

[2018] NZSSAA 54

Reference No. SSAA 129/17

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

Appearances

For the Appellant: Mr Howell (with the appellant)

For Chief Executive of the Ministry of Social Development: Mr R Signal

INTERIM DECISION

Background

[1] This is a second appeal dealing with the same issues. The previous appeal is *SSAA Appeal* [2017] NZSSAA 30 (the previous decision). This decision should be read with that decision. The issues are essentially the same. The previous decision concerned a decision to cancel the appellant's jobseeker support from 7 March 2016. The Ministry's reasons for cancelling the support, and now for not renewing it, are the same. The appellant operates a small business which produces income, and the Ministry does not accept the appellant has provided information that shows his income is low enough to entitle him to any support.

[2] The previous decision upheld the Ministry's position, the key reasons being:

[2.1] The appellant had an obligation to keep accurate business records and determine his income, both for tax compliance purposes and for the Ministry, if he sought support from it.

- [2.2] The appellant neither provided complete records, nor explained them adequately.
- [2.3] Income calculations were not properly presented with sufficient detail (such as treating a large portion of expenses as “other expenses”).
- [2.4] Some expenses the appellant deducted to calculate his income were personal expenses, and others were not explained.
- [3] This appeal concerns a decision on 30 January 2017 not to resume support, which a Benefits Review Committee upheld on 12 September 2017. The Ministry has accepted that the appellant can present evidence for resumption of his benefit as from its cancellation. In effect, the appellant has the benefit of presenting his case twice; in the previous decision against cancellation, and this case for resumption.
- [4] In preparation for the present case, the Chairperson conducted two telephone conferences, and issued written minutes. Orally and in writing, the appellant was given notice that:
- [4.1] He must provide the information the Ministry sought from him regarding his income; and
- [4.2] The appeal was his last opportunity to be heard.

The Ministry’s position

- [5] At the commencement of the hearing, the appellant had not produced the information the Ministry sought. Accordingly, we commenced the hearing with the Ministry’s witness to provide an update on why it would not accept the appellant’s information. That witness was Ms Donnelly, who is an experienced chartered accountant. She reviewed the material provided by the appellant, and said that in her view the information provided was unsatisfactory as:
- [5.1] There was a set of financial statements, and there were features in them that raised concerns. For example, some expenses seemed unusually high.
- [5.2] She had sought information that is conventionally required in an investigation or audit, including consecutive bank statements, some kind of transactions register (or accounting records providing that information), copies of invoices, journal entries, and explanations for transactions.

[5.3] The appellant, despite the Ministry seeking this information, had not provided it.

The appellant's response

[6] After the Ministry had outlined its position, the appellant gave evidence. He produced various documents, which it seems he had not disclosed to his agent previously. The documents included bank statements, a handwritten cashbook, some coding references and other material.

[7] Ms Donnelly within the time available reviewed the material, as did the members of the Authority, and questioned the appellant regarding the material.

Discussion

The issues

[8] The evidence focused on the year ending 31 March 2017, as it covers part of the period in issue, and the appellant has no better information than he has for that year.

[9] This appeal essentially concerns a factual issue, namely did the appellant earn too much to qualify for assistance, and, if not, how much did he earn? There are potentially legal issues regarding measurement of the income, but the first question is more fundamental. There is no dispute that the appellant controlled a company, was paid some remuneration, and the company had other income. Overall, the appellant says that the company had a gross income of approximately \$32,000 in the 2016 year, and \$35,000 in the 2017 year. He claims after expenses it had approximately a net taxable income of \$5,000 in the 2016 year, and a loss of \$15,000 in the 2017 year.

[10] Accordingly, it is clear the appellant has a substantial source of income and it is necessary to measure that income before deciding whether the appellant is entitled to support from the Ministry. Section 88B(4) of the Social Security Act 1964 (the Act) provides that to be eligible for jobseeker support a person must have no income or an income of less than an amount that would fully abate a benefit. We are required to decide whether that is the case for the appellant.

[11] The Ministry takes the view that it cannot tell whether the appellant qualifies for jobseeker support, and there are good reasons to require him to establish that he does qualify. That is the first question we must determine, and, if he establishes he may qualify, then we must measure the amount of the appellant's income.

- [12] If there is no reason to think a person has income, then of course a simple certification on a form is likely to be enough to address the issue. However, in the present case, the Ministry's position is that it is not satisfied the appellant has disclosed all his income, and it is not satisfied the expenses claimed as the costs of earning the income are properly measured either. We are required to evaluate the evidence to determine the position on the evidence before us.

The evidence presented to the Authority

- [13] The appellant produced financial statements. However, they were prepared by an agent based on what the appellant presented to the agent. Accordingly, it is necessary to consider what support the appellant provided for the financial statements. The key deficiencies in what he presented at the point the hearing commenced were:

[13.1] He did not present bank statements, despite the Ministry asking him to do so. Instead, he produced documents that appeared to be extracts from electronic banking records, with some of the information blacked out.

