[2020] NZSSAA 23

Reference No. SSA 85/19

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an appeal by **XXXX** of Nelson against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

C Joe - Member

Hearing on the papers

Ms Brereton and Ms Locke, agents for the appellant

Mr Sharpe-Davidson, counsel, and Mr Palmer, agent, for the Ministry of Social Development

FINAL DECISION

The interim decision

[1] XXXX ("the appellant") appeals the decision by the Ministry of Social Development ("the Ministry") on 21 February 2019 to increase her income related rent from $53 to $351 per week from 24 April 2019. The appellant believes the increase is too high and says the Ministry has a discretion to take her employment-related travel costs into account when calculating her assessable income.

[2] On 20 August 2020 we issued an interim decision, explaining that on the information before us we consider it appropriate to deduct from the appellant's assessable income the cost of her travel from Nelson to Wellington for work. We provided the parties with an opportunity to make further submissions challenging

this view and to correct any factual error before we issued a final decision. Both parties filed submissions which we considered. We now issue our final decision.

Background

[3] The appellant's situation is unusual. She has a Kāinga Ora (formerly Housing New Zealand) house in Nelson but works in Wellington during the week. She incurs weekly costs of travel to and from Wellington ($200), board in Wellington ($115), and travel to work on public transport ($53). It is these costs which she claims should be deducted from her income.

[4] There are no disputed facts in this case. The Ministry accepts the appellant's circumstances as set out in her Notice of Appeal and the brief of evidence she filed. The Ministry does not dispute that the appellant who is Māori is obliged to retain her tenancy in Nelson to provide care for her mokopuna (granddaughter) who has been declared by the Family Court to be a child in need of care and protection. The Ministry accepts the appellant's calculation of her employment related costs.

[5] The issue for the Authority to determine is how the law and regulations require the appellant's assessable income to be calculated for the purpose of setting income related rent and whether there is any discretion over the costs that may be deducted from income. We also considered whether the Ministry is bound to increase income related rent when income increases.

Relevant law

Calculating assessable income

[6] Section 104 of the Public and Community Housing Management Act 1992 (PCHM) requires a social housing agency to calculate income related rent for a tenant. Section 74(2) of the PCHM prohibits income related rent from exceeding the market rent for the house.

[7] Pursuant to s 108(a) of the PCHM, weekly income is calculated on the basis of net income.

[8] Section 110 of the PCHM provides that:

110 Calculation mechanism may include amounts in or exclude amounts from weekly income

(1) For the purposes of section 108, a person's weekly income—

(a) includes any amount or payment (or, as the case requires, the appropriate weekly proportion of any amount or payment) of a prescribed description:

(b) does not include any amount or payment (or, as the case requires, the appropriate weekly proportion of any amount or payment) of a prescribed description.

(2) Subsection (1)(a) does not limit section 108.

(3) Subsection (1)(b) overrides sections 108 and 109(1).

[9] Section 114 provides for regulations establishing a calculation mechanism. Clause 9 of Schedule 2 of the PCHM specifies prescribed elements of the calculation mechanism relevant to s 110(a). Regulation 14 of the Housing Restructuring and Tenancy Matters (Prescribed Elements of Calculation Mechanism) Regulations 2018 prescribes the amounts for payments of a prescribed description relevant to s 110(b) that are not to be treated as income.

[10] Section 113(a) of the PCHM sets the period for estimating weekly income. Section 113(b) confers a discretion on the agency to deduct any amounts by which it is satisfied that income may be reduced or add any items which may increase income:

113 Estimating weekly income

…

(b) there may be deducted from that amount any items by which the agency is satisfied the income is likely to be reduced, and there may be added to that amount any items by which the agency is satisfied the income is likely to be increased.

Cultural values

[11] In *Takamore v Clarke* the Supreme Court considered the relationship between Māori custom and tikanga and the application of the law:[1]

> [94] Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. That accords with the basis on which

[1] *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

> the common law was introduced into New Zealand only "so far as applicable to the circumstances of the … colony". It is the approach adopted i*n Public Trustee v Loasby* and, in Australia, in *Manktelow v Public Trustee*. Maori custom according to tikanga is therefore part of the values of the New Zealand common law.

[12] The Court concluded that the law cannot give effect to customs or values which are contrary to statute but must take care to identify the custom or values that are truly relevant to its determination.[2]

The case for the appellant

[13] The appellant trained as a social worker and, after applying for several jobs in Nelson, was offered the Wellington position as a mental health professional. She states that she took this job because it was an ideal role and complied with her obligations under Job Seeker Support to accept an offer of suitable employment.

[14] The appellant's mokopuna was in foster care, then returned to the care of the child's mother, then moved to the care of her maternal aunt with a guardianship order in favour of Oranga Tamariki. The Family Court granted the appellant access and approved her as a supervisor of her son's access to his daughter. Due to her work, the appellant is only able to see her mokopuna on the weekend. It is a condition of access that she has her own bedroom. The appellant has applied for full custody of this child and her younger sibling.

