[2018] NZSSAA 006

Reference No. SSA 056/17

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

S Pezaro - Deputy Chair

K Williams - Member

Hearing at Auckland on 13 December 2017

Appearances

The appellant in person
J Burns and A Katona for the Ministry of Social Development

DECISION

This decision replaces the decision issued on 24 January 2018 which is recalled due to numerical errors at paragraphs [32] and [39] which are now corrected.

Background

[1] XXXX (the appellant) appeals the decision of 23 August 2016, upheld by a Benefits Review Committee, to stop paying a childcare subsidy from 8 August 2016 due to excess income.

[2] The appellant assesses his weekly income as $1028, which would entitle him to a subsidy of $4.04 per hour. He believes that his income has not been correctly calculated by the Ministry.

[3] The appellant is self-employed and his wife is in paid employment. Their son was enrolled in day care from 30 May 2016. The application for a childcare subsidy filed on 17 May 2016 included a 2015 financial year income tax return for the appellant as an individual tax payer and income tax return for A Limited. He also provided earning and income details for his wife and self-prepared profit and loss statements for his self-employed income and income earned in companies, and details of his consulting income for the 2016 financial year. However, the information about his gross weekly income on the childcare subsidy application form did not match the financial accounts.

[4] The Ministry therefore asked the appellant to supply business accounts and income return forms for the 2016 financial year. He provided draft accounts and on 10 August 2016 advised the Ministry that the childcare required was increasing to 52.50 hours per week because his wife returned to full-time work on 8 August 2016. He provided her first payslip and the Ministry assessed his annual gross income as $66,375.85 and his wife's income from 8 August 2016 as $37,440.

[5] As a result, the appellant was granted a childcare subsidy for the period 30 May 2016 to 8 August 2016 based on a gross weekly income of $1,276.46. The Ministry concluded that from 8 August 2016 when the appellant's wife returned to paid employment, their income disentitled them to a childcare subsidy.

[6] After this appeal was filed, the Ministry reviewed its decision. It conducted this review based on the appellant's 2017 income and accounts, provided on 21 April 2017 when he filed a further application for the subsidy. The Ministry then concluded that from 8 August 2016 the appellant was entitled to a subsidy of $1.55 per hour based on a weekly income of $1,308.63.[1]

[7] The record in the Ministry's Section 12K Report of the dates on which the appellant submitted information about his personal income and the income of his three companies and his work as a consultant to B Limited is not in dispute. The appellant continued to provide new information after the Benefits Review Committee decision was issued. The most recent documents were provided on 7 December 2017, prior to this hearing. As a result, the Ministry continued to revise its assessment up to the date of hearing.

[1] The rate increased from 1 April 2017 to $1.57 per hour.

Issues for determination

[8] The issue that the Authority is required to decide is whether the appellant was entitled to a childcare subsidy, and if so at what rate, between 8 August 2016 and 21 April 2017 being the date on which the appellant filed his second application for a subsidy. While the decision reviewed by the BRC was the decision made on 8 August 2016, it is accepted that the decision to be made at that time was the entitlement to a childcare subsidy for the subsequent period. Once the appellant provided the relevant 2017 financial records, it was possible to assess entitlement on the basis of actual, rather than projected, income.

[9] *Molloy v Chief Executive of the Ministry of Social Development*[2] is authority that where entitlement to a benefit is determined on the basis of income, the correct period of assessment is the 52-week period from the date on which entitlement commenced. However, the appellant's submission that his wife's income should be averaged over 52 weeks is not accepted by the Ministry because to be eligible for childcare assistance, the principal caregiver is required to be in paid employment.[3] As his wife was the principal caregiver, and only in paid employment for 33 weeks, the appellant is not eligible for a childcare subsidy for a full year. Therefore, it is appropriate to determine eligibility for the childcare subsidy on the basis of income earned from 8 August 2016 to 21 April 2017, the date on which the appellant filed a further application.

Relevant Law

[10] Section 3 of the Social Security Act 1964 (the Act) provides an interpretation of 'income' and 'income-related purposes'.

> **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;

[2] *Molloy v Chief Executive of the Ministry of Social Development* [2013] NZHC 1233.
[3] Clause 15 of the Social Security (Childcare Assistance) Regulations 2004.

[11] Section 61GA of the Act provides for childcare assistance as follows:

> **61GA Childcare assistance**
>
> (1) The purpose of childcare assistance is to provide targeted financial assistance to help certain people meet the costs of childcare.
>
> (2) The principal caregiver of a dependent child is eligible for financial assistance (**childcare assistance**) if he or she satisfies any prescribed criteria and any other requirements set out in regulations made under section 132AC.

