

[2017] NZSSAA 47

Reference No. SSA 107/17

IN THE MATTER

of the Social Security Act
1964

AND

IN THE MATTER

of an appeal by **XXXX** of
XXXX, against a decision of a
Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr K Williams - Member

Mr C Joe - Member

Hearing at Wellington on 4 December 2017

Appearances

G Howell for the Appellant

N E Kirkman for Chief Executive of the Ministry of Social Development:

DECISION

G Pearson (Chair) and **C Joe** (Member)

[1] XXXX (the appellant) appeals the decision of the Chief Executive, upheld by a Benefits Review Committee, to:

[1.1] decline to deduct her mortgage principal repayments from the calculation of her income for benefit purposes; and

[1.2] when calculating her income, not to offset her accommodation costs from the income she derives from letting out her home, which she does not live in.

Background

- [2] For many years, the appellant has owned her own home. Approximately 12 years ago, she developed a life-threatening illness. At that point in time, she received treatment for this illness. One of the components of the treatment was a treatment regime that was not funded by the public health system. The appellant decided to raise the money to pay for the treatment herself, and did so by borrowing money on the security of her home. The cost, and borrowing, amounted to about \$80,000. Since that time, public funding has become available for the treatment she paid for.
- [3] For significant periods of time since becoming ill and receiving treatment, the appellant has not lived in her home. She has let it out to persons with whom she has no personal connection. She lived with her parents for a time, and has more recently lived in a flat. One of the flatmates owns the home where she lives and the appellant and another flatmate share the property with the owner. One of the reasons for not living at her own property was that she became depressed, and gained support from her parents.
- [4] In the years since she became physically ill, the appellant has lived as frugally as possible. She has repaid a substantial part of the money she borrowed for her treatment, the mortgage she has over the house is now a relatively modest amount larger than it was at the time she increased it to pay for her treatment. The appellant intended to finish repaying the mortgage and save enough to refurbish the house. A motivation for doing that is her concern regarding returning to live in her house without significantly changing it. She believes resuming living there may trigger another depressive episode. She would be returning to familiar surroundings, which encourage reflection on the circumstances that led to her depressive condition.
- [5] The appellant had her strategy in hand for refurbishing the house and relocating there. She was not in receipt of a benefit, and was in what she thought to be secure employment until her planned retirement. She expected to have completed the refurbishment by that time, and to be mortgage free. However, her life was disrupted approximately 14 months before the hearing; her employment became intolerable, and, to her surprise, she has been unable to find alternative employment. Due to this situation, the appellant has had to seek assistance in the form of a jobseeker support benefit.

- [6] The issue in the present case concerns whether, and if so, to what extent, her jobseeker support benefit is affected by income received from rental income from her home.

The facts

- [7] The facts were not contentious. The appellant explained her circumstances, including the health-related matters, her plans for putting her home into a condition into which it would be suitable for her to return, and the disruption to those plans due to losing her employment. The circumstances are understandable, arose entirely independently of the social security support she now receives, and the Ministry took no issue with the appellant's evidence

The issues

How to calculate the amount of income from renting the appellant's house

- [8] The first issue arises from the fact that where a person has income, including income from the rental of their own home, that can affect their entitlement to a jobseeker support benefit. In this appeal, a disputed issue is whether the appellant's repayments of principal on her mortgage should be deducted from her income for benefit purposes. The appellant, through her advocate, says that the repayments of principal should be allowed as a deduction against the income. The Ministry says that the mortgage principal repayments are not an expense but repayment of a liability which puts the appellant into a better financial position.
- [9] The Ministry accepted that, in principle, repairs and maintenance to the house are properly deducted against income. The appellant explained that she had submitted information to establish the costs of repairs and maintenance, but they had not been allowed. The Ministry accepted that this should be examined and an adjustment made if there are expenses that qualify under that heading. In addition, there are potentially minor calculation issues, and a need to ensure up-to-date figures are available. In this decision, the Authority will not endeavour to deal with repairs and maintenance or the arithmetical calculations. The decision will reserve those issues to be determined, if the parties cannot resolve them.

