

[2016] NZSSAA 019

Reference No. SSA 096/15

**IN THE MATTER**

of the Social Security Act 1964

**AND**

**IN THE MATTER**

of an appeal by **XXXX** of  
Christchurch 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 CHRISTCHURCH on 9 February 2016

**APPEARANCES**

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

**DECISION**

**Introduction**

[1] The appellant appeals against a decision of the Chief Executive confirmed by a Benefits Review Committee declining to pay Disability Allowance to the appellant.

[2] The appellant's application for Disability Allowance was declined on the basis that the Chief Executive assessed the appellant's income to be in excess of the applicable income limit.

## Background

[3] The appellant suffers from Multiple Sclerosis. In 2012 she started taking a new drug which is not funded by PHARMAC. The drug costs the appellant approximately \$200 per week. The appellant says the drug has had significant benefits for her. She does not require the level of assistance that she might otherwise need if she were not taking the drug. As she is obliged to pay for it herself, she is saving the government the cost of providing care and assistance in other ways.

[4] The appellant made an application for Disability Allowance as a non-beneficiary on 12 May 2014, to assist with her disability costs. In support of her application she provided a variety of information about her financial circumstances.

[5] The appellant is in business as an accountant and business manager. She operates the business through a limited liability company, XXXX Ltd. The appellant is a 70% shareholder in the company, while 25% of the shares are owned by the XXXX Trust and 5% are owned by her son. In addition to carrying on her business as an accountant through the company, the company owns rental properties in Kaikoura and Queenstown.

[6] The appellant is also a trustee and discretionary beneficiary of a trust. The XXXX Trust was settled on 20 December 1996. The trust owns three properties in Christchurch including the house the appellant lives in. The house on another property has been demolished and the trust receives no income from that property. Rental income is received from the third property.

[7] Initially, the Ministry's financial analyst assessed the appellant's income to be \$77,398.51 per annum. In August 2014 a further assessment of her income was carried out and it was reduced to \$58,749.41 per annum. From 1 April 2014 the income limit for receipt of Disability Allowance was \$607.36 a week. On the basis of the information provided, the appellant's application for Disability Allowance was declined.

[8] The appellant sought a review of decision. The matter was reviewed internally and by a Benefits Review Committee. The Benefits Review Committee began its hearing on 14 November but the hearing was adjourned to enable the appellant to provide further accounts. The appellant provided further amended accounts showing a significant reduction in the income of both the trust and the company. The Benefits Review Committee determined the appellant's income to be \$35,925 per annum, but

as this was still over the income limit for Disability Allowance the Chief Executive's decision to decline the appellant's application was confirmed to be correct.

[9] The appellant then appealed to this Authority.

[10] The Ministry's financial analyst has since reviewed the appellant's income using the amended accounts, on the basis that the accounts for the company reflected two different streams of income. The financial analyst has assessed the appellant's income to be as follows:

XXXX Limited:	
Accounting income net profit	\$18,326.21
Salary	\$22,750.00
XXXX Trust net profit	<u>\$2,524.48</u>
	<b>\$43,600.69</b>
	(\$838.47 weekly)

[11] On behalf of the Chief Executive it is submitted that:

- (i) the appellant has deprived herself of income and assets by conducting her business activity through a company and placing assets in a trust rather than owning the assets personally;
- (ii) in assessing income, a positive stream of income from one source cannot be offset against a negative stream flowing from a different activity; and
- (iii) its assessment is based on the information provided for the year ending 31 March 2014. In fact, the appellant applied for assistance in 2014 and the March 2015 accounts may be a more accurate indication of the appellant's income at the time of her application. Unfortunately, despite requests, the appellant has not been able to provide these accounts to date. As at the date of the hearing the position remained that the appellant had not completed her accounts for the year ending 31 March 2015.

[12] The appellant's position is that she only takes \$500 per week from the company business. Any other money available remains in the company. Essentially, it is used to offset losses made by the rental properties. Her income should be assessed at no more than \$500 per week. The appellant points out that many people in her situation simply give up work and rely on benefits.

## Decision

[13] Disability Allowance is an income tested benefit. Section 69C provides that an applicant's income should not exceed the income specified in Part 3 of Schedule 31 of the Act. At the relevant time, the maximum income for a single person without dependent children was \$607.36. Regardless of the particular circumstances of an applicant, if their income exceeds the maximum Disability Allowance cannot be paid.

[14] What constitutes income for the purposes of the Social Security Act 1964 is defined in s 3, the key points of which provide as follows:

**income**, in relation to any person,—

- (a) means any money received or the value in money's worth of any interest acquired, before income tax, by the person which is not capital (except as hereinafter set out); and
- (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] The definition is different from and much wider than the definition of income contained in income tax legislation.<sup>1</sup> It is a definition designed to include all the financial resources available to an applicant for benefit for their support.

