

[2021] NZSSAA 9

Reference No. SSA 32/20

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an appeal by **XXXX** of Auckland 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

J Ryall - Member

Hearings at Auckland on 9 November 2020, 19 January 2021 and 8 March 2021

Appearances

The appellant in person; M Taylor as support person on 19 January and 8 March 2021

T Braden, counsel for the Ministry of Social Development on 9 November 2020 and 19 January 2021; T Kanji, counsel, on 8 March 2021; A Katona, appeals officer

DECISION

Background

[1] XXXX (the appellant) appeals the decision on 18 July 2019 by the Ministry of Social Development to cancel his Accommodation Supplement and Temporary Additional Support, effective 15 July 2019. The Ministry said that it made this decision because it was unable to establish the appellant's accommodation costs. The decision was upheld by a Benefits Review Committee and the appellant filed his appeal on 4 June 2020.

[2] As part of his appeal the appellant asked that amounts he says are owed by the Ministry to three of his boarders be paid to him. The Authority has no jurisdiction

over these matters as they are not decisions that have been confirmed or varied by a Benefit Review Committee, as required by s 395 of the Social Security Act 2018 (the Act). Further, as the appellant is not a party to those decisions, it is unlikely that he has the standing to seek a review.

The issues

- [3] The issues we must decide are whether the appellant has provided all information required for his entitlement to Accommodation Supplement and Temporary Additional Support to be assessed as at 15 July 2019. If he has provided the required information, we must determine whether he was entitled to those forms of assistance at that time, or to any other assistance.
- [4] While the decision subject of this appeal was made on 18 July 2019, for the reasons that follow it is necessary to consider the nature of the appellant's interest in the house in which he lives and what assets he held prior to the date on which the decision was made.

Relevant law

- [5] Section 65 of the Act sets out the circumstances in which an accommodation supplement may be granted:

65 Accommodation supplement: discretionary grant

- (1) MSD may grant a person (**P**), for the period that MSD determines, an accommodation supplement if—
- (a) P has accommodation costs; and
 - (b) P meets the assets requirement (as set out in regulations made under section 423); and
 - (c) P is not excluded on either of the following grounds:
 - (i) the social housing exclusion:
 - (ii) the other funding exclusion.

- [6] Section 65(2) provides that accommodation costs may relate to premises either rented or owned by a person, or for a boarder, lodger or joint tenant of any premises.
- [7] Section 69 of the Act allows the Ministry to refuse or cancel a grant of Accommodation Supplement if an applicant or their spouse or partner has not realised any assets available for the applicant's personal use.

- [8] A person not receiving a main benefit is entitled to full Accommodation Supplement if their assets are less than \$2,700 for a single person. The rate of entitlement is set according to the area in which the property is located and reduces as assets increase above the threshold for full entitlement to a nil entitlement for a single person with no dependents and assets of \$8,100.
- [9] Section 95 of the Act establishes Temporary Additional Support to provide temporary financial assistance, as a last resort, to alleviate financial hardship for people who cannot meet essential costs from their chargeable income and other resources. Chargeable income includes the cost of accommodation.
- [10] Section 304 of the Act provides that the Ministry may review a benefit to ascertain whether the beneficiary remains entitled to receive the benefit or to review the rate of benefit being paid. Section 305 of the Act allows the Ministry to require the beneficiary to provide information or answers to questions within a certain timeframe.

The case for the appellant

- [11] The appellant's case is set out in his notice of appeal, submissions filed 21 August 2020, 9 November 2020, 17 December 2020, and oral submissions and evidence given at the hearings. He says he has received Accommodation Supplement and Temporary Additional Support since 2007 and been subject to four investigations of his entitlement by the Ministry. He said that the previous investigations covered the same issues and resulted in these supplementary benefits continuing.
- [12] The appellant's written submissions include extensive comments about the amounts he says the Ministry owes to former boarders, and therefore to him, and about the process of the Ministry's investigations into his entitlement over several years. For the reasons given, these issues cannot be considered as part of this appeal. However, we have endeavoured to extract all relevant information from the submissions.
- [13] The appellant's position is that he has no financial interest in the house in which he lives (the property) and has always resided there as a tenant. He says the property is owned by the Trust (the Trust) and he settled the property in the Trust and is a discretionary beneficiary of the Trust. The title to the property shows a transfer to the appellant and his sister on 7 October 1998. The appellant produced a property title transaction report which shows he and his sister

purchased the property in 1998 for \$335,000 and the rating valuation at that time was \$390,000. This transaction report was generated on 2 February 2016 and records the appellant's sister as the owner at that time.

[14] Prior to the hearing, the Ministry asked the appellant to provide a full copy of the Trust deed. At the hearing on 9 November 2020 (the first hearing) the appellant said that while he was in prison the pipe behind a vanity burst and water spoiled the Trust deed. However, he said he would provide a copy. He did not do so before the hearing on 19 January 2021 (the second hearing).

