[2016] NZSSAA 113

Reference No. SSA 179/15

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of Auckland 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 Auckland on 15 November and by video conference in Wellington on 17 November 2016

APPEARANCES

Bo Yu for the appellant
Patira Suieva for the Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant appeals against a decision of the Chief Executive, upheld by a Benefits Review Committee, declining to pay him Accommodation Supplement in the period 1 April 2011 to 31 March 2014 inclusive.

[2] His application was declined on the basis of his assets.

Background

[3] The appellant is married. He and his wife have seven children of whom five remain at home. The appellant's mother and sister also live in his household. The appellant is currently in receipt of Jobseeker Support with a work deferral. His doctor has certified that he can undertake light duties between 15 to 30 hours per week.

[4] On 23 February 2015, the appellant applied for and was granted Accommodation Supplement. This grant was later cancelled. On 17 June 2015, he was advised of the decision to decline his application for the year ending 31 March 2014. On 3 and 11 August 2015, he was advised that his request for Accommodation Supplement was declined for the years ending 31 March 2012, 31 March 2013 and 31 March 2014.

[5] The appellant sought a review of these decisions. The matter was reviewed internally and by a Benefits Review Committee. The Benefits Review Committee upheld the decision of the Chief Executive. The appellant then appealed to the Authority.

[6] The appellant and his wife personally own properties at XXXX and two units at XXXX. These properties are all rental properties.

[7] In addition, the appellant and his wife are the directors and shareholders of a company called XXXX Limited. This company owns the property the appellant and his wife and family live in at XXXX. In addition, it owns a rental property at XXXX. In carrying out his assessment of the appellant's eligibility for Accommodation Supplement the Chief Executive has excluded the family home – but included the property at XXXX.

[8] The issue in this appeal is whether or not the assets owned by the appellant and his wife and those owned by a company should preclude their entitlement to Accommodation Supplement. In addition, it is alleged by the Ministry that the appellant has cash assets which preclude his entitlement to Accommodation Supplement.

Decision

Cash assets

[9] Section 61EA provides for the payment of Accommodation Supplement to assist in meeting the applicant's accommodation costs.

[10] Section 61EC(3) of the Social Security Act 1964 provides that Accommodation Supplement shall not be paid to any person who has cash assets exceeding—

(a) $16,200 in the case of a person who is married.

[11] 'cash assets' is defined in s 61E of the Social Security Act 1964 in the following way—

(a) means—

(i) money saved with a bank or other institution, money invested with a bank or other institution, or money banked with a bank or other institution:

(ii) money invested in securities, bonds, or debentures, or advanced on mortgage:

(iia) money withdrawn from a KiwiSaver scheme registered under subpart 2 of Part 4 of the Financial Markets Conduct Act 2013:

(iii) money invested in shares in a partnership or limited liability company or other incorporated or unincorporated body; but

(ab) does not include any contributions to, or any member's interest in, any KiwiSaver scheme that is registered under subpart 2 of Part 4 of the Financial Markets Conduct Act 2013; and

(b) does not include any specified item or amount of cash assets, or cash assets of a specified kind, that is declared not to be cash assets for the purposes of this Act by regulations made under section 132

[12] In the first instance, it is submitted on behalf of the Chief Executive that a loan of $21,500 owed by XXXX and XXXX to XXXX Limited is a cash asset. This loan is evidenced in the company's accounts and in a caveat registered against the title to a property on XXXX. This loan does not fall within the definition of money saved with a bank or institution or money invested with a bank or institution or money banked with a bank or other institution. Nor can it said to be money invested in securities, bonds or debentures. The loan is not money withdrawn from a KiwiSaver scheme, nor is there evidence indicating that it amounted to shares in a partnership or a limited liability company or other incorporated or unincorporated body. The only question is whether it falls within the criteria "advanced on mortgage" in subparagraph (a)(ii) of the definition of cash assets. The caveat records that it is lodged pursuant to an agreement to mortgage dated 20 July 2007 with XXXX agreeing to execute a mortgage when called upon to do so. If the money were lent to XXXX without security it would not be caught by the definition of 'cash asset'. Money lent with the security of a mortgage is, however, caught by the definition. In this case, there is apparently an agreement to mortgage and an agreement that a mortgage will be executed if required. To this extent, there is some actionable security for the debt, but a legal mortgage does not in fact exist. We have reservations as to whether it can be said the loan has been advanced on mortgage. For present purposes, we consider it best that the asset be considered under s 61EC(4).

