

[2020] NZSSAA 2

Reference No. SSA 140/16

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

Mr G Pearson - Chairperson

Mr K Williams - Member

Hearing at AUCKLAND on 14 July 2017 and 11 November 2019.

Appearances

The Appellant in person

For the Chief Executive of the Ministry of Social Development: Ms T Braden (Counsel)

INTERIM DECISION

Introduction

- [1] This appeal concerns assistance XXXX received. The first issue arose from rental properties in which XXXX had an interest over the relevant period. They potentially affected her benefit entitlements as she received assistance that was asset and/or income tested. The rental income and equity in the rental properties were potentially relevant. The second aspect of the appeal is deposits into bank accounts, which the Ministry treated as income.
- [2] The issues to determine are:
- [2.1] what are the true facts regarding XXXX's income and assets; and
- [2.2] how did that affect her benefit entitlement?

- [3] The hearing commenced in 2017, and there have been extensive delays completing the matter. XXXX cares for her adult daughter who has high needs. It is enough to observe it has been difficult for XXXX to deal with the issues. For reasons we discuss, we have taken an approach where we consider the Authority is obliged to conduct an inquiry to ensure it makes sound factual and legal decisions.

Issues

Overview

- [4] Before embarking on a discussion concerning the case it is necessary to identify the issues with some clarity. The position has changed during the hearing process. XXXX arranged for financial statements to be completed in respect of income from the rental properties, and the Ministry now accepts she had no net income from that source.
- [5] However, the Ministry made no concession in respect of the net value of the rental properties as assets, and said they were to be considered under the asset test.
- [6] The second aspect of the appeal are deposits into bank accounts, which the Ministry treated as income. There were two bank accounts, one in the sole name of XXXX and the other in the joint names of XXXX and her former husband.¹ The Ministry treated all deposits it considered were not explained in XXXX's account as income; and half of the corresponding deposits in the joint account as income.
- [7] XXXX gave some evidence at an initial hearing. At the second hearing, she had understood that when she demonstrated she had no income from rental properties the Ministry would accept she had no income. We can understand why XXXX would reach that conclusion. The Ministry's s 12K report referred² to net rental calculations and identified \$8,527.95 as income; but then went on to refer to "unidentified and unverified deposits" which totalled \$106,234.79.³ The Ministry's report said those transactions "demonstrate that the appellant had received rent from income and deposits to her bank account". The Ministry's report does not identify what source of income XXXX could have, apart from rent. It appears XXXX found the Ministry's position unclear, however we do not

¹ The current status of the marriage is not in evidence, but the Ministry accepts the relationship broke down many years ago.

² At [5.9]

³ Apparently including the \$8,527.956.

intend that as a criticism of the Ministry. The issues are complex, involving a number of years, and numerous transactions.

The outstanding factual issues relating to income

- [8] There were deposits into the account held by XXXX, all of which the Ministry still regards as income.⁴ There were deposits in a joint account, the Ministry treated half of those deposits as XXXX's income. However, it did concede two points relating to the joint account since this appeal commenced:
- [8.1] Deposits in the joint bank account during the period 9 September 2006 to 7 September 2007 included a bank loan, XXXX's half share of \$15,000 was to be removed from the total income attributed to her. It followed there were residual deposits of \$1,189.29 treated as income for that period in the joint account.
- [8.2] Deposits included \$6,812.85 that had been treated as income in the joint account in the period 8 September 2007 to 5 September 2008. At the hearing counsel for the Ministry said there was no benefit paid in that period, so it should be ignored. The Ministry also said (possibly inconsistently)⁵ the sum of \$1,702.34 for the same period in the other account held solely by XXXX continued to be treated as income.
- [9] The net amount of income the Ministry now says should be attributed as income due to deposits in XXXX's account and the joint account is \$84,978.72, it says the result is an overpayment of \$29,108.68 of benefits that should not have been paid as they are income tested, and this income was not taken into account when the benefits were paid.
- [10] The information before us, which does not allow a complete reconciliation back to the bank statements the Ministry relied on, does not permit verification of the Ministry's calculations. There is also an inherent uncertainty in that the Ministry presented figures it said were from "the appellant's bank statements" that allowed the Ministry "to calculate the rent received minus mortgage interest payments, rates and some other maintenance". Those figures in the s 12K report were in periods from August to July in the years ending 2007 to 2012; whereas the Ministry presented tables in the s 12K report concerning "unidentified and unverified deposits", but they were in September to September

⁴ From a table produced in the Ministry's 12K report

⁵ That may not be the case, as we do not have the information to precisely identify time periods for benefit payments and transactions.

periods.⁶ When the Ministry made concessions and removed what it described in the s 12K report as the net income from net rent, and the other adjustments, it did so in a table based on the annual September to September periods. While a full reconciliation is not feasible given the different periods, on the information we have, we can say the following:

[10.1] It appears the Ministry has removed the amounts it identified as rental property income in the annual periods ending in July from 2007.