Whether section 68 allows the appellant to offset her cost of housing against rental income

- [10] The second issue to be resolved concerns s 68 of the Social Security Act 1964 (the Act). Section 68, among other things, allows a person who has

let out their home to potentially deduct the costs of alternative living arrangements from income derived from letting out their home. The provision is a discretionary one. It is necessary for the Authority to consider the relevant factors and determine how it should exercise any discretionary power under s 68.

Discussion

Deduction of principal repayments of a mortgage

- [11] The Ministry accepts that “income” is not defined in such a precise way that there is any statutory provision that directly answers the question of whether principal repayments are deductible against rental income. It is necessary to bear in mind that the ordinary meaning of income for the purposes of accounting and tax conventions have not been adopted for the purposes of the Act, which has its own definition. In some cases that definition is quite different from income as measured for accounting and tax purposes; in some instances, such as employment income, the results are typically very similar.
- [12] The position taken by the parties did not greatly advance the issue. From the Ministry’s point of view, the position was put in terms of the Ministry’s policy. The appellant’s advocate argued that because the principal repayments were an unavoidable expense, they should be considered when determining the income derived from renting out the property.
- [13] In *Carswell v Director-General of Social Welfare*¹ the High Court considered the concept of measuring income under the Act. The specific issue was whether a loss on renting out a home could be offset against income from another source. The issue in the present case is different. However, it is clear the Court did consider rental income was a net amount, and takes account of outgoings. In the circumstances of that case the High Court decided a loss is treated as nil income. The High Court took the view that the Act does not contemplate the subsidisation of unprofitable ventures. While the issue is different in the present case, we consider that when measuring income for the purpose of this income test, the Act does not contemplate reducing income to the extent a beneficiary expends funds to extinguish their debts. There is simply no authority in the Act to do so,

¹ *Carswell v Director-General of Social Welfare* HC Christchurch AP132/98, 14 December 1999.

and the offset is not consistent with calculating a net income for the test, or indeed any conventional calculation of income.

- [14] In our view, principal repayments under a mortgage cannot be deducted when calculating the amount of income from a rental property to determine the appellant's entitlement to and level of jobseeker support. We recognise that there may be circumstances where simple cash flow is properly treated as determinative in a social security context. If a person cannot provide the necessities of life, the legislation will not necessarily be concerned with whether outgoings are on capital or revenue account. However, considerations of that kind do not arise in this case, it is a conventional situation where a it is necessary to measure income from a rental property.
- [15] Income is a net concept. It is the balance between income and outgoings. A surplus between income and outgoings that is allocated to reduction of a debt cannot sensibly be regarded as an outgoing that reduces the amount of income in this situation.
- [16] Accordingly, though it will not alter the result in this case,² we are satisfied that the Ministry is correct and no deduction should be allowed for repayments of mortgage principal.

The application of s 68

- [17] The material parts of s 68 of the Act are:

68 Exemption of income from former home property

Notwithstanding anything to the contrary in this Act, where any person has let his home or sold it on terms providing for the payment of the purchase money or any part thereof by instalments or by which the purchase money or any part thereof is secured by mortgage thereon, the chief executive may, in the chief executive's discretion, in computing the income of that person, set off against the rent or interest derived or received by him in respect of that letting or sale the whole or any part of —

- (a) any rent payable by him in respect of the tenancy of another home:
- (b) any interest payable by him or unpaid purchase money owing by him in respect of the purchase of another home:

² We discuss below at [34] ff why within a band of income there is no effect on the appellant's income. In essence, she is allowed to earn \$80 with no effect on her benefit, so as long as that amount is not exceeded there is no consequence for the appellant's level of benefit.

- (c) any interest payable by him on money advanced to him for the purchase of another home:
- (d) any money payable by him in respect of his board, lodging, or maintenance, whether in a private home or in any public or private institution.

[18] It can be readily seen that the purpose of s 68 is to provide for a situation where a person derives income from letting out their home, but has expenses of providing substitute accommodation. The core effect of s 68 is that, subject to the Chief Executive's discretion, it allows a person to be put into a situation they receive comparable support to that which they would have if they had been able to live in their home.