[13.2] It was impossible to trace through any transaction by: taking a source document such as an invoice, identifying a corresponding record in a bank statement, tracking a record of the transaction being allocated to and entered into a ledger, and tracking the ledger balance flowing through to the financial statements (or any other information flow used to keep minimal accounting records).

[13.3] The lack of information made it impossible to conduct a spot check on selected transactions, or verify the integrity of the accounting systems.

[13.4] The blacking out of information on what appeared to be extracts from bank statements included the names of people making payments to the business. That precluded the possibility of making inquiries of the relevant people and checking whether the payments were accurately recorded; ensuring, for example, that some of the payments were not in cash, or that other elements were not accounted for.

[13.5] The risk of the records being incomplete was heightened due to it appearing that the business may have significant cash receipts that can easily be omitted from an accounting system. The business was also not GST registered so third parties would not expect GST invoices and record them in their own systems, which made

verification more difficult (where customers were businesses they needed to keep GST invoices in their own records).

[13.6] There was no coherent explanation of what the business activity was, and the amounts of some transactions raised at least a query because some expenses appeared to be potentially disproportionate to the income.

[14] The Authority put the appellant on notice of its concerns, and frankly told him the appeal would be dismissed unless he could provide sensible answers to the deficiencies. The Authority also told him the fact he redacted information that would be useful for verification, and persistently refused to supply bank statements invited the inference that he did so because disclosing the information would be harmful to his interests. The omissions invited concern that the appellant had hidden some of his income, and potentially manipulated his apparent income in other ways. The Authority pointed out to the appellant that if he sought support from the State, he had an obligation of frankness, and could not expect support unless he disclosed all information required to make a reliable evaluation of his income.

[15] The appellant gave evidence, and explained he had some, but not all, of the relevant records. He had bank statements, and some invoices and statements issued by suppliers. There was a substantial shortfall from what was expected to provide a foundation for even rudimentary verification, as there appeared to be no transactions register, or other document with the equivalent information. Toward the end of the day, the appellant did produce what appears to be a cashbook, or similar, but it was not possible to analyse the document in the time available. Regardless, the contents of the cashbook and examination of the appellant and the material he presented, disclosed the following information:

[15.1] It appeared that the receipts in the bank statements did not account for the reported income in the financial statements. The inference was that there were cash receipts, which were not banked but were included in some other way. However, lack of information made it impossible to make the routine inquiries used to verify that cash transactions had been consistently reported. Standard investigative techniques involve referencing expenditure in a period to the income that should be produced from the expenditure, and may involve third party inquiries. Lack of records made it impossible to do that.

- [15.2] There were highly unusual transactions recorded. For example, the vehicle expenses were high. When asked about some unusual credit card transactions, the appellant claimed they were expenses of an independent business, which his company financed. If they were legitimate deductions, then the offsetting receipts from the other business should have been identifiable; the records did not include the information needed to allow verification. The financial statements did not disclose that the expenses of other businesses had been processed in the appellant's company's bank records. A possible explanation was that the appellant had other businesses put their expenses through his business and those businesses reimbursed the appellant in cash and those receipts were not reported. That would understate his income.
- [15.3] The transactions treated as business expenses were, in some cases, recorded on invoices in the name of other people. We asked about one case where an invoice was recorded in the name of a family member. It appeared that supermarket shopping, which would usually be a personal expense, was treated as a business expense. So was the purchase of underwear. There was also road travel in the South Island that was potentially holiday travel (for the family member or the appellant). The appellant explained the supermarket shopping was business entertainment, the purchase of underwear as a genuine error, and travel as being for the delivery of a trailer. There were no records to support those explanations, and, on their face, they were plausible only if supported by records. For example, unless and until the appellant produced an invoice for the sale of a trailer with delivery in the South Island, the explanation remained unsupported. An investigator would expect to be able to contact the purchaser of the trailer and make inquiries from an independent party.
- [15.4] There was a large write-off of a bad debt, and an absence of the accounting records required to write off a bad debt for tax purposes (the financial statements were for tax compliance so that action should have been performed).
- [16] If we were to reach a conclusion based on the information we have, we would dismiss the appeal because:
- [16.1] The appellant has wholly failed to provide evidence of what his income was in the period in issue.

[16.2] The evidence establishes that the financial statements appear to contain a false statement of the appellant's income, which may be far more than he claims. The quantum of misstatement could not be established on the evidence available to us; the necessary information has been in the appellant's control, and he refused to provide the information when requested. We would conclude that the appellant was probably not entitled to any support, as he would have provided the information when requested if it supported his claim.