[10.2] It appears the Ministry has removed the money identified as a bank loan.

[10.3] We understand the Ministry's adjustments in the period from 8 September 2007 to 25 July 2008 reflect, the removal of rental income from the Ministry's calculations. The Ministry also said it accepted XXXX did not receive any form of benefit for part of that period, and it accounted for that; but we cannot verify the position.

[10.4] The Ministry is now treating XXXX as having income that should be considered as set out above [9], which is a total of \$84,978.72 in the period from 9 September 2006 to 8 July 2012.

[10.5] The Ministry says the result of this additional income not taken into account when the benefits were paid is an overpayment of \$29,108.68 made to XXXX.

[11] The questions we need to address concerning the income are:

[11.1] Are the sums of money correctly quantified?

[11.2] What is the character of the deposits in the bank account? Are they income for the purposes of determining XXXX's entitlement to support?

The outstanding issues relating to assets

[12] The position relating to assets is more straightforward factually. The Ministry has approached the issue based on taking the sale and purchase price, rating valuations, and loans to determine the net value of rental properties XXXX held.

⁶ Based on the period determined in *Molloy v Chief Executive of the Ministry of Social Development* [2013] NZHC 1233 at [28]. It appears the periods are appropriate, but we cannot check the analysis fully.

- [13] In the periods where the value was more than \$16,200 the Ministry took the view that XXXX did not qualify under the asset test. The Ministry's s 12K report provides an analysis⁷ that sets out the information the Ministry had (as outlined in the preceding paragraph), and said it indicates:
- [13.1] In the period from 1 August 2006 to 1 August 2010, XXXX had a value of \$54,639 available as a cash asset. It arose from properties and was the difference between the purchase price and the borrowing over the properties.
- [13.2] In the period from 2 August 2010 to 7 April 2011, the cash asset value increased to \$67,440. That related to the same properties as the previous period, the change related to differences in value and the level of borrowing.
- [13.3] In the period from 8 April 2011 to 6 March 2012 sales and acquisitions altered the assets treated as cash assets. The Ministry claims there was a value of \$359,985. There were sales of two properties in the period, and three properties treated as having a cash asset value.
- [13.4] In the period from 7 March 2012 to 8 July 2012, the cash asset value was treated as being \$129,364, with disposal at the end of the period.
- [14] The upper limit for the permitted asset value in the asset test is \$16,200. Accordingly, the precise amounts of equity in the various periods are not sensitive. The key issues are to determine the nature of the assets, and whether in law they are considered for the purpose of the asset test.

Discussion

The procedure

- [15] As noted, this matter has been protracted. XXXX's daughter has high needs, and it is apparent that XXXX is not particularly well equipped to deal with the issues. She apparently has an accounting qualification, but has never worked using the qualification. XXXX said she had spent a lot of money getting financial statements prepared for the rental property income. We have concluded we should not attribute any special skill to XXXX in relation to dealing with the issues in this appeal.

⁷ At [5.38].

[16] We have reached the point where we need to review the approach we should take. We do not have full knowledge of XXXX's circumstances, but it does appear that potentially these issues are very significant for XXXX and her daughter.

[17] Given the vulnerabilities of many appellants, and the limited assistance available to progress an appeal there are exceptional provisions relating to appeals before this Authority. The Ministry is required to assist with the prosecution of an appeal. As Williams J observed in *Chief Executive of the Ministry of Social Development v Genet*:⁸

Another of the Act's design elements is that the Ministry must facilitate the prosecution of the appeal. For example, s 12K requires the appellant to lodge a written notice of appeal with the Authority and to send or leave with the Chief Executive a copy of that notice of appeal. At that point it is the job of the Chief Executive to provide any necessary background information to the Authority to assist its assessment of the appeal including "a report setting out the considerations to which regard was had in making the decision or determination.

[18] Under both the Social Security Act 1964 (the Act) and the Social Security Act 2018 the Authority sits "as a judicial authority",⁹ and is deemed to be a commission of inquiry with the powers to gather information contained in the Commissions of Inquiry Act 1908.¹⁰

[19] This is a statutory framework where conventional jurisprudence relating to the onus and standard of proof must be applied with caution. The Ministry has a positive duty to provide the Authority with all the available material information,¹¹ and the Authority has powers to obtain further information. None of that alters the inevitable reality that some information is only available from an appellant and does not prevent the Authority drawing adverse inferences should an appellant fail to produce information they can access and should reasonably provide. It is also the experience of this Authority that while some parties may find it difficult to present aspects of their case, few cannot identify their point of concern and their perception of error and unfairness. The information provided by appellants when hearing appeals is very important, notwithstanding the duties placed on the Ministry and the Authority.