[19] The provision is intended to cover a wide range of circumstances. Section 68(a) provides for offsetting of rent payable in respect of the tenancy of another home. However, s 68(d) provides for a very wide range of situations including where a person has "board, lodging, or maintenance, whether in a private home or in any public or private institution". Accordingly, it may for instance, cover the situation where a person is in permanent care in an institution.

[20] Given the breadth of s 68, we will not endeavour to set out general principles, each case must be decided on its own facts. Considering the circumstances in which s 68 can apply, it is not appropriate to see any factor as generally determinative. For example, the Ministry contended that it might be more willing to apply the section in circumstances where the situation was of short duration. However, in a case where a person is in permanent care in an institution, it may well be that the permanence is a positive factor in favour of applying s 68. The issues must be considered having regard to all the material circumstances in each case.

[21] In the present case, as our starting point, we consider the appropriate thing to do is compare the appellant and her present circumstances to what they would be if she was living in her own home.

[22] Before doing so, we reiterate a factual point that it is not contested. The appellant over the last 12 years has faced some very difficult circumstances. She was required to fund very expensive treatment using her own resources. Treatment that would have been available to her without cost if she had become ill a short time later than was in fact the case. She has worked assiduously to repay the money she borrowed for

her treatment, and sought to save enough money so she can put her house into a situation where it is suitable for her to live in again. That aim was thwarted when she prematurely lost her employment. Nothing the appellant has done in relation to her house has changed because of having to obtain jobseeker support. On the contrary, her circumstances are the same as they were when she was working and did not anticipate needing any support. We are satisfied that there is no question whatever of the appellant manipulating her circumstances and she has arranged her affairs as best she can to ensure that she has lived independently using her own resources; only circumstances beyond her own control have led to her requiring income support.

[23] If the appellant was living in her own home, her circumstances would be as follows:

[23.1] She would need to meet her mortgage repayments (including the repayment of principal), rates and house insurance.

[23.2] The appellant would have zero income and her jobseeker support benefit would be assessed on the basis that she had zero income.

[23.3] She would be entitled to an accommodation supplement, it is calculated to include mortgage repayments, including principal repayments, and essential repairs and maintenance costs. It is a 70% subsidy, with a limit which differs from region to region.

[24] Before any application of s 68, the appellant's circumstances are:

[24.1] She is treated as having an income of approximately \$200 per week.

[24.2] The benefit of some \$212.45 per week which the appellant would be entitled to is reduced by \$93.80 because of the income she receives (the precise amount will vary a little once the cost of repairs and maintenance are taken into account).

[24.3] Because the appellant is treated as having income from her home, she receives only an amount that is somewhat more than half of the benefit that she would receive if she was living in her own home.

[25] In our view, it is not appropriate to allow the costs of electricity, telecommunications and SKY television, as the appellant would have those costs if she was living in her own home. In some cases, it will be

appropriate to allow for those costs. In the present case, it could be said that the absence of an accommodation supplement favours that approach. The reason that arises is that the accommodation supplement is asset tested, and the appellant's home is an asset for the purpose of the test, but only when she is not living in it.

[26] However, we do not find it persuasive that we should allow the costs of electricity, telecommunications and Sky television. In this case, the accommodation component is the proper element to offset against the rental income, as it best reflects the additional cost of the alternative accommodation arising from not living in the home that has been rented out. We are satisfied that the appellant's estimate of \$150 for the accommodation component is reasonable.

[27] We do, none-the-less consider the accommodation supplement is relevant in relation to measuring the equivalence between the appellant living in her own home, and her actual situation. The point arises in this way:

[27.1] If the appellant were in her own home, her mortgage, rates, insurance and repairs would have to be met from her income support payments.

[27.2] In her present situation, the amount of income attributed to her is the net amount after deducting those expenses.

[28] Accordingly, there is, on the face of it, a substantial category of expenses which the appellant does not meet in her present situation, which she would bear if she occupied her own house. However, that is affected by the accommodation supplement, and our conclusion regarding the non-deduction of principal repayments on a mortgage.

