018 to 18 September 2018. As the Ministry decided not to recover the overpayment received by the appellant during these two periods, we are only required to consider whether it may recover the overpayment as it was calculated on 12 February 2019.

[33] We emphasise that context is critical in an evaluation regarding the appellant's income reporting obligations. Many beneficiaries have frailties that make the complexities of income reporting difficult. The appellant is one of them, it is necessary to take reasonable steps when dealing with a beneficiary. Sometimes that may involve requesting a document, or permission to obtain a document that will be the only way of getting reliable information. The Ministry took this step only after the appeal was filed. The reality is that the appellant was engaged in employment where comprehensive records of her income were kept for tax purposes. While the Ministry may have had an obligation to first go to the appellant and seek the information from her, we would have a quite different view had the appellant not cooperated with a request to provide or authorise access to the relevant records. That is not what happened and, in this case, it is the essential failing in the Ministry's dealings with the appellant.

Is the Ministry barred from recovering the overpayment?

[34] The Ministry is barred from recovery of an overpayment where the three-stage test in reg 208(1)(a) is met. That is that the recipient:

> (i) received that sum in good faith; and
>
> (ii) changed the debtor's position in the belief that the debtor was entitled to that sum and would not have to pay or repay that sum to MSD; and
>
> (b) it would be inequitable in all the circumstances, including the debtor's financial circumstances, to permit recovery.

[35] The appellant's income for the full year, including the two periods for which the Ministry is not seeking to recover the overpayment, is less than $2,500 over her

estimate of her annual income from employment, if the figure she provided was applied as net. Therefore, we are satisfied that the appellant believed she was providing the information required for the relevant period. We find that she received her benefit entitlement during this period in good faith, believing that she had agreed to an annual review of her income and provided an accurate estimate of her net income. This is not a case where the discrepancy was "too good to be true" and we could infer wilful blindness.

[36] Significantly, we have no doubt that she would not have taken on the type of employment she did during this period, and incurred significant costs in doing so, had she believed she was not entitled to retain the income on the basis of a reduced benefit. This amounted to a substantial change in her position which meets the requirements of the second step of the test.

[37] We have considered the circumstances of this appellant, including the Ministry's acceptance of her integrity, and her financial position. After her Housing New Zealand rent has been deducted from her benefit and a $2 deduction to repay an advance, the amount she received from the Ministry at the time it prepared its report was $282.75. However, this included a winter energy payment of $40.91 per week which has now ceased.

[38] In these circumstances we find that it would be inequitable for the Ministry to recover the overpayment of $8,719.80.

Order

[39] The appeal is upheld.

[40] The Ministry of Social Development is not entitled to recover the amount of $8,719.80 from the appellant.

Dated at **Wellington** this 14th day of January 2021

S Pezaro
Deputy Chair

J Ryall
Member