⁸ *Ministry of Social Development v Genet* [2016] NZHC 2541 at [15].

⁹ Section 12I of the 1964 Act, and s 401(2) of the 2018 Act.

¹⁰ Section 12M(6) of the 1964 Act, and cl 12(1) of Schedule 8 of the 2018 Act.

¹¹ Section 12K of the 1964 Act, and under the 2018 Act, reg 249 of the Social Security Regulations 2018.

- [20] At the initial hearing the Authority had the Ministry's s 12K report, and heard from Ms Kurene and Ms Halberg, both Ministry employees called as witnesses. XXXX also gave evidence. The hearing was adjourned, because it was apparent XXXX did not have the information required to respond adequately. The Authority has been forthright with XXXX regarding the information it expected from her, she did ultimately provide financial statements and a second hearing took place. XXXX was required to have the information on her rental property income for tax compliance purposes but had to have an accountant undertake the analysis after the Authority required it. When the second hearing took place there was some confusion regarding the extent of the Ministry's concessions following receipt of XXXX's financial statements.
- [21] We have had to examine the evidence and the legal issues with some care after the second hearing. The purpose of this decision is to evaluate all the issues based on the information we have before us. We have reached the view that there are elements of the Ministry's case where we could not make a factual finding supporting the Ministry's position on the information we have. However, we are concerned that may well be due to the Ministry not having adequate notice of the potential matters it needs to put in issue. This appeal involves a report from the Ministry that includes several hundred pages of detailed information; it is unsurprising that XXXX has found it difficult to present her response to that material. In our view, it is essential to give both parties the opportunity to respond fully to the potential findings to ensure fairness. For that reason, this will be an interim decision.

Facts

XXXX's income – the evidence

- [22] As indicated, the Ministry says XXXX received a total of \$84,978.72 income she did not report in the period from 9 September 2006 to 8 July 2012. It is about \$14,000 per annum. To give some perspective the Ministry says up to about \$30,000 was received in rent per annum, and there were substantial volumes of transfers between bank accounts. After this appeal commenced, the Ministry conceded income of \$15,000 was a bank loan, initially categorised as income. The character of a bank loan would potentially have been apparent when the Ministry first analysed the figures. In terms of the source of the income the Ministry says simply they are income on the basis they are "unidentified and unverified deposits". This is a case where it is plausible the Ministry's conclusions are, potentially, either wrong, or significantly wrong. The failure to identify a bank loan creates uncertainty regarding the depth of the Ministry's

analysis. We simply make the point, the potential for some of the contentious transactions to have been wrongly characterised as income cannot be rejected out of hand.

[23] Ms Kurene's evidence was that she is an investigator employed by the Ministry as part of its Fraud Intervention Services, she investigated XXXX in that capacity. Ms Kurene said the Ministry obtained information from XXXX's bank, and her colleagues made an assessment that included the deposits as income. Ms Kurene did not explain why she thought the deposits were probably income, aside from not being satisfied they had been explained.

[24] Ms Kurene said XXXX promptly disputed the assessment. Nowhere in her evidence did Ms Kurene suggest what the source of the funds were if they were income. While the concept of income for social security purposes is broad, and in some instances quite different to the concept in other contexts, we must take account that Ms Kurene's evidence did not:

[24.1] identify any likely sources of income,

[24.2] include information pointing to a source of income, or

[24.3] show the transactions were consistent with a source of income being intentionally obscured (such as evidence of cash transactions).

[25] Ms Halberg, the Ministry's other witness, focused on the effect of the amount of income on benefit entitlement, not whether the receipts were income.

[26] Ms Kurene did interview XXXX on 11 December 2014, and a transcript of that interview is included in the Ministry's s 12K report. It is apparent the primary purpose of the interview was to investigate the relationship between XXXX and her former husband. The interview did include discussion relating to bank accounts. Ms Kurene asked about funds coming into bank accounts. She asked specifically about:

[26.1] Deposits that XXXX identified as coming from her husband's business. XXXX said the receipts were repayment for supplies she purchased initially for that business in the expectation of repayment, and the transactions were the repayments. XXXX said she had paid substantial sums of money to make good her former husband's business losses; the key information XXXX provided was that she made poor decisions relating her husband's financial affairs, received no income and suffered losses.