[29] It would appear if she were in her own home the appellant would receive up to \$105 as an accommodation supplement, that is the current maximum for the region in which she lives. She does not receive any additional support in her present circumstances. The accommodation supplement is at the rate of 70%, of expenses but unlike the rental assessment it includes 70% of the mortgage principal repayments (but only compulsory payments). The accommodation supplement also applies to the other expenses including insurance, rates, and essential repairs and maintenance. Accordingly, we do not consider that these expenses provide a clear advantage for either living in the owned home with an

accommodation supplement, or as a flatmate without the supplement. It is not possible to calculate the position to a point of mathematical certainty, as we do not have all of the information to calculate a theoretical accommodation supplement if the appellant was in a different situation. In our view, we have sufficient information to conclude that there is a clear disadvantage if s 68 is not applied, and no clear advantage at all if it is applied.

[30] In summary, our obligation in this appeal is to exercise the same powers as the Chief Executive has under s 68. Due to compelling reasons, we are satisfied that the appellant has rented out her home and found alternative accommodation. Her reasons for doing so were not controversial, and not put in issue at the hearing. The alternative accommodation arose out of the appellant's own endeavours to be as independent as possible, and remains an appropriate and sensible choice until she can make changes to her home so that she has confidence that it will not trigger a further depressive episode.

[31] If the appellant was living in her own home she would be entitled to jobseeker support without abatement, and an accommodation supplement.

[32] It is appropriate to apply s 68 in this case to allow \$150 per week to be offset against the appellant's income from renting out her home. Doing so will on the balance of probabilities not give her more, or significantly more, support than would be the case if she were living in her own home.

[33] However, there is a final factor we need to consider. We have regard to the fact that the appellant does in fact receive income from renting her home, it is cash flow available to her to support herself. However, offsetting the \$150 as the cost of alternative accommodation then leaves the appellant in the same position as to the remaining income as other persons who receive job seeker support. Whether the income is from employment or owning a rental property, job seeker support abates in the same way. The first \$80 is disregarded, and the balance abates at the rate of 70 cents in the dollar. Accordingly, after allowing for the cost of alternative accommodation the appellant will be in the same position as other persons in receipt of job seeker support.

The significance of the amounts in issue

[34] While the Authority is not endeavouring to reach a final calculation, it is appropriate to have regard to the figures in issue. That is because there is

a threshold before income from letting out her home will affect the level of the appellant's jobseeker support entitlement.

- [35] The Ministry's calculation of rental income received by the appellant is \$214.39 per week (varying a little depending on the date selected). That figure excludes any deduction for repayments of principal on the mortgage over the appellant's house. When we take account of repairs and maintenance, the Ministry's adjusted figure for rental income is likely to be \$200 per week or less.
- [36] The issue we must decide is whether, and to what extent, the costs of the appellant's alternative accommodation can be offset against the weekly rental income. The appellant pays a total of \$200 per week to live in the home where she and her flatmates live. The \$200 includes accommodation, electricity, fixed telecommunications and SKY Television. There is no mathematically precise way to quantify the accommodation as a separate component from the other elements. The appellant reasonably suggested it was \$150 per week for the accommodation component.
- [37] One of the reasons it is difficult to quantify the elements is that the owner of the house will, regardless of the flatmates, have fixed charges for electricity, telecommunications and SKY Television. The incremental costs for the two flatmates would be the actual costs to the home owner. Alternatively, those costs could be divided by three and allocated to the three individuals. What in fact happened was that a total of \$200 per week was agreed, and that was the arrangement.
- [38] However, for reasons we discussed, s 68 of the Act does not necessarily prevent offsetting the electricity, telecommunications and SKY Television. Accordingly, if the proper application of s 68 requires that all of the expenses, that is \$200 per week, were offset against the weekly income then the appellant's income would be approximately nil. If only \$150 was offset, then her residual income would be approximately \$50.
- [39] However, in terms of abatement of the appellant's jobseeker support benefit, there is no difference between an income of \$50 and nil in the appellant's case; she is allowed to earn \$80 per week without any abatement of the benefit. Her only income is from renting her property. In these circumstances, disallowing the deduction of mortgage principal, and deducting the lesser figure of \$150 rather than \$200, do not result in any abatement to the job seeker support payments.