[13] Secondly, it is submitted on behalf of the Chief Executive that the loan by the appellant to his company should be considered as a cash asset. The loan relates to the transfer of the family home to the company. It is not secured by way of mortgage. It is only caught by the definition of 'cash assets' if it can be considered to be "money invested in shares in a partnership or a limited liability company ..." We consider this provision should be read to mean shares in a partnership or shares in a company or other incorporated or unincorporated body. The loan does not constitute shares in a company. We are not satisfied that it can be regarded as a cash asset.

Deprivation of assets

[14] The property owned by XXXX Limited at XXXX has been included in the assessment of the assets of the appellant and his wife. The property has been taken into account in assessing the value of the appellant's assets on the basis of the provisions of s 74(1)(d) of the Social Security Act 1964.

[15] Section 74(1)(d) gives the Chief Executive a discretion to refuse to grant any benefit or terminate or reduce any benefit or the grant of any benefit where the applicant has directly or indirectly deprived himself of any income or property which results in his qualifying for a benefit or an increased rate of benefit.

[16] All that is required for deprivation to occur is a deliberate act on the part of the person. For example, where a person decides to conduct a business through a company rather than in their personal name a deprivation can be said to have occurred.

[17] In this case, we conclude that in conducting part of the family rental business through the auspices of a company, and indeed in purchasing property in the name of the company rather than in their personal names, the appellant and his wife deprived themselves of an asset. In that circumstance, the discretion contained in s 74(1)(d) allows the Authority to consider the appellant's circumstances as though the deprivation had not taken place. It is appropriate to consider the rental property owned by the company as an asset of the appellant and his wife for the purpose of assessing benefit entitlement.

Realisable assets

[18] Section 61EC(4) gives the Chief Executive a discretion in circumstances where the applicant or the applicant's spouse or partner has not realised any assets available for the applicant's personal use, to refuse to grant an accommodation supplement or reduce the rate of any accommodation supplement already granted or terminate any accommodation supplement already granted.

[19] In summary, there are four rental properties to be considered in determining whether this discretion should be exercised in this case.

[20] In its assessment at pages 202 and 203 of the Section 12K Report, the Ministry have used rating valuations to assess the total value of the property concerned. The total liabilities of the appellant and his wife and their company have been calculated using the accounts provided by the appellant. The Ministry have then removed both the asset and liability relating to XXXX from the equation, the loan of $307,203.78 made by Mr XXXX to the company and shareholders funds of $50,652.11 to arrive at total liabilities of the appellant. Total liabilities (rather than liabilities associated with a particular property) have then been deducted from total assets to calculate that the appellant and his wife had the following equity in their properties:

31 March 2012	$106,344.07
31 March 2013	$125,932.84
31 March 2014	$145,337.19

[21] The most recent calculation by the Ministry, presented following the hearing, is calculated by simply deducting loans associated with particular properties from the rateable value as follows:

Address	**Rateable value in September 2008**	**Rateable value in July 2011**	**Loan balance at 31 March 2012 taken from accounts**	**Net Equity**
XXXX	$170,000	$170,000	$179,210.73	-$9,210.73
XXXX	$315,000	$280,000	$142,109.39	$137,890.61
XXXX	$305,000	$330,000	$274,956.64	$55,043.36
TOTAL	**$790,000**	**$780,000**	**$596,276.76**	**$183,723.24**
Property owned by company				
XXXX	$580,000	$580,000	$472,391.00	$107,609.00
TOTAL	**$1,370,000**	**$1,360,000**	**$1,068,667.76**	**$291,332.24**

[22] In summary, the appellant's equity in his properties as at 31 March 2012 is calculated to be $291,332.24. There is no evidence of a significant increase in borrowing or drop in values after that point. The inference to be drawn is that the appellant's equity in the properties concerned did not fall below $291,332.24 in the ensuing years.