- [26.2] Ms Kurene prepared a spreadsheet, which she said showed rental income. XXXX said all the rental income was offset by expenses, which the Ministry has now accepted was a correct explanation.
- [26.3] A receipt of \$650 in a bank account on 9 September 2008, which XXXX said was a loan from her former husband for something to do with a property.
- [27] Ms Kurene ultimately said during the interview she had bank statements but would deal with the information later, as XXXX had limited time for the interview due to an existing commitment. XXXX did offer to remain as long as she could, but Ms Kurene said she would look at the information later. During the interview Ms Kurene confirmed XXXX did not believe there was any undeclared income affecting her entitlement to support.
- [28] In an internal review template Ms Kurene provided a summary of the 12 December 2014 interview, she did not identify any admissions regarding income. In this document she said:
- The decision to establish the debt was based on the evidence, which showed that the Applicant owned up to 4 properties from 2005 onwards.
- The Applicant received deposits in her bank accounts from rental property and other unexplained deposits while in receipt of supplementary assistance.
- The debt was established as a result of the Applicant not advising the Ministry of changes.
- [29] Later XXXX, to support her review before the Benefits Review Committee, explained what she thought were all of the contentious transactions. One was a deposit of \$1,500 on 19 October 2006, and another a deposit of \$30,000 on 28 October 2006. She said the first was likely a payment from her former husband relating to mortgage outgoings. The second was a bank loan. The Ministry has accepted the second explanation. XXXX more generally provided explanations to the Ministry regarding what all the deposits the Ministry considered were unexplained, or at least the ones XXXX could identify. The explanations included, on payment of a hospital bill for a friend, so the receipt was offset by the payment. Selling text books used in the previous year for study. Topping up a bank account to cover outgoings (the source of the top up apparently being from XXXX's income/assets otherwise accounted for). Repayment of a loan advanced to a family member.
- [30] When XXXX brought this appeal, she said:

When I first had my hearing with the BRC, I gave evidence of cash deposited into my bank account and I was told that the Income Into your bank will be reviewed by the Investigations officers name Lino Kurene and I think the other lady named Heather. Therefore a separate meeting was arranged by Lino Kurene, Heather and myself on the 20th of May 2016, where I submitted all evidence that I had for cash deposits into my bank. I was told by Lino that she will get back to me once she has reconciled. However, I haven't heard from her yet. I emailed her last Friday to find out where she is at but till today got no response.

XXXX's income – our evaluation of the evidence

- [31] As matters stand we do not have the information to identify the bank deposits the Ministry regards as unexplained. We do have a summary of the total, and as matters stand we generally have no reason to doubt the quantum.
- [32] However, we cannot reconcile the summaries and adjustments due to different periods in the respective tables containing the summary of rental income and unexplained deposits. We also need to confirm, whether in the period 9 September 2006 to 7 September 2007 XXXX was in receipt of a benefit, and if not whether there is consistent treatment of the joint account and XXXX's individual account.
- [33] Our key concern regarding the evidence concerns the "unexplained deposits". In our view this appeal is a civil proceeding, and it follows the standard of proof is on the balance of probabilities.¹² To make our evaluation of the material before us, we had regard to the weight to attach to evidence. In this case, we give full weight to XXXX's obligation to provide information regarding transactions in her bank accounts. She is potentially the only person who can explain some transactions and if she refused to do so we could draw adverse inferences; however, she understands she has provided explanations.
- [34] We cannot identify all the entries in bank statements included as unexplained deposits, we have the bank statements and we have summaries. The bank statements are not marked up with identification of the Ministry's classification, and the summaries do not include references to the bank statements.
- [35] It follows we are left to speculate regarding some significant elements. We do not know if deposits are cash and if so the extent of such deposits. Cash deposits have significant traceability issues, other types of deposit that can typically be traced to a source, at least with information from a bank.

¹² *Director-General of Social Welfare v Ilyes* [1997] NZAR 292 per Tipping J at 296

- [36] The Ministry has claimed there are many “unexplained” deposits. However, we can infer that the Ministry’s categorisation is not necessarily reliable. A significant example is a bank loan of \$30,000, which the Ministry characterised as unexplained. In the ordinary course of events the nature of a deposit that is from a bank loan should have been clear, if inquiries were made of the bank.
- [37] It also appears to us that as far as XXXX understands, the transactions to be treated as income are ones where she believes she has already explained why the deposits are not income. As noted, notwithstanding the Ministry’s initial position it now accepts there was no net rent from the rental properties, and it mischaracterised a bank loan as income. We cannot simply reject XXXX’s explanations on the basis they provide no answer to the Ministry’s evidence. The Ministry has asserted that XXXX used the receipts for her living expenses; which can be significant when characterising receipts under the Act. However, the Ministry has not provided an analysis that allows us to find that was a surplus she could use in that way.
- [38] XXXX has said deposits are not income because they are:
- [38.1] receipts from friends and family where XXXX has agreed to make payments on their behalf;
 - [38.2] repayment of a loan by a family member;
 - [38.3] a loan advanced from or liability met by XXXX’s former husband; and
 - [38.4] funds from XXXX’s own resources already accounted for.
- [39] We accept XXXX understands she has provided an explanation for the unexplained depositions and provided all the evidence she has to support the explanations. On their face the explanations are plausible, provided on oath, and potentially partly or wholly inconsistent with the deposits being income affecting XXXX’s entitlement to assistance under the Act. Accordingly, if all we have is:
- [39.1] the Ministry’s evidence that does not identify what the “unexplained deposits” are;
 - [39.2] plausible explanations from XXXX;
 - [39.3] no evidence from the Ministry rebutting XXXX’s explanations;