Conclusion

- [40] We are satisfied that the correct calculation of income from the appellant's home excludes deductions for the repayment of principal on the mortgage over the home.
- [41] We are satisfied that s 68 applies in the present case, and on the evidence we have, \$150 per week of the appellant's accommodation expenses is to be set off against the rental income from her home.
- [42] We are conscious that there is potentially a live issue relating to maintenance costs, and potentially factors to consider in reaching a position where there is equivalence between the appellant's situation, and the counter-factual of her living in her own home. Accordingly, if it is necessary to quantify the consequences of those uncertainties we reserve leave to deal with all issues relating to quantification. Either party may apply to have the Authority determine the quantum of the appellant's job seeker support payments.
- [43] The appeal is allowed to the extent and on the terms set out above.

Dated at Wellington this 27th day of September 2018

G Pearson
Chairperson

C Joe JP
Member

K Williams (Member)**Sequence of events**

- [44] On 6 January 2017, the Ministry asked the appellant to provide verification of rental income, house insurance and proof of repair and maintenance costs over the last 52 weeks. This information was required by 28 January 2017.
- [45] On 16 January 2017, the appellant supplied mortgage details, rates information and her insurance details. No details of repair and maintenance costs were provided. She also advised that her rental income was \$350 per week and that she lived at a different address, paying \$200 per week in rent.
- [46] On 30 January 2017, the Ministry calculated the net equity of the rental property and determined that the weekly income was \$214.39 per week, with net equity of \$214,323.62.
- [47] The appellant purchased the property in January 1994 for \$62,500. As at January 2017, 24 years later, she owes \$64,000 on her mortgage over the property.
- [48] In November 2007, the appellant's cancer drug treatment cost \$85,000 so she increased her mortgage from \$42,000 to \$127,000. Between November 2007 and January 2017, she has repaid \$63,000. While the house was purchased for \$62,500 in 1994, we have no details of the original deposit and therefore do not know what the original mortgage advance was.
- [49] The appellant says that she has had a very good tenant renting her property for two years and is reluctant to give her notice to end the tenancy as she would be put into a difficult renting market. The appellant told the Benefits Review Committee that the tenant rents a very tidy property for \$350 per week; she would be unlikely to find anything similar and is very appreciative of this fact.
- [50] The Ministry added chargeable weekly income of \$214.39 against the appellant's Jobseeker Support benefit, which left a balance of \$116.33 per week payable.

- [51] The appellant's Accommodation Supplement and Temporary Additional Support were declined as she had cash assets in excess of \$8,100 for a single person.
- [52] The Benefits Review Committee changed the calculation of rental assessment and weekly net benefit and paid arrears of \$863.90 on 13 July 2017 for the period from 28 January 2017 to 9 July 2017.
- [53] The decision appealed against is the decision to charge income from the appellant's rental property against her benefit.
- [54] The Grounds for the Appeal are that the outgoings on the rental property exceed the rent received from the tenant so that there is no net income from the rental property.
- [55] Essentially, the issue is whether principal mortgage repayments can be deducted against rent received.
- [56] The question of applying s 68 was not raised in the initial appeal nor was it considered by the Benefits Review Committee.
- [57] The question of applying the s 68 discretion was only raised by Mr Howell in his written submission dated 27 November 2017 at the date of the hearing on 4 December 2017.
- [58] The Benefits Review Committee states in its findings that the decision being reviewed is "The decision to pay a reduced rate of Jobseeker Support benefit due to the Applicant having assets in excess of the allowable limit".
- [59] The Appellant rented the house out about 7 years ago.

Discussion

- [60] I respectfully disagree with my colleagues in applying the s 68 discretion in this appeal.
- [61] The appellant's illness, although very serious, was some 12 years ago.
- [62] Other than the appellant's oral evidence, no medical evidence was produced in regards to her depression, which is a reason given for her not wishing to continue to live in the property and it thus being rented.