[12] Section 132AC of the Act provides for regulations relating to childcare assistance. Regulation 3 defines household income as the total income of the child's principal caregiver and their spouse.

[13] Regulation 11 provides that no person can be granted a childcare subsidy unless they have applied for it on the form required by the Chief Executive and supplied the evidence required to satisfy the Chief Executive that they are eligible for the subsidy.

[14] Regulation 18 establishes the rate of childcare subsidy. The rate relevant to the appellant is that of a principal caregiver with one dependent child. The cut-off point at which a person is no longer eligible for any benefit is a household income of $1,400 a week.

The case for the appellant

[15] The appellant describes himself as a tax agent with experience setting up companies for clients and for himself. He has income as a sole trader, employment from consulting with B Limited (an accounting business), and through his companies: A Limited, C Limited and D Limited. He describes these companies as being part of the E Group.

[16] In his submissions filed 12 December 2017 the appellant argues that his household weekly income for the period was $1,028 and therefore he is entitled to a childcare subsidy of $4.04 per hour.

[17] The appellant contends that he is entitled to offset losses from one income stream against income from another. He argues that it is the holding group as a whole that has suffered a loss and as all three companies are in the same business, selling the same product, using the same website, phone number, supplier and premises it is unreasonable to separate out the results of the three entities.

[18] He also took issue with the Ministry's treatment of depreciation. He said he put cash aside to cover replacement of equipment but in evidence accepted that the amount banked was not calculated on any specific formula or related to any particular asset. He said he aimed to have $10,000 in an account for emergencies although he accepted that he drew out $15,000 in early November 2016 to purchase a Mercedes and pay suppliers.

[19] The appellant also argues that he is entitled to claim losses on sales that were not allowed by the Ministry, including losses on a Mercedes and a BMW, and that he is entitled to claim 100% of his travel expenses and not 50% as the Ministry allowed. He also claims $40 per week as entertainment costs, being the cost of food prepared one day per week by a personal cook.

[20] The appellant's calculation of his wife's income from salary and wages over a 52-week period resulted in a lower joint income for the relevant period than the Ministry's assessment which was based on the 33 weeks that she actually worked.

The case for the Chief Executive

[21] The Chief Executive relied on the evidence of Colleen Donnelly, a Chartered Accountant employed by the Ministry. The Ministry filed two briefs from Ms Donnelly. The first was sworn 23 November 2017 and the second 11 December 2017.

[22] In her first brief Ms Donnelly stated that the draft and final 2016 accounts provided to the Ministry did not attribute any expenses to two of the three companies. The accounts indicated that one company, A Limited, suffered a loss for tax purposes and the other two companies made profits.

[23] Ms Donnelly stated that the appellant, who was director and sole shareholder of the companies, prepared the company and business accounts. These were signed off by a chartered accountant but not reviewed or audited. This accountant used the standard accountant's statement declaring that the statements were compiled from information provided by the appellant and did not involve verification of that information. The accountant did not give oral evidence to the Authority.

[24] Ms Donnelly said that when in April 2017 the appellant provided some of the 2017 tax year accounts, the Ministry decided it was fair to use the income assessment for the period after 9 August 2016 rather than an estimate based on the previous

2016 tax year. Ms Donnelly explained that using the 2017 accounts resulted in the appellant being found partly eligible for a subsidy from 9 August 2016.

[25] When it prepared the s 12K report, the Ministry wrote back the amount claimed of $8,320 p.a. for entertainment, which was the cost of a personal cook, as an expense of A Ltd. However, the appellant subsequently clarified that the amount claimed was $40 per week. Ms Donnelly said that when this reduced figure was taken into account there was no assessable income for A Ltd.

[26] Therefore when the Ministry recalculated the appellant's income, it did not attribute any income from the appellant's group of companies. The difference in treatment of depreciation and loss on sale of assets therefore became irrelevant to the Ministry's assessment.

[27] Ms Donnelly's evidence was that the sum claimed for entertainment and 50% of vehicle use should be attributed to the appellant as income because they were personal benefits in 'money's worth' and therefore income under the Act. Ms Donnelly said that the personal benefit from the use of the company motor vehicles was assessed as 50% of total use. She explained that as there were no usage records kept of the vehicles, the Ministry considered that it was reasonable to attribute 50% to personal use, with the quantum based on the 2017 accounts provided by the appellant. Ms Donnelly noted that no fringe benefit tax was paid in relation to vehicle use.