[15] In addition to the circumstances of her work and family, the appellant asserts a right to maintain her whānau as a taonga which she says is recognised in Article 2 of the Treaty of Waitangi. The appellant produced examples of children being considered taonga including Ministry of Education Learning Plans and the Government's Whānau Ora Initiative established in 2010.

[16] She cites *Barton-Prescott v Director General of Social Welfare*[3] where the High Court considered the relevance of the Treaty of Waitangi to guardianship of a Māori child. The Court viewed the familial organisation of one of the parties to the Treaty as taonga and considered that the preservation of this taonga is contemplated in the Treaty.

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2 At [95].

3 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR (1997) 15 FRNZ 501 (HC).

[17] The appellant submits that s 113(b) of the PCHM confers a discretion on the Ministry to deduct her employment-related costs from her estimated weekly income for the purpose of calculating her assessable income. She contends that the requirement for her to maintain a home in Nelson as an approved access venue for her mokopuna, with a separate bedroom for her, constitutes exceptional circumstances and the resulting unavoidable and extraordinary costs of travelling to Wellington should be deducted from her income.

[18] In response to the Ministry's submission that allowing travel related expenses to be deducted from assessable income would cause an administrative burden, the appellant says the Ministry has a discretion to annualise such expenses.

[19] The appellant noted that s 72(5) of the PCHM was amended in October 2019 to provide Kāinga Ora with the absolute discretion to charge a rent lower than income related rent. She submits that this discretion is consistent with the purpose of social housing in the Kāinga Ora Homes and Communities Act 2019.

The case for the Ministry

[20] The Ministry accepts that the appellant's mokopuna is a taonga and that she is required to maintain a home in Nelson. However, it contends that the legislative provisions are clear in requiring it to treat income in a certain way for the purpose of calculating her assessable income for income related rent.

[21] The Ministry submits that there is no discretion to take the appellant's expenses into account because s 110 of the PCHM does not provide any discretion to exclude any amount or payment from the appellant's assessable income unless it is a prescribed amount identified in the regulations. The Ministry argues that only the prescribed payments are not to be treated as income and, as the payments that the appellant seeks to have deducted are expenses paid by her and not income, those expenses cannot be excluded from her income assessment.

[22] The Ministry submits that only deduction of payments to a person is contemplated by the Act, not the deduction of outgoings. Mr Hunt does not accept that s 113(b) of the PCHM provides any discretion to deduct outgoings from income. He suggests that accepting the Authority's interpretation of an 'item' in s 113(b) as being an expense would mean that the expense could be added to as well as

deducted from income. It is inconceivable he says that the Ministry would add expenses to a person's income.

[23] The Ministry also contends that interpreting 113(b) as allowing deduction of employment related expenses would take the legislation beyond its scope and intention. It is submitted that the true purpose of s 113(b) is to allow the Ministry to 'adjust its estimation of income where the estimation would not lead to an accurate picture of what the person would receive …'.

Discussion

Interpretation of the legislation

[24] We accept that s 110 of the PCHM establishes the calculation mechanism for income related rent and provides a discretion only to include or exclude certain amounts received from weekly income. However, s110 has no bearing on how expenses, or outgoings, are treated in the calculation of assessable income. Neither the regulations in the PCHM or the Housing Restructuring and Tenancy Matters (Prescribed Elements of Calculation Mechanism) Regulations 2018 fetter the discretion in s 113 of the PCHM to deduct outgoings when calculating assessable income.

[25] The title of s 113 of the PCHM is 'Estimating weekly income' indicating that the process is not prescriptive. The language of s 113(b) is general rather than specific and reinforces the discretionary power to "deduct from (income) any items by which the agency is satisfied that the amount is likely to be reduced…". The items for which deductions may be made, and the amount, are not prescribed nor it is necessary for the cost to have been incurred at the time the calculation is made; it is sufficient for the cost to be likely to reduce income.

[26] The Ministry submits that the PCHM does not refer to expenditure as being capable of deduction from the assessment of income however that is precisely what s 113(b) allows. The use in s 113(b) of the broad term 'items' indicates an intention not to restrict the estimate of weekly income to payments made or received.

[27] The Ministry relies for its interpretation of s 113(b) on *Robb v Chief Executive of the Ministry of Social Development* [2014] NZHC 3347 in which the High Court considered the interpretation of s 64(3) of the Social Security Act 1964. The

Ministry says that as s 64(3) has similar wording to s 113(b) of the PCHM, *Robb* is directly relevant. However, the issue in Robb was whether s 64(3) was whether there was any basis for deducting expenses from the appellant's income. The court did not have to address that issue as the appellant did not establish that expenses had been incurred. The court commented that the Ministry's submissions had merit. The Ministry submitted that whether there was a contract of employment or a contract for services was not necessarily significant.

