

[2019] NZSSAA 11

Reference No. SSA 099/18

IN THE MATTER of the Social Security Act 2018

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

S Pezaro - Deputy Chair

K Williams - Member

C Joe - Member

Hearing at Auckland on 16 January 2019

Appearances

The appellant in person

XXXX, the appellant's wife

A Katona, agent for the Ministry of Social Development

DECISION

Background

[1] XXXX (the appellant) appeals the decision made on 15 November 2017, upheld by a Benefits Review Committee, to decline his application for Jobseeker Support (JS) and to grant Non-Beneficiary Accommodation Supplement at a weekly rate of \$9.

[2] The appellant is 64 years old. He sought assistance from WINZ in October 2017 after illness prevented him from working. In June 2016 the appellant had a heart attack and was fitted with a pacemaker. The following month he had an eye haemorrhage and an operation to restore the sight in his eye. The next month the other eye haemorrhaged and he required further surgery. These events followed the tragic death of their daughter in January 2016 after being

diagnosed with cancer in 2013. During the period of their daughter's illness, the appellant and his wife supported and cared for her by spending time with her in Australia.

- [3] Due to his ill health, the appellant sold his business in 2017 for less than 50 per cent of its 2011 valuation, clearing debts to IRD and creditors. As he was unable to work and could not service the mortgage on the family home, that was also sold.
- [4] The appellant and his wife were left with \$120,000 which they deposited in a bank account. By the hearing, approximately 18 months later, the appellant said that this fund had reduced to \$80,000 because he had to draw on it for living expenses.
- [5] A Disability Certificate issued on 25 October 2017 by a registered medical practitioner confirmed that the appellant had depression which was likely to last for one to two years. The certificate also records that the appellant has medical expenses due to GP visits and prescriptions, and the insulin pump necessary for managing his Type 1 diabetes.
- [6] Six months after he stopped work, the appellant sought assistance from WINZ. At that time, his wife was earning a gross weekly income of \$1,019. The couple were living in an outer suburb of Auckland and paying \$460 per week rent. The appellant's wife commuted into the city for work and had high travel costs.
- [7] The appellant's applications for JS, Disability Allowance, and Temporary Additional Support were declined. The relevant criteria were applied using the couple's gross income to assess entitlement for JS and Disability Allowance, and their chargeable income (net income and any other benefits) less allowable costs for Temporary Additional Support. The Ministry granted the appellant Accommodation Supplement at \$9 per week.
- [8] The appellant sought a review of this decision which went to the Benefits Review Committee. It was during the BRC hearing that the appellant indicated he had a term deposit of \$120,000. The Ministry then suspended payment of Accommodation Supplement from 7 May 2018.
- [9] By the date of hearing, the couple had moved into rent-free accommodation in a friend's granny flat because they were not managing financially.

- [10] We note that the Ministry accepts that the appellant genuinely believed that he did not need to disclose the proceeds of the sale of his home. There is no suggestion that the appellant was attempting to obtain a benefit to which he was not entitled by failing to disclose that he had this money in a bank account.
- [11] The issues for the Authority to decide are whether the proceeds of the sale of the appellant's house is a cash asset and whether his wife's income should be assessed for the purpose of entitlement to an Accommodation Supplement based on the gross or net figure.

Relevant law

- [12] The Act in force at the time of the decision under appeal was the Social Security Act 1964 (the Act). Schedule 31 of the Act sets out asset and income limits applicable to certain types of assistance.
- [16] Section 3 of the Act defines income as money received before income tax. The question of whether "income" in the Act meant gross rather than net income was considered by the High Court in *Dixon-Mclver v Director-General of Social Welfare*.¹ This case considered whether Mr Dixon-Mclver's wife's gross or net income should be used to calculate entitlement to assistance.
- [17] The High Court concluded that Parliament had carefully considered the implications of defining income as the gross amount and may well have allowed for this fact in the abatement rates. The Court observed that: ²

Parliament laid down a simple (and to some degree arbitrary) scheme which it plainly intended would apply across all beneficiaries. It is difficult to see how it could have done otherwise, without a vastly more complex scheme, and much greater transaction costs.

- [13] Cash assets is not defined in the Act but is defined in Ministerial Directions as the assets of the client and their partner which can easily be converted into cash and includes money in bank accounts, money invested and proceeds from the sale of a family home, shares, stocks or bonds. A family home is not a cash asset. The cash asset limit for Accommodation Supplement and Temporary

¹ *Dixon-Mclver v Director-General of Social Welfare* HC Wellington AP94/98, 20 March 2000.

² At [40].

Additional Support is significantly lower than the funds held by the appellant at the time of the decision.

