

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

Ms M Wallace	-	Chairperson
Mr K Williams	-	Member
Lady Tureiti Moxon	-	Member

HEARING at WELLINGTON on 10 June 2015

APPEARANCES

Mr C Griggs for the appellant
Mr N Mumford for the Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant originally appealed to the Authority against a decision of the Chief Executive upheld by a Benefits Review Committee declining his application for a Rural Assistance Payment under the Special Needs Grant Programme. The Authority issued a decision on 30 April 2014 allowing the appeal in part.

[2] The appellant appealed the Authority's decision to the High Court.

[3] The High Court¹ has remitted the matter to the Authority for a factual determination as to the nature of the payments from the **XXXX** Family Trust to the

¹ *Thode v the Ministry of Social Development* [2015] NZHC 521 (19 March 2015).

appellant, as a pre-requisite to the Court ruling on a question of law as to whether or not payments made by the Trust to or on behalf of the appellant constitute income.

Background

[4] The facts of this case are set out in our earlier decision, but for present purposes we note the following:

- (i) The appellant is the settlor of a Trust known as the **XXXX** Family Trust (the Trust).
- (ii) The Trust owns a Kiwifruit orchard at **XXXX**.
- (iii) The appellant works for and manages the orchard for the Trust.
- (iv) The appellant is a Trustee of the Trust with a power of appointment. He is also a beneficiary of the Trust.
- (v) The Trust's accounts for the year ending 31 March 2013 show that in that year wages of \$26,462.37 were paid. Of this amount \$1,200 was paid to the appellant.
- (vi) The accounts also record an outstanding loan from the appellant to the Trust. The accounts show that this loan had reduced from \$879,497.32 in the year ending 31 March 2012 to \$839,019.29 in the year ending 31 March 2013, a reduction of \$40,478.03. Of this amount \$27,000 was a gift by the appellant to the Trust. The balance of \$13,478.03 represented amounts paid by the Trust to or on behalf of the appellant.
- (vii) Reductions in the amount owed by the Trust to the appellant occurred in a similar fashion in previous years. For example, as at 31 March 2011 the balance of the loan owed by the Trust to the appellant was \$1,001,838.58. This amount had reduced by \$122,341.26 to \$879,497.32 by 31 March 2012. Of the reduction of \$122,341.26, \$27,000 was a gift and the balance was apparently payments to, or made on behalf of, the appellant for his living expenses from Trust funds.

[5] On behalf of the Ministry it is submitted that the reductions in the balance of the appellant's loan to the Trust represent periodic payments of capital paid and used for income-related purposes. These payments should therefore be regarded as income for the purpose of assessing entitlement to a Rural Assistance Payment.

[6] Mr Grace, who is an accountant and financial analyst employed by the Ministry of Social Development, gave evidence for the Chief Executive. Mr Grace says he has inspected the minutes of the Trust from 2007 onwards. These records show that, with the exception of the year ending 31 March 2011, the Trust made a loss. The appellant was not paid an income in any of these years. In the year ending 31 March 2011, the Trust made a net profit of \$123,038 but no income was allocated to the appellant in that year either.

[7] In addition, Mr Grace says that in his examination of the financial statements for 31 March 2012, he was unable to identify any wages reflecting payment for the appellant's labour or management skills. This was despite the fact that the appellant apparently relies on the Trust for his financial support. Mr Grace concluded that support is provided to the appellant by virtue of his ability to draw at will from the Trust's accounts. He concludes that in the absence of any minute or other documentation to the contrary, the appellant's drawings/payments will be coded to the loan (from the appellant to the Trust) thereby reducing the balance owed by the Trust to him.

[8] He offers the opinion that the outstanding loan owed by the Trust to the appellant is a mechanism for remunerating the appellant for his work for the Trust by way of non-taxable loan repayments as opposed to a taxable wage or salary. Due to the size of the loan and the ability of the Trustees to offset this credit by way of a capital distribution when they choose, the appellant is able to draw on the loan tax free for many years.

[9] On behalf of the appellant, it is said that the payments received from the Trust by the appellant are in fact loans.

[10] Mr **XXXX**, who is a co-trustee of the Trust and also its accountant, gave evidence on behalf of the appellant. Mr **XXXX** said that the payments to the appellant could only be viewed as loans to him by the Trust because although the Trust owed the appellant a substantial amount of money on paper, there was a significant drop in the valuation of the Trust's kiwifruit orchards as a result of the PSA crisis. In reality, at the time the appellant received the payments for his living expenses from the Trust, the Trust had zero or negative equity in its assets. Mr **XXXX** said the loan by the appellant to the Trust was effectively worthless. The payments could not be regarded as payments of capital to the appellant as there was no capital to draw down on. In this context the \$13,478.03 could only be viewed as a loan from the trust to the appellant.

[11] Mr XXXX confirmed that the appellant was paid wages by the Trust. In the year ending 31 March 2013, \$5,000 was paid in a lump sum on 12 March 2012. In the year ending 31 March 2013 \$1,200 was paid, of which \$900 was paid on 29 January 2013 and \$100 per month thereafter. \$1,200 was also paid in the year ending 31 March 2014.