A final opportunity

[17] The evidence points to potential dishonesty on the appellant's part. It unequivocally demonstrates he has not provided information to measure his income even to a point of crude approximation. We have hesitated simply to dismiss the appeal only because it appeared the appellant may lack the judgment to make decisions in his best interests, and he has a capacity to engage in rationalisation to support his poor decisions that are not grounded in reality. There is an interest for both the Ministry and the appellant in having the appellant's affairs put in order, at least for the future, even if his lack of records means nothing can be done about the past. This is a second appeal dealing with the same issues, and it is a waste of resources to have an ongoing cycle of requests for assistance, and appeals. The appellant needs to stop business activity, or comply with the record keeping obligations that every business has in New Zealand.

[18] Accordingly, we will give the appellant the opportunity to provide complete information to the Ministry to evaluate. We were impressed by Ms Donnelly's pragmatic approach regarding evaluation of the information provided by the appellant, and agree with her principled refusal to acquiesce in the appellant not providing the necessary information.

[19] The process will work in this way:

[19.1] The appellant will have until 5:00 pm on Thursday, 15 November 2018 to provide information to the Ministry. It is to be delivered to Ms Donnelly to consider (she will potentially have to give further evidence).

[19.2] The appellant and his agent are encouraged to liaise with the Ministry through Mr Signal to ascertain what the Ministry requires. As a minimum requirement, it appears necessary to:

- [19.2.1] Confirm that the bank statements provided are a complete set of all bank accounts under the appellant's control, and a continuous set of for the year ending 2017.
- [19.2.2] Provide a full record of all cash transactions to reconcile with the financial statements, and an explanation of any other cash transactions; also, a sworn statement that there are no other cash transactions, or a reference to the fact there are, and what is known of them.
- [19.2.3] Provide any additional records necessary so that Ms Donnelly can trace every transaction (if she wishes to do so):
 - [19.2.3.1] from a source document,
 - [19.2.3.2] to a bank statement (or explanation of how an unbanked cash transaction was treated),
 - [19.2.3.3] to a ledger, that reconciles with the financial statements.
- [19.2.4] Provide a written explanation of how the business operated, as far as is necessary to understand all the transactions. That is to include an explanation for any irregular transactions such as those referred to in [15.3], including identifying if there is a claim for an expense that should not have been made, or an omitted cash transaction that has not been accounted for.
- [19.3] When Ms Donnelly has had the opportunity to review any further material provided she may be in a position to indicate that the Ministry has a view regarding an amount of income it accepts. If so, the appellant can agree with that view, and the appeal can be resolved by agreement and withdrawn.
- [19.4] If the appeal has not been resolved by agreement before 3 December 2018, the Authority will hold a telephone conference to determine:
 - [19.4.5] If there is an amount of income that can be established on some conventional basis (such as tax accounts). If so, the Authority will consider determining what adjustments might

be necessary to measure the appellant's income under the Act, should that be disputed.

[19.4.6] If there is no agreed level of income, what the appellant's level of income is, based on any written evidence he has provided.

[19.5] If necessary, the Authority will conduct a further oral hearing, but only if satisfied there is an evidential foundation to justify a hearing. The appellant should be mindful that he is in a situation where he has failed to comply with his responsibilities, and he cannot expect the Ministry or this Authority to rectify any lack of correct and complete records.

Alternative

[20] The Authority is well aware that it may be impossible for the appellant to construct a reliable analysis of his income. The accounting techniques available to deal with an absence of records is time consuming and costly. The appellant is unlikely to have the money to engage the sort of professional assistance required to put his affairs in order over the disputed period of time, and is unlikely to have the skills to do it himself.

[21] The Authority has already made it clear to the appellant it can have little sympathy for his predicament, because he was required by law, like every other business in New Zealand, to keep proper financial records. Further, he has long been on notice that the Ministry would not accept the limited and unsatisfactory information he provided. He chose not to provide what he was asked for. He has effectively had three opportunities of pursuing the matter before this Authority.

[22] Potentially, the appellant may never be able to quantify his income for the disputed period, and can hope to do no more than put his affairs in order in the future. It is a matter for the appellant to determine what is realistically possible, and we urge him to listen carefully to his agent's advice. He may potentially be able to get assistance from a business mentor from a voluntary organisation. Mr Howell will be able to provide advice on what assistance of that kind may be available.

Conclusion

[23] If we decide the appeal on the information we have available to us, the Authority will dismiss the appeal for the reasons discussed.

- [24] The appellant has an opportunity to improve his situation in the manner described.
- [25] The Authority expects to dismiss the appeal, or have a means in place to resolve it, no later than by the end of November 2018. The Case Manager will liaise with the parties to reserve a day for hearing in early December 2018.
- [26] Either party may request a telephone conference to discuss any issues.

Dated at Auckland this 19th day of October 2018

G Pearson
Chair

K Williams
Member

C Joe JP
Member