[28] Mr Hunt suggests that interpreting 'item' in s 113(b) to mean an expense could result in expenses being added to income. This argument has no merit as interpreting 'items' to be deducted as an expense does not preclude interpreting 'items' to be added to income as payments or items of value received. We consider the clear purpose of s 113(b) is to allow either costs, or outgoings, to be deducted from income, or to include items which add value such as the use of a vehicle in the assessment of weekly income.

[29] The Ministry's submission that the true purpose of s 113(b) is 'to allow the Ministry to adjust its estimation of income where the estimation would not lead to an accurate picture of what the person will actually receive…' is consistent with our conclusion that s 113(b) provides for income adjustment where outgoings effectively reduce income, as well as when payments or receipt of items of value increase it. The Ministry fails to provide an example of when or on what principled basis it would exercise the discretion it acknowledges to adjust its estimation of income; in our view the only reason to do so would be where 'items' either add to or reduce the income.

[30] The Ministry's submissions continue to confuse outgoings with income. It refers to 'amount' and 'payment' as if the two were interchangeable without distinguishing between income and outgoings. Excluding a receipt from income is something the legislation does in places. That is a different thing from calculating net income, where a person has expenses to earn the income. For example, if a person derives income from selling product for 10% more than it costs them to acquire, any benefit to their financial position will only be slightly more than 9% of the gross income from sales. It would be an absurd approach to regard the gross receipts as income under the PCHM. The correct result is achieved by deducting costs, not excluding income.

[31] For these reasons we conclude that there is a discretion to deduct from the calculation of the appellant's assessable income for income related rent, an amount by which the appellant's weekly income is likely to be reduced.

Is it appropriate to deduct the cost to the appellant of travelling to work?

[32] In this case we are dealing with a situation where the appellant's kāinga is in Nelson, more importantly we are concerned with a particular house located there, and the right amount of rent for that house. The Ministry does not dispute that house is fundamental to the appellant meeting her rights to be, and the duties of, a kaitiaki of the taonga that is her whānau and particularly her mokopuna. That is the tauwāhi, the whenua where the appellant must be for that part of her life.

[33] The other part of her life is her work as a mental health professional. For that, she leaves the rohe where her whānau are, and spends some days away working and contributing to the community and providing income for her whānau.

[34] When considering work/home travel costs, for tax purposes various authorities look at whether the travel is the cost of living at home, or the cost of travelling to work. We do not consider the discretion in this appeal can be exercised as simply as that, it is an arbitrary distinction. In the context of this case, we consider the appellant's base is her home in Nelson which she is required to maintain in order to meet her obligations to her whānau. Our reasoning is not simply that the cost of all travel to work is deducted from income, we consider that the following distinctive features in this case justify the exercise of the discretion. This is not a case where tikanga is inconsistent with legislation; there is a discretion in the Act to take into account any expense and in light of the observations of the Supreme Court in *Takamore v Clarke,*[4] it is appropriate in this appeal to give effect to those cultural values which are truly relevant to this determination:

(a) A compelling set of circumstances that tie the appellant to the home that the rent relates to (what we have said of kaitiakitanga, taonga, whenua and whānau);

(b) The appellant's professional life is separate (geographically, she has a temporary place to sleep in the city where she works, effectively a different

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4 *Takamore v Clarke*, above n 1.

temporary home, and her professional duties take her away from her whānau and the dimensions that we have described).

[35] These circumstances are far removed from the cost of day to day bus fare and the like. In this case, the appellant has her home available continuously, but has to pay for a temporary one because of the location of her employment, she could not perform her obligations to her whānau if she did not retain her home in Nelson, so needs to meet the cost of travel to the work community. It is necessary to deduct these costs from the appellant's income to give the correct measure of what income from her work truly adds to her resources.[5]

[36] The concept that income should be measured by what truly adds to a person's resources was explored by Davison J in *F v Chief Executive of the Ministry of Social Development* in respect of income measurement for Social Security legislation and benefit entitlement. While the legislation is different, we cannot justify a conclusion that we should take a different approach.

[37] Accordingly, we conclude that it is appropriate to deduct the cost incurred by the appellant in travelling from Nelson to Wellington for work from her weekly income. The Ministry has not challenged the calculation of these costs and we therefore accept that they are as stated by the appellant in her affidavit. In reaching this conclusion, we have taken into account the nature of the appellant's work and the fact that her unchallenged evidence is that the position in Wellington was the only one available at the relevant time that utilised her skills and qualifications, and her need to provide weekend accommodation in Nelson that is suitable for her young granddaughter.

[38] Given this conclusion, we do not need to consider whether or not any increase in rent should be applied.

Orders

[39] The appeal is upheld.

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5 *F v Chief Executive of the Ministry of Social Development* [2018] NZHC 1607, referring to *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36.

[40] The Ministry is to calculate the appellant's assessable income for the purpose of income related rent by deducting the expenses referred to at [3] from her net income.

[41] If the parties are unable to agree on the rate of income related rent, they may apply to the Authority for a determination.

Dated at **Wellington** this 20th day of November 2020

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S Pezaro
Deputy Chair

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C Joe
Member