[12] Mr XXXX refers to the other ways in which the Trust could have paid the appellant, including capital distribution from the capital account or taxable distribution from the Trust's income account. These options were not possible. A capital distribution could only be made if there was a formal resolution by the Trust and no such resolution was made. Moreover the Trust's bank would not have countenanced such a resolution. For a taxable distribution to be paid the Trust would have needed to have made a taxable income which exceeded any losses carried forward from previous tax years.

[13] As the appellant needed funds for his immediate needs, the only possible avenue for such payments to be met was by way of a loan. Mr XXXX says that in his position as an independent Trustee of the Trust he had a duty to ensure the Trust did not trade insolvently and to maximise the equity of the Trust.

Decision

[14] Income is defined in s 3 of the Social Security Act 1964. The definition in subparagraph (b) is particularly relevant in this case it provides that income:

- (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; ...

[15] Section 3 of the Act defines income-related purposes as follows:

income-related purpose, in relation to any person, means the purpose of—

- (a) replacing lost or diminished income; or
- (b) maintaining the person or a member of his or her family; or
- (c) purchasing goods or services for the person or a member of his or her family, being goods or services of a kind that are commonly paid for from income; or
- (d) enabling the person to make payments that he or she is liable to make and that are commonly made from income.

[16] The term “periodical” is defined in s 3 of the Act as “regular or intermittent”. The Authority has previously found that the definition of “periodical” makes it clear that there need not be any particular regularity of the intervals over which payments are made. In some instances, a payment once a year over a period of years may suffice. What is required is a number of payments made over a period of time.²

[17] A log headed “XXXX Family Trust – loan – XXXX Transactions” lists a variety of payments made from Trust funds or Trust banking facilities, on behalf of the appellant or to the appellant in respect of the period 20 December 2012 to 31 March 2013. The payments made relate to living expenses such as supermarket spending, pharmacy, washing machine repairs and pool care, clothing and the like. We are in no doubt the payments were made for income-related purposes and used for income-related purposes. These payments are included in the \$13,478 reduction in the loan account.

[18] We are satisfied that the relevant payments made from the Trust for or on behalf of the appellant were periodical.

[19] Mr XXXX’s claim that the money received by the appellant from the Trust was a loan, has a number of difficulties associated with it. First and foremost, there is no evidence of a probative value that the Trust had negative equity in its assets. Mr XXXX is not a valuer, either of land and buildings or farm equipment.

[20] In addition, we note the following:

- Only part of the appellant’s orchard was affected by PSA. The Trust’s bank made a loan of \$200,000 to the Trust in November 2012, a few weeks before the appellant sought assistance from the Ministry. It is difficult to believe that the bank would have lent this amount to the Trust in November 2012 if its assets (which are not limited to land) were in negative equity at that point, or were likely to be in negative equity in the months immediately following. We infer that in making the loan the bank would have also given consideration to the Trust’s budget for the next period, including what money might be needed to staff the orchard including the living expenses for the Manager (namely the appellant).
- The financial statements prepared by Mr XXXX for the year ending 31 March 2013 do not reflect a loan from the Trust to the appellant of either \$13,478.03 or any other amount. Rather, they show a loan from the appellant to the Trust and part repayment of that loan.

² [2007] NZSSAA 68 (13 August 2007).

- The Trust accounts show the Trust repaying part of the loan from the appellant every year, even when there is a profit.
- Payment of wages by the Trust to the appellant is minimal and is not sufficient to pay for his basic support.
- There are no minutes of the Trust recording a loan to the appellant.
- In evidence provided to the Authority at the first hearing, in a letter dated 4 September 2013, Mr XXXX referred to the appellant taking personal drawings from the Trust of \$6,421.16. He did not suggest that the living expenses paid for by the appellant with Trust money constituted loans from the Trust to the appellant.
- Even if the Trust was insolvent (the Authority is not satisfied that it was), that does not mean that any money paid by it to suppliers, contractors or employees for their services, including the appellant, would be regarded as loans.

[21] We are satisfied that the Trust funds paid for the appellant's living expenses were received by the appellant as capital repayments of his loan to the Trust.

[22] As such, they were periodic payments of capital, paid and used for income-related purposes. The Authority considers they were "income", to be taken into account in the assessment of the appellant's entitlement to the assistance he was seeking.

[23] If we had been unable to find that the payments received by the appellant were periodic repayments of capital, then it may have been necessary for us to consider the deprivation provisions of s 74(1)(d) of the Social Security Act 1964. However, as we are in no doubt that the payments received by the appellant meet the criteria of income contained in paragraph (b) of the definition of income, we have not considered it necessary to consider how the provisions of s 74(1)(d) apply in this instance.

[24] The Authority notes in passing that the accounts for the year ending 31 March 2011 and 2012 are indicative of the way in which the appellant receives income from the Trust. They could not be used to determine the actual amount being received by the appellant in the period December 2012 to March 2013.

[25] Both parties have requested that the Authority reassess the appellant's income. If the parties seek a ruling from the Authority as to the calculation of the appellant's income following receipt of this decision, then the parties will need to make submissions as to precisely how the calculation should be made. The appellant is invited to make a submission as to how his income should be calculated within one month of the date of this decision. The Ministry will have an opportunity to respond. The appeal is adjourned. Either party may return to the Authority for further directions if required.

DATED at WELLINGTON this 31st day of August 2015

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member