[39.4] no examples of information in the record that is inconsistent with XXXX's explanations (for example a loan repayment not coming from a family member as claimed); and

[39.5] no information pointing to an illicit source of income (for example suspicious cash receipts, or unexplained acquisition of assets);

then we are not entitled to reject XXXX's explanations, to do so would be capricious, and we could not provide an explanation that would be consistent with our obligation to act judicially and issue a reasoned decision.

[40] Our inability to reject XXXX's evidence and explanations on the evidence we have is particularly clear in this case. The evidential approach for identifying suppressed income is routine. It arises in a wide range of commercial and regulatory enforcement situations where people may have an incentive to suppress income. As a starting point, an allegation of income suppression will usually identify an undisclosed source for income. Either there will be a known source, and a suspicion the quantum is underreported; or a hidden source of income such as returns from an undisclosed investment.

[41] In this case the Ministry investigated rental income and potential employment income. It appears the Ministry accepts it has no foundation to claim either is the source of unexplained deposits.

[42] At this point the Ministry has not provided any plausible evidence of another source of income for the \$83,063.66 it says should be attributed to XXXX. There can be cases where that is not surprising, but the lack of identification of a source after investigation is usual only where receipts are in cash or there is other evidence pointing to an undisclosed source. There is little difficulty in inferring there is an illicit, and potentially unknown, source of income in such cases. This is not a case of that kind, the Ministry has only identified bank deposits and has not provided evidence any or some portion of them were cash deposits, or refuted XXXX's claim they are offset by outgoings on behalf of family and matters of that kind. There are no examples of XXXX providing an explanation that is inconsistent with the extensive written material produced, or other banking records the Ministry could obtain from XXXX's bank records.

[43] If the Ministry wishes to challenge XXXX's explanations, we expect the Ministry to either:

[43.1] Demonstrate from the information held or additional information provided, that the bank records are not, at least in some cases, compatible with XXXX's evidence; or

[43.2] question XXXX and demonstrate her explanations should be doubted.

[44] Unless the Ministry does one of those things, we would be obliged to accept XXXX's explanation as we cannot justify rejecting it. If we determine this appeal on the evidence before us, we will not find any of the "unexplained" deposits were income as there is no factual basis to do so. However, we consider the Ministry must have the opportunity to take those steps, given the history of this appeal.

XXXX's assets – value and identification of character

[45] We find the factual situation regarding XXXX's assets less problematic than her income. The Ministry has essentially provided evidence using purchase prices, rateable values, and sale prices as a reflex of current value, and mortgage finance has been offset to give a net value. The method shows that in all the periods to which the evidence relates XXXX's equity in the rental properties exceeded the threshold for the asset test by a wide margin.

[46] There is some lack of certainty, as it is not completely clear at some points whether all or some of the value lay:

[46.1] as equity in rental properties;

[46.2] proceeds from sales of property held as bank deposits, or something else;

[46.3] equity in some other form of property (particularly an owner-occupied home).

[47] Whether there is any ambiguity in the categories in the preceding paragraph may not be important, that will turn on the legal issues relating to the asset test discussed below.

[48] At this point, on the evidence of values and mortgage levels, in the absence of further information, we would find XXXX had equity in rental properties which did exceed \$16,200 in the periods identified at [13]. We have no reason to doubt that analysis, and XXXX has not provided evidence pointing to errors.

Legal issues – what is income?

- [49] At this point we do not consider there is any complexity relating to the characterisation of income. The Ministry has approached income on the basis income is net income, repayable loans are not income, and XXXX's explanations are generally that the contentious receipts could not be income on any view.
- [50] If we ultimately make factual findings that involves a more complex characterisation, we would consider the issue at that point. For now, we consider the general description in the Ministry's s 12K report regarding what is legally income is appropriate.