- [63] The appellant continued to live in the property for 5 years after her illness and let it out about 7 years ago.
- [64] The appellant also advised that she did not want to return to the property until she had sufficient funds to upgrade the property to a condition which she was comfortable with.
- [65] However, in her evidence to the Benefits Review Committee, the appellant stated:
- I have had a reliable tenant for 2 years (she is employed full time) who lives in my property with her 7 year old son. I am reluctant to evict her as she would be trying to find accommodation in a climate where there is a dire shortage (ALSO SHE HAS A VERY TIDY PROPERTY FOR \$350/WEEK AND WOULD BE UNLIKELY TO FIND ANYTHING SIMILAR AND IS VERY APPRECIATE OF THIS FACT).
- [66] This would seem to indicate that the property is of a reasonable standard, and, in the appellant's words, appears to be under rented.
- [67] In any event, whilst I have huge sympathy with the appellant's aspiration to save a sufficient amount of money to renovate her home to a standard she is comfortable with, an aspiration which was obviously set back by her illness, I do not see that a benefit is designed for this purpose.
- [68] The property was purchased in January 1994 for \$62,500, but there is no evidence in regards to the original mortgage amount, given that there would probably have been a deposit paid. In any event, as at November 2007 the mortgage stood at \$42,000, which was then increased that month by \$85000 to \$127000 to fund the appellant's cancer treatment.
- [69] At the time of the appellant's application for Jobseeker Support on 28 January 2017, the mortgage balance was \$64,000 and her net equity in the property \$214,323. Thus she had reduced her mortgage by some \$63,000 from November 2007 to 28 January 2017. The increased mortgage balance appears to be covered many times over by the increase in the value of the property.
- [70] The appellant stated that she cannot live on net Jobseeker Support of \$116.06 plus net rental of \$214.39. This comes to a total of \$330.45, less her accommodation costs of \$150. That of course would be increased by \$94.07 if the income abatement is cancelled with the exercise of the s 68 discretion.

- [71] Judges in the High Court and Court of Appeal have inferred that the purpose of the Act is to alleviate hardship rather than eliminate it and that the efficient use of public funds should be balanced against supporting people who need help getting back on their feet.³
- [72] Whilst the net rental figure may change as a result of repair and maintenance costs, I note that on 6 January 2017 the appellant was asked by the Ministry to provide proof of repair and maintenance costs. On 16 January 2017, she was again asked to provide proof of repair and maintenance costs but subsequently no costs were provided, which presumably meant there were not any.
- [73] My colleagues are of the opinion that applying the s 68 discretion to the appellant's situation essentially places her in a similar position to what she would have been in if she was back living in her home without rent and receiving the Jobseeker Support of \$210.13. There may also be some element of accommodation supplement available, but that may be limited in this case as generally the mortgage balance must be related to the original purchase of the property.
- [74] I respectfully disagree with that opinion. We are in common agreement that the appellant has a balance of \$180.45 remaining after accommodation costs of \$150 per week. The net rental is of course after the payment of rates of \$42.87, insurance of \$23.48 and mortgage interest of \$69.26, coming to a total of \$135.61 per week. Her benefit would increase by \$94.07 if the s 68 discretion is applied.
- [75] However, if the appellant is assumed to be living in her home and receiving Jobseeker Support of \$210.13 per week, she must still meet the weekly property outgoings of \$135.61, leaving her with \$74.52. That position is considerably worse than the amount of \$180.45 she would receive without the exercise of the discretion under s 68.

³ See *Harlen v Chief Executive of the Ministry of Social Development* [2015] NZHC 2663; *Cowley v Chief Executive of the Ministry of Social Development* HC Wellington CIV-2008-485-381, 1 September 2008; [Tapp v Chief Executive of Department of Work and Income](#) [2003] NZFLR 761 at [19]; [Nicholson v Department of social Welfare](#) [1999] 3 NZLR 50 at [30]; [Ruka v Department of Social Welfare](#) [1997] 1 NZLR 154 at 161.

[76] In my opinion, the exercise of the s 68 discretion in this instance would unfairly advantage the appellant by a significant amount, as compared with other beneficiaries living in similar circumstances to those of the appellant if she was still living in her own home.

K Williams
Member