[28] Although the question of depreciation was not relevant to the Ministry's final assessment of income, Ms Donnelly explained the way it was treated. She stated that money set aside to cover depreciation is not allowed as a deduction from income for benefit purposes under the Act. She said her approach reflects the principles in the decision of the High Court in *Hendrickson v Director-General of Social Welfare*[4]. In that case the High Court upheld the Authority's interpretation of s 3(1) of the Act as not allowing a depreciation allowance but only allowing depreciation where money to replace fixed assets is actually set aside. The Court observed that depreciation is a notional concept, and should not be used when determining income under the Act.

[29] Ms Donnelly said that money set aside for anticipated depreciation should be held in a separate bank account and be calculated in relation to depreciating assets.

---

[4] *Hendrickson v Director-General of Social Welfare* NZHC AP25-SW00, 12 June 2000.

She stated that having money in a general bank account is not the same as setting aside depreciation for replacement of assets.

[30] Ms Donnelly also pointed out that money which the appellant said he put into a Rabobank account for depreciation was deposited at the rate of $200 a week but there were two withdrawals which did not appear to be related to replacement of assets. One was for $15,000 and the other for $4,699.05 for "transfer". In addition, Ms Donnelly stated that on 6 April 2017 there was a nil balance in this account therefore it could not provide a replacement fund for depreciated assets.

[31] In relation to the appellant's claim that he is entitled to deduct the loss on the sale of assets, such as motor vehicles, Ms Donnelly stated that the issue in the appellant's case is the level of income not the value of assets which are relevant only to asset testing, and treated as a separate matter under the Act. Ms Donnelly stated that even if the loss on the sale was treated as an expense, expenses can only be deducted from their own income stream. The Ministry did not allow any deduction from income due to loss on sales.

Discussion

[32] For the reasons that follow we are satisfied that the appellant's weekly income for the purposes of assessing entitlement to a childcare subsidy for the period 8 August 2016 to 21 April 2017 was $1359.63, as assessed by Ms Donnelly on 11 December 2017.

Classification of income

[33] The definition of income under the Act includes value received in money's worth. Using income to purchase food and the use of motor vehicles by the appellant and his family for private purposes is a personal benefit. Either the receipt of the non-monetary benefits was income, or the money used to purchase the benefits was income. There is no opportunity of diverting this income from being considered for benefit purposes. The value of these benefits is appropriately treated as income when assessing entitlement to a childcare subsidy. The appellant failed to establish in a principled or factually probable basis that the value of the food and motor vehicles did not constitute a personal benefit to him, or that the extent of the benefit was less than the Ministry's evaluation. Accordingly, we accept the Ministry's quantification.

Assessment of weekly income

[34] The appellant confirmed at the hearing that he calculated his wife's income by averaging the amount she earned for the 33 weeks she worked in paid employment during the year over 52 weeks prior to 21 April 2017. As the appellant was not entitled to a childcare subsidy unless the principal caregiver was in paid employment, he was only eligible for a subsidy for 33 weeks of the year. There is no basis for averaging his wife's income over 52 weeks.

Depreciation and loss on sale of assets

[35] From the Ministry's point of view, the treatment of depreciation and loss on sale of assets did not affect its assessment of the appellant's income. However we have considered these issues as the appellant initially argued that they were relevant to his subsidy entitlement.

[36] The appellant has not provided any evidence to support his contention that the money he deposited into the Rabobank account was due to depreciation of company assets. It seems he claims the bank account was a depreciation reserve fund matching the depreciation claimed. Regardless, the appellant did not use the reserve funds in that way. Instead, he used these funds, to purchase a vehicle and pay suppliers, without relating the expenditure to depreciation of company assets.

[37] The appellant has failed to establish that this was a reserve fund relating to the depreciation of assets, on the evidence before us we consider it was simply income deposited into a bank account and used for general purposes. There is no justification for treating these funds any differently. The principles in *Hendrickson v Director-General of Social Welfare*[5] prevent the appellant claiming that depreciation should not be written back as the company did not set up a specific bank account, nor did the amounts deposited and withdrawn from the appellant's personal account appear to match depreciation claimed or assets purchased. Accordingly, we conclude that these funds were not set aside as a depreciation reserve.

[38] We accept the Ministry's evidence that any loss on sale of assets is not relevant to an assessment of income under the Act. Even if a loss on a sale was accepted as an expense, as it cannot be offset against another income stream it would have no effect on the appellant's income assessment.

---

5 Above at 3.

Conclusion

[39] For the reasons given we find that from 8 August 2016 to 21 April 2017 the appellant was entitled to a childcare subsidy based on a weekly income of $1,359.63, that is $1.57 per hour.

[40] The appeal is dismissed.

Dated at **Wellington** this 25th day of January 2018

_____
S Pezaro
Deputy chair

_____
K Williams
Member