*Legal issue – the asset test**Scope*

- [51] The Act governed XXXX's entitlement to support at the relevant times. The Act has authorised a range of subordinate legislation, some of which is relevant to the issues in the appeal.
- [52] The starting point is to identify the forms of assistance XXXX received, where the Ministry says the asset test is relevant.¹³ The Ministry's position is XXXX was not entitled to:
- [52.1] \$46,487.64 she received as an Accommodation Supplement;
- [52.2] \$35,301.36 she received as Special Benefit; and
- [52.3] \$252.18 as Temporary Additional Support.

Accommodation Supplement

- [53] Section 61EA of the Act provided for payment of an accommodation supplement to assist in meeting the accommodation costs of people who qualified for assistance. People with cash assets of over \$16,200 would not receive any accommodation supplement, s 61EC of the Act is the relevant provision. That value in assets was the highest level, which applied to married people and single persons with a dependent child. It is not contentious that XXXX is entitled

¹³ The income test applied to the Domestic Purposes Sole Parent, and Domestic Purposes Care Sick benefits, which the Ministry says involved overpayments of \$29,108.68 separately from the payments affected by the asset test.

to have this highest level of cash assets before she is disqualified under the asset test.

- [54] The term “Cash Assets” was defined in s 61E of the Act to mean things that included money, bank accounts and shares in a partnership or company. It does not include investments in real estate.¹⁴ The definition in s 61E is mandatory in form but does contemplate regulations that may exempt asset categories from being “Cash Assets”. The reverse is not true; there is no provision for regulations that include assets in addition to those included by the Act. The definition in the Act is expressed in mandatory form as it uses the words “cash assets ... means”, money and other things that do not include real estate.
- [55] The Ministry took the position that XXXX had both “Cash Assets” (a defined term) and “realisable assets”, with reference to the Act. It relied on XXXX having the rental properties. It said they were real estate which XXXX did not occupy as her home; and they had a net value¹⁵ over the threshold. Potentially, there are exceptions, in the period from 8 April 2011 until 6 March 2012 properties were sold, and some of the proceeds were potentially held as cash. The information provided does not give a clear analysis of any cash or bank accounts resulting from real estate sales.
- [56] To justify applying the asset test in respect of the accommodation supplement for the net value in the rental properties the Ministry has, at least in part, departed from the definition of “Cash Assets” in the Act, which does not include real estate, as noted it also referred to “realisable assets”, which is not a term used in the Act.
- [57] It appears the Ministry relies on two factors to support this approach:
- [57.1] The general principle that people must use their own resources before seeking support under the Act (s 1A of the Act that identifies its purpose). The Ministry also refers to “targeted financial assistance”, which is set out in s 61DH as the purpose of the provision for Accommodation Supplement payments.

¹⁴ Robyn McArtney (ed) *Income Support Law and Practice* (Butterworths, Wellington 1997) at [1061EA.6] speculated this represented a deliberate policy setting concerning developing increased security as “homeowners are building capital asset while paying off a mortgage”.

¹⁵ That is the value of the property less mortgage securities over the property.

[57.2] The second justification advanced for the Ministry's approach is the "Ministerial Direction in relation to Special Benefit".¹⁶

- [58] In terms of general principles expressed in s 1A overriding the specific definition of "Cash Assets" in s 61E, applied in s 61EC, the contention is not sustainable. It is not advanced further by the reference to "targeted financial assistance" in s 61DH. The terms of Part 1K of the Act that contain those provisions are clear and very specific, there is no basis on which this Authority can ignore specific statutory provisions relying on expressions of general principles in the legislation. The outer limits of that approach are the use of a purposive interpretation or the New Zealand Bill of Rights Act 1990. They do not support the Ministry's approach, Part 1K of the Act is specific legislation where the categories of assets are defined, and precise monetary limits applied. The Authority is required to apply the legislation as it is written.
- [59] The second justification for departing from the express terms of Part 1K of the Act is the Ministerial Direction. Section 5 of the Act requires the Chief Executive to comply with general or special Directions given to the Chief Executive in writing by the Minister. However, unsurprisingly, it is not a general power conferred on the Minister to countermand the terms of the Act. In *Ankers v Attorney-General*¹⁷ the High Court said there were limits on the power conferred on the Minister. In that case, the Court said there could be no objection to the Minister identifying cases when support should be provided; because, that was a direction for exemplary application of the legislation, not a purported mandatory fetter on the Chief Executive's statutory discretion. Similarly, there was no objection to a Direction providing guidance. While the issue did not arise in that case, the tenor of its reasoning is certainly not consistent with the Minister having a power to issue Directions that are inconsistent with the Act.
- [60] The Ministerial Direction on Grants of Special Benefit¹⁸ (the Direction), like similar Directions is expressed in a manner that is consistent with the principles in the *Ankers* decision, respecting the legislative powers conferred on the Chief Executive. The opening part of the Direction states:

¹⁶ "Ministerial Direction in relation to Special Benefit" (16 December 1999) *New Zealand Gazette* 4599.