[16] In this case, the provisions of s 74 of the Act are also relevant. Section 74(1)(d) provides that if a person has deprived themselves of income or assets, either directly or indirectly, then the Chief Executive has a discretion to refuse to grant a benefit or to grant a benefit at a reduced rate. Deprivation of assets occurs when a person makes a deliberate decision to deprive themselves of income or assets.<sup>2</sup> It is not necessary that the decision be made with the intention of gaining a benefit. Where a person has made a deliberate decision to deprive themselves of income or assets, the Chief Executive has a discretion to assess income as though the deprivation had not taken place. In practical terms, this means that the income of a trust or company may be treated as the income of the applicant.

[17] In this particular instance we accept the submission made on behalf of the Chief Executive that the appellant has deprived herself of income in carrying out her

---

<sup>1</sup> *Director-General of Social Security v K & M HC*, Wellington AP255/95 7 February 1997.

<sup>2</sup> *Blackledge v Social Security Commission HC Auckland CP81/87*, 17 February 1992.

personal work activity through the auspices of the company. She has also deprived herself of income by placing investment property in the trust.

[18] The issue is how should the appellant's income be assessed. In assessing income for the purposes of the Social Security Act 1964, the offsetting of losses from one stream of income from profits made in another is not permitted. The matter was considered by the High Court in *Carswell v Director-General of Social Welfare*.<sup>3</sup>

The offsetting of losses which could give rise to subsidisation, is not compatible with the scheme of the Social Security Act or the definition of "income" included in that Act.

This approach was followed in *Hendrickson v Director-General of Social Welfare*.<sup>4</sup> The High Court found at para [13]:

I do not think it matters how the income is describe[d] such as coming from separate 'streams'. because the exercise to be undertaken is to determine whether losses from one activity can be offset against income from another activity. If losses arise in a notional or a tax assessment sense from an activity which is not common to or realistically linked to that from which the income is separately derived, then it may be the case that losses cannot be offset.

[19] In this particular instance the accounts for XXXX Ltd include income from the appellant's personal activity as an accountant and business manager, and from the rental activity of properties in Kaikoura and Queenstown. The amended accounts for XXXX Ltd provided by the appellant in August 2014 show the company having a net profit after shareholders' salaries of \$6.67. An analysis of the accounts by the Ministry's financial analyst, apportioning expenses between the rental properties and the accounting business, indicates a surplus of \$18,326.21 in the accounting income stream and a loss of \$18,319.54 in the rental business stream.

[20] The appellant did not dispute the allocation of expenses as between the rental and accounting business provided for in the analysis. Rather, she says that she draws only the amount of the shareholder's salary of \$500 per week. Her income should be assessed solely on that basis. Any surplus from her accounting income is needed to make up the loss in her rental business. The rental properties are her attempt to provide for her future when her need for assistance and support will be much greater.

---

<sup>3</sup> AP132/98, HC Christchurch 14 December 1999 at [12].

<sup>4</sup> HC Auckland AP25-SW00, 19 June 2000.

[21] The difficulty about this argument is that to disregard that part of the income available to the appellant which is invested into her property activities would, in a sense, be asking the government to subsidise her investment activity. The appellant's efforts to provide for herself are to be admired. However, the provision of income-tested benefits under the Social Security Act 1964 is a backstop for people in financial need. Applicants for benefits must call upon their own resources before calling on the State for assistance.<sup>5</sup>

[22] Many people earning an income just above the threshold for Disability Allowance assistance would not own rental properties. It is not appropriate to ignore the fact the appellant subsidises her rental properties from income and that this is income which could be available to her to meet her other costs. To support her investment activities by ignoring the income used to support her investment would not be in accord with the objective of the legislation.

[23] Looked at on the basis that no deprivation has taken place, the amount of \$41,076.21 represents the income available to the appellant from her accountancy business in the year ending 31 March 2014.

[24] In addition, on the same basis, a further \$2,524.48 of income was available from the XXXX Trust. The appellant did not dispute this assessment, which was again based on the amended accounts which showed a reduction in income of \$31,350.31 from accounts previously provided for the same period.

[25] Based on this information, we are not satisfied that the appellant met the income criteria for Disability Allowance at the date of her application. We agree, however, with the Chief Executive's approach that consideration of the accounts for the year ending 31 March 2015 may be fairer to the appellant. These would not have been available to the decision-maker at the time of her application, but the Chief Executive has indicated that he would be prepared to take these into account as they may provide a more accurate indication of the appellant's income. Unfortunately, these accounts were not available when the Ministry requested them or at the time of the hearing. All that is required is the financial accounts prepared for filing with the Inland Revenue Department. In the circumstances, the appeal is adjourned for the appellant to provide the accounts that she has provided to the Inland Revenue Department for XXXX Ltd and the XXXX Trust for the year ending 31 March 2015.

[26] The appeal is adjourned.

---

<sup>5</sup> See *Director-General of Social Welfare v W* [1997] 2 NZLR 104 and s 1A of the Act.

**DATED** at WELLINGTON this 11<sup>th</sup> day of March 2016

---

Ms M Wallace  
Chairperson

---

Mr K Williams  
Member

---

Lady Tureiti Moxon  
Member

SSA096-15.doc(jeh)