[23] The appellant prepared his own calculation of the equity in his properties for the years ending 31 March 2011, 31 March 2013 and 31 March 2014 which was presented to the Authority on the second day of the hearing. This calculation shows negative equity for 2011 of $84,059.13, negative equity of $24,622.35 for the year ending 31 March 2013 and a small positive equity of $5,938.64 in the year ending 31 March 2014.

[24] In respect of the year 31 March 2011, he appears to have failed to include the value of the XXXX property in the calculation. In each of the years of 2013 and 2014, he has used the figures contained in the Statement of Financial Position from his personal accounts and the accounts for XXXX Limited. The figures relating to assets in

turn are drawn from the depreciation schedules. The value of assets in the Statement of Financial Position, are therefore based on purchase price less depreciation.

[25] We do not accept that the values in the depreciation schedules for the periods 2011 to 2014 of the accounts to be a useful guide to the value of properties purchased in the period 2005 to 2007.

[26] Establishing the value of the appellant's property by using a market valuation by a registered valuer would be the ideal method for establishing valuation but this will not be feasible for most beneficiaries. In some cases, where a purchase is recent, the actual purchase price may be the best option. In other cases, the rating valuation may be the best information available. In this case, the properties were purchased in 2006 and 2007 some five years earlier. We are in no doubt that the figures used by the appellant are not an appropriate way of establishing valuation for the purpose of determining whether or not the appellant and his wife had assets available for their personal use which had not been realised. They do not reflect the sale value of the properties.

[27] We accept that in this case, using the rating valuations was the best guide to the value of the properties available. As the amounts relating to the liabilities are taken from the accounts prepared by the appellant's accountants, we do not consider they can be criticised. Whether the calculation referred to in paragraph [19] or [20] is relied on, the figures show the appellant and his wife had equity of more than $100,000 in their rental properties at all material times. In addition, there is the loan of $21,500 previously referred to.

[28] The appellant says the discretion in s 61EC(4) should not be exercised in this case because if in fact he were to sell a property, the bank would take the proceeds of sale and there would be no money left for his personal use. Furthermore he draws attention to the Authority's decision in [2014] NZSSAA 36.

[29] There is no comparison between the property referred to in the decision referred to and the four properties owned by the appellant in Auckland. There is no evidence to suggest that the properties in this case could not be sold without difficulty. If the appellant and his wife were to have sold all of the rental properties in any of the years in respect of which he is now seeking Accommodation Supplement, it is more likely than not that all of the mortgage debt would be extinguished. The Chief Executive's estimate of the equity in the properties suggests they would also be able to pay off the loan remaining on their family home. They would have no need for assistance by way of Accommodation Supplement and may be left with some income to invest and earn income to support themselves and their family.

[30] Arguably, if the Chief Executive were to pay Accommodation Supplement in circumstances where the appellant and his wife retain multiple rental properties, the Chief Executive would in effect be subsidising their rental business and enabling them to retain the rental properties to reap any capital gains. We do not think this is the purpose of payment of Accommodation Supplement.

[31] Before seeking assistance with his accommodation costs, the appellant ought to sell all of his rental properties and apply any funds remaining to the repayment of any mortgage on his family home – thereby reducing his need for Accommodation Supplement. In our view, it was entirely appropriate for the Chief Executive to exercise the discretion in s 61EC(4) and decline to pay Accommodation Supplement to the appellant and his wife in the years 2011 to 2014.

[32] We record our concern that the appellant appears to have included mortgage payments relating to a rental property in his claim for Accommodation Supplement.

[33] The appellant's appeal as it relates to Accommodation Supplement is dismissed.

DATED at WELLINGTON this 22nd day of December 2016

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Ms M Wallace
Chairperson

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Mr K Williams
Member

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Lady Tureiti Moxon
Member