¹⁷ *Ankers v Attorney-General* [1995] 2 NZLR 596.

¹⁸ See <www.msd.govt.nz> for the consolidated version. A "Special Benefit" under s 61G was based on a wide discretion that allowed the Department of Social Welfare to pay a benefit, quite separately and in some cases in addition to other benefits in the 1964 Act, (Robyn McCartney (ed) *Income Support Law and Practice* (Butterworths, Wellington 1997) at [1061G.3]

In the exercise of your discretion to grant a Special Benefit under former section 61G of the Act, and without derogating from your duty to have regard to the particular financial circumstances and commitments of the applicant, you must have regard to the following matters.

- [61] That is wholly inconsistent with a Direction to depart from any express terms of the Act, and it concerned a broad discretionary power not the prescriptive assets test that applies to an Accommodation Supplement. The Minister issued the Direction in its original form on 10 February 1999. It has been subject to many amendments since then. It still applies under the Social Security Act 2018.
- [62] The scope of the Direction in the 31 October 2016 consolidation, which the Ministry says applies, is set out in Clause 1 of the Direction. The clause says the Direction applies to Special Benefits under former s 61G of the Act,¹⁹ which concerned “a special entitlement to a Special Benefit under this Act or the Social Welfare (Transitional Provisions) Act 1990 or ...”. It is not expressed to include the statutory provisions relating to an accommodation supplement, which were in the Act at the time of the Direction. We cannot identify any justification for applying the terms of the Direction to a statutory provision that is not referenced in the Direction. Furthermore, the terms of the Direction and the statutory provisions concerning an Accommodation Supplement are inconsistent. For example, the Direction has definitions including a definition for “Cash Assets”, and it is different from the definition of the same term in s 61E of the Act. Materially in this case the Act does not include real estate as a Cash Asset, and the Direction includes certain real estate as a Cash Asset.
- [63] In these circumstances, subject to hearing from the Ministry, our view is the Act, not the Direction, governs whether the equity in XXXX’s rental property is included as a “Cash Asset”. On that basis it is not included, and to the extent the Ministry has included that as part of the asset test under Part 1K of the Act, it was wrong to do so as it is not relevant to the asset test.

Special Benefit

- [64] The Ministry’s s 12K report does not specifically identify the statutory basis for the payment of what it characterises as a “Special Benefit”.²⁰ The Ministry’s

¹⁹ See <www.msdc.govt.nz> for terms of “Former section 61G (“Special Benefit”) Social Security Act 1964”.

²⁰ The power to provide a Special Benefit was, subject to section 68A of the 1964 Act for the Director-General in her or his discretion, to fix a special entitlement to a special benefit in respect of any person, whether or not that person was receiving any other benefit under that Part of the Act. The Director-General had to be satisfied that, after

report does apply the Direction, which does say it applies to a Special Benefit. The Direction in the version the Ministry says applies equates a “Special Benefit” to what is paid under “former section 61G” of the Act. The Ministry’s website links from that definition to “Former section 61G”, says it is a “Special Benefit” under the Act, or certain other legislation. Accordingly, we understand XXXX did receive a Special Benefit, and the Direction applies to it.

[65] Section 23 of the Social Security (Working for Families) Amendment Act 2004 provided for the continuation of Special Benefits established under s 61G of the Act. It came into force on 1 April 2006.²¹ The Ministry’s report indicates XXXX’s Special Benefit commenced on 20 March 2004, so potentially the Direction applied. However, it would not appear to apply after 25 June 2006, as the Ministry’s report indicates between that date and 9 September 2006 XXXX did not receive a Special Benefit. Section 23 of the Social Security (Working for Families) Amendment Act 2004 terminates Special Benefits when a person ceases to qualify for them.

[66] As matters stand it is not clear which version of the Direction applied in the relevant periods, or that the Direction applied to money paid as a Special Benefit. We are left to speculate regarding the circumstances in which XXXX received payments characterised as a Special Benefit, and their relationship with the Direction, which was subject to numerous amendments.

Temporary Additional Support

[67] The Ministry’s report does not identify a basis for an asset test²² relating to Temporary Additional Support. As from 1 April 2006,²³ s 10 of the Social Security (Working for Families) Amendment Act 2004 created a new statutory regime for Temporary Additional Support. It included an asset test where “Cash Assets” were given a meaning under regulations made by Order in Council, not

taking into account all of that person’s financial circumstances and commitments, including any benefit payable under this Part of this Act, it was justified to provide a Special Benefit. See: Robyn McArtney (ed) *Income Support Law and Practice*, Butterworths, Wellington 1997 at [1061G]). It seems that potentially XXXX received a Special Benefit due to her daughter’s needs, but we do not have that information.