[15] When the second hearing was adjourned we directed that:

By 27 January 2021 (the appellant) will file in the Authority and serve on the Ministry of Social Development in hard copy:

- (a) A certified copy of the trust deed for the Trust (the Trust),
- (b) A certified copy of the loan documents between the Trust and (the appellant) verifying the purposes of all loans and mortgages obtained by (the appellant) which are guaranteed by the Trust,
- (c) The records of each transfer of the property at (address and title number) since 1998 showing the value of the transfer,
- (d) A schedule showing (the appellant's) income from all sources and his outgoings including rent payments with supporting documents verifying the amounts in the schedule for the period 1 April 2019 to 15 July 2019.
- (e) And any other documents he relies on to support his appeal.

[16] Prior to the third hearing the appellant filed a folder of documents. He said these documents provided the information referred to in the directions (above).

[17] The appellant did not provide a certified copy of the loan documents between himself and the Trust to verify the purpose of his borrowing which the Trust guaranteed. In response to the direction to provide a schedule showing his income from all sources and his outgoings including rent payments with supporting documents verifying the amounts and schedules for the period 1 April 2019 to 15 July 2019, the appellant provided bank statements from a BNZ account in his name and the name of another person with the same surname, and handwritten schedules he prepared of his income and outgoings for each month. He did not provide anything to verify that the cash payments which he said were for rent were applied for that purpose.

- [18] The appellant did not provide a certified copy of the Trust deed. He did provide what appear to be some pages of a Trust deed but it was incomplete as the first page was missing. Further, the pages that he provided appeared to be from different documents as the font was inconsistent and the page numbers had been manually altered. As a result, we have no documentary evidence to confirm what property the appellant settled in the Trust. The appellant's evidence is that the loan for the property was in his name as he was the settlor. He says there is nothing unusual about this as any trust that buys property with a mortgage has the loan in the settlor's name. We note that if trustees own property the trustees will be the owner and borrower. The Land Registry System does not record the trust, but it is elementary that the trustees will be the registered owner and accordingly the mortgagor.
- [19] The appellant filed Exhibit 26 with his notice of appeal, it is a letter from him stating:
- My Trust was set up over 30 years ago – not to deprive myself of any income (as there is none) but to safeguard assets from any creditor claims due to being in business for over 30 years.
- [20] He did not disclose the nature or extent of the assets he was intending to protect.
- [21] In June 2006 the appellant took out two loans secured against the property and a third loan which appeared to have been taken out on 26 February 2007. Each loan was guaranteed by the Trust and was for a fixed term. One loan was for \$120,770, another for \$230,000, and the third loan for \$150,000.
- [22] At the first hearing the appellant said that one of these loans was for a business, an art shop which he started. He said he was not sure why he took the loan for \$230,000. He said that \$30,000 of the loan of \$120,770 was to pay lawyers and the balance of \$90,000 was for personal use and business debts. He said the Trust had lent him money as he was under threat of bankruptcy. He could not remember what the loan for \$150,000 in 2007 was for, however he said the bulk of the loans was for the initial purchase of the house.
- [23] In his final submissions filed before the third hearing, the appellant said the home loan was topped up for reasons explained in an email to the Ministry on 17 January 2012, and to fund an art shop that went into liquidation with the loss of "all my money".
- [24] In the email of 17 January 2012 the appellant states:

Obviously I have accommodation costs and obviously there is no income coming from the Trust due to the huge mortgage on the property.

1.funds owed to the Trust. These were loans made outside of the trust which I have personally guaranteed to cover my rent for the mortgage payments, lawyers fees (sic) and living costs before and when I went to jail and was forced by financial hardship to go on the benefit. Also a large chunk went to purchase a share in an art shop that went into receivership not long after (in 2006).

[25] In a letter dated 23 February 2012 to the Ministry the appellant stated:

- (1) The \$220,000 BNZ loan was included in the 2009 accounts as it was owing in 2009 and then the house was remortgaged that year with Sovereign.

Therefore it was showing as a long-term asset of the Trust owing by me (the settlor) and deducted off in the term liabilities in the 2010 accounts as it was repaid to the BNZ by the new loan. It is down as an asset of the Trust as I was the borrower and have a personal guarantee for it with Sovereign.

- (2) The \$37,000 rental income of the Trust for the house I am responsible for was made up of all the money I am able to pay from my sickness benefit, accommodation allowance and temporary additional support and any shortfall a trustee has borrowed as they also have a personal responsibility for the loans on the house. It is accumulating as I am legally required to pay it back when I eventually are fit to return to work and is slowly chipping away at any equity in the house.

- (3) As you were shown on Tuesday there is also substantial power, phones, rates etc I owe and as I have not been received my entitlements the mortgage is three months in arrears and I am about to receive another foreclosure notice.

[26] At the third hearing the appellant said that the loans were for the purchase of the house. When we asked him to explain why this evidence