- [14] Chargeable income is relevant to the calculation of Temporary Additional Support and is net income, income from other benefit assistance which is then offset against costs considered allowable for the purpose of calculating whether there is a balance of disposable income. The level of disposable income determines the rate, if any, at which Temporary Additional Support and Disability Allowance is paid.

The case for the appellant

- [15] The grounds of the appeal are that:

[15.1] The proceeds of the sale of his family home should not be treated as cash assets.

[15.2] That the discretion to disregard cash assets in exceptional circumstances should be exercised in his case.³

[15.3] Assessment based on his wife's income should be calculated on the basis of her net income not her gross income.

- [18] The appellant says that it is unfair and inequitable to treat the proceeds from the sale of his family home as cash assets when a family home is not treated as a cash asset. He argues that whereas a person who has a family home may be eligible for the type of assistance he has been declined, regardless of the value of their home, he is forced to live off the proceeds of the sale.

- [19] The appellant therefore submits that home owners are given preferential treatment over a person in his position who has been forced by sickness and family circumstances to sell their home. The appellant also pointed out that he endeavoured for some six months to manage without social assistance after he had sold his home.

³ Clause 10 of the Ministerial Direction in relation to Emergency Benefit and Benefits on Ground of Hardship.

- [20] The appellant produced evidence of his expenses. He explained that he maintained medical insurance despite the high cost because, if he had not done so, he may have lost the sight in his eye as the treatment was available because he had insurance. In addition, he points out that medical insurance is important because he is a Type 1 diabetic.
- [21] The appellant and his wife reduced their expenses by having only third-party vehicle insurance and no contents insurance. Before they moved to free accommodation, their rent was approximately 66 per cent of their net income.
- [22] The appellant was upset that, when he applied for assistance, WINZ advised him to use his Kiwisaver funds. Ms Katona accepted in the hearing that this was inappropriate because Kiwisaver funds are intended to be preserved until a person turns 65 years old.
- [23] The appellant said that the financial stress he was under added to his health problems. He felt that he was being penalised for being honest and disclosing the bank deposit. He said that it was his intention to be well enough to return to work and to be able to own his own home again. He reiterated that he and his wife were not in a position of having a family home without using the funds in the bank which the Ministry treats as a cash asset.
- [24] The appellant also argued that the discretion in cl 10 of the Ministerial Direction provided the discretion to disregard some or all of cash assets if exceptional circumstances exist, having regard to the serious adverse effect that may result to a person's health or welfare and any other matters relevant to determining whether there would be hardship.
- [25] In relation to his wife's income the appellant argued that, as it is the net income which is available to them, it is unfair to base income calculations on the gross amount. The appellant said his wife had a net income of \$770 per week, however in the course of the hearing it became apparent that her net pay was \$1,541.53 per fortnight after a deduction of \$168.03 for Kiwisaver. Once the Kiwisaver deduction was added back, her fortnightly net pay was \$1,709.56, or \$854.84 per week, which was in excess of the cut-off point for entitlement.

- [26] The appellant found the use of the terms “chargeable income” and “gross income” confusing and unhelpful. His confusion is understandable because for the purposes of some forms of assistance it is gross income that is relevant whereas others are assessed based on the level of “chargeable income” which is the net figure of any other benefits and income earned.

The case for the Ministry

- [27] The Ministry’s position is that the appellant’s wife’s income clearly places the appellant above the threshold of entitlement for JS. As Ms Katona pointed out in the hearing, even if the net income was used as the basis for this calculation, the appellant would not qualify.
- [28] Disability Allowance has an income limit of \$944.49 per week gross and the Ministry’s position is that there is no discretion to calculate this on net income, even if it made a difference.
- [29] The cash assets disentitled the appellant to Accommodation Supplement. It is the Ministry’s view that in the circumstances of the appellant’s case there is no discretion to ignore the cash held in a bank deposit.
- [30] Temporary Additional Support cannot be granted to the appellant due to the low asset cut off point, \$1,770.44 for a married couple, and the calculation of chargeable income based on net income and allowable costs which left a surplus of \$44.64. A deficiency of less than \$1 is required for there to be any entitlement to Temporary Additional Support.
- [31] At the hearing, Ms Katona said that the only possible support available to the appellant was Supported Living Payment, provided he had a medical certificate confirming that either his disability was expected to last two years or more or he was not able to work more than 15 hours per week. At the date of hearing, it was almost two years since the disability certificate was issued and the appellant was still advised not to work by his doctor.
- [32] However, the cut off for Supported Living Payment is \$790 per week household income, or \$41,400 per annum gross, and the appellant would not have been eligible unless his wife’s income significantly reduced.

Discussion

Are the proceeds from the sale of the appellant's family a cash asset?