²¹ Social Security (Working for Families) Amendment Act 2004, s 2(5).

²² Under s61G “(2) An applicant is eligible for temporary additional support if “ his or her chargeable income is less than his or her essential costs”. It appears the Ministry only challenges the payment of temporary additional support on the basis of the asset test.

²³ Social Security (Working for Families) Amendment Act 2004, s 2(5).

the Direction. However, there was a transitional provision²⁴ that excluded temporary additional support while a person continued to be entitled to a Special Benefit under the former s 61G.

- [68] Accordingly, it appears that the relevant asset test is one the Ministry's report does not identify; and it highlights a potential inconsistency in the Ministry's position. The Ministry's calculations show that the relevant Temporary Additional Support was paid in the period 1 August 2006 to 8 September 2006. It could only be paid if XXXX was not paid a Special Benefit in that period, and when she lost entitlement to a Special Benefit under the former s 61G it terminated permanently.²⁵ However, the calculations show Special Benefit payments continuing after 1 August 2006.
- [69] It follows that we cannot be satisfied of the basis for payment of temporary additional support, the asset test, if any, that applied; or reconcile the payment of temporary additional support with the Ministry's position on the payment of a Special Benefit and the legislation governing the two types of support.

Conclusion

- [70] On the information we have currently we cannot find the evidence establishes on the balance of probabilities that any of the "unexplained deposits" are income.
- [71] It appears the Ministry has potentially applied an asset test that is wrong in respect of Accommodation Supplement payments; if so we do not have sufficient information to quantify the effect.
- [72] We cannot be sure of the legislative and factual basis for Special Benefit payments made to XXXX and relate them to the relevant asset test. The information we do have leaves open the possibility initial payments of a Special Benefit were correct, but later payments made in error after XXXX cease to qualify for the payments (the Temporary Additional Support payments and the Special Benefit payments seem to not be consistent with the legislative provisions, where they cannot both be paid, and when a Special Benefit stops it cannot be reinstated).
- [73] We cannot identify the change of circumstances that led to Temporary Additional Support payments and relate them to an asset test.

²⁴ Social Security (Working for Families) Amendment Act 2004, s 23(4).

²⁵ Social Security (Working for Families) Amendment Act 2004, s 23.

Further steps

- [74] We are reluctant to prolong this matter further. However, we must ensure that both the Ministry and XXXX are heard fairly.
- [75] In terms of the factual matters relating to income, the Ministry has put forward its case. Largely due to the procedural course the matter has taken the Ministry has not had the opportunity to cross-examine XXXX. It is entitled to identify the transactions it says are income, refer her to the relevant documentation and question her as to any discrepancies between her explanations and the written record. The Ministry will have the opportunity to do that if it wishes to do so, potentially including producing further evidence (but it should apply to do so if it wishes to take that course). If the Ministry does not seek to cross-examine XXXX, the Authority will for the reasons expressed, find on the evidence before it that there was no overpayment due to XXXX's income.
- [76] In terms of the asset test, there is principally a concern regarding the correct legal position relating to the asset test:
- [76.1] Does the asset test relating to the Accommodation Supplement include the equity in XXXX's rental properties? If not, there is a legal and factual question as to whether she did fail the asset test as she had other material assets.
- [76.2] Did XXXX receive a "Special Benefit" to which the asset test in the Direction applies? If so, then there is the factual question of when and to what extent. Regardless is there an asset test that does correctly apply to the payments the Ministry characterised as a "Special Benefit"?
- [76.3] Whether XXXX did, and should have received Temporary Additional Support, and the asset test that should have applied if any.
- [77] At this point we cannot write a decision with any confidence where we can state the law as it applied to XXXX's circumstances in each of the periods. We accordingly request that the Ministry set out its position in writing regarding the application of the asset tests for the three forms of support, for each material period. The references to the legislation, including the Direction should refer to the official version of the document, and clearly identify the relevant form of the legislation for each period as far as necessary (it is sufficient that the format is clear, the Authority simply needs to know what the law is, and be able to reference the relevant form of the legislation for each period).

[78] When the Ministry has responded, the Authority will hold a telephone conference to discuss completing the hearing.

Timetable

[79] The Ministry is to provide its indication as to whether it wishes to cross-examine XXXX (and potentially an application for leave to call further evidence), and its written submissions on the legal issues within one month.

[80] If the Ministry seeks to extend the time or raise other issues, it may request a telephone conference for that purpose.

Dated at Wellington this 11th day of February 2020

G Pearson
Chairperson

K Williams
Member