[33] The question of what constituted a cash asset was considered by the Authority in NZSSAA 81/16.³ In that case, the appellant owned a unit in Egypt which he wanted to sell. The unit was in a complex which had not been completed, however the appellant had the option to cancel the contract but had declined to do so. The amount due to him would have been refunded over a three-year period.

[34] The Authority considered whether to apply a provision in Ministerial Directions to disregard cash asset limits in exceptional circumstances but concluded that the equity in the property should be regarded as a cash asset. The Authority calculated that the cash asset available to the appellant was approximately NZ\$27,000 and was satisfied that the appellant could not be considered to be in hardship.

[35] The Chief Executive would have granted that appellant an emergency benefit if he had exercised his right to cancel the contract. However, s 61(2) of the Act provides that an Emergency Benefit shall not exceed the rate at which the beneficiary is entitled to receive the analogous benefit. In this appellant's case, the relevant benefit would have been either JS or Supported Living Payment and, due to the requirement to take his cash assets into account, the appellant's entitlement would have been nil.

[36] We understand the appellant's argument that treating the residual funds from the sale of his home as a cash asset is not fair and equitable when a homeowner can seek assistance without the value of their home being taken into account. However, we are satisfied that the legislation is clear and therefore we have no discretion to treat the proceeds from the sale of a family home as anything other than a cash asset.

Should income be assessed on the gross or net figure?

[37] The definition of income in the Act is "before tax". The High Court has confirmed that income is to be interpreted as gross income and we must apply this

³ [2016] NZSSAA 081.

definition. The result is that, where entitlement to a benefit is income tested, the appellant's household income must be assessed based on the gross figure.

- [38] We note the appellant's comments about the manner in which the terms gross income and chargeable income are used. In this case, we do not consider that these terms were used or applied incorrectly.

Other assistance available

- [39] We are concerned that when the appellant sought assistance he was not advised that he may qualify for Supported Living Payment, if he provided an appropriate medical certificate and his wife's income reduced. The fact that the appellant stated on his application for Disability Allowance that he was not able to work full time should have been a trigger for the Ministry to investigate eligibility for Supported Living Payment.

- [37] Section 11D(3) – (4) of the Act allows applications for any benefit as a gateway to the grant of a benefit of a different kind. The obligation to “get it right” when a person presents seeking assistance carries through each level including the disposition of appeals before this Authority.

- [38] The law is very clear law regarding the Chief Executive's duties, and staff at all levels within the Ministry must understand that law to perform their duties. In *Crequer v Chief Executive of the Ministry of Social Development* the High Court observed that:⁴

[48] ... under s 12, it is for the Chief Executive and those acting with his authority, to determine what benefits should be granted to a claimant. In doing that, there is a requirement for the Chief Executive, or his delegate, to ensure that the correct benefit or benefits are paid and in making that determination, to be “pro-active in seeing to welfare, and not defensive or bureaucratic”.

(footnotes omitted)

⁴ *Crequer v Chief Executive of the Ministry of Social Development* [2016] NZHC 943.

- [39] In *Scoble v Chief Executive of the Ministry of Social Development* the High Court acknowledged that the Act “does not specifically place a duty on the Chief Executive to invite application where no enquiry for assistance has been made.”⁶ However, when a person does seek assistance, then the Chief Executive is to consider what forms of assistance the person is or may be eligible to receive.⁷
- [40] These duties were reiterated in *Koroua v Chief Executive of the Ministry of Social Development*⁸ where the Court observed that the Ministry should be proactive in seeing to welfare, and not defensive or bureaucratic.

Conclusion

- [41] Due to the level of his household income and cash assets, the appellant was not entitled to JS, Accommodation Supplement, Disability Allowance or Temporary Additional Support when he applied in October 2017.
- [42] On the information in the medical certificate he provided at the time, he was not entitled to Supported Living Payment on the basis of having a disability which was likely to last more than two years. His eligibility for SLP on the basis of being unable to work 15 hours per week or more was not tested, however, based on this wife’s income at the date of application, it appears he may have been eligible but had a nil entitlement.
- [43] For these reasons, this appeal does not succeed.
- [44] However, given the appellant’s circumstances at the date of hearing, it is appropriate for the Ministry to provide him with the criteria for SLP and assess his entitlement for this assistance.

⁶ *Chief Executive of the Dept of Work and Income v Scoble* [2001] NZAR 1011 (HC) at [9].

⁷ At [9]–[11].

⁸ *Koroua v Chief Executive of the Ministry of Social Development* [2013] NZHC 3418 (HC).

Order

[45] The appeal is dismissed.

Dated at Wellington this 8th day of March 2019

S Pezaro
Deputy Chair

K Williams
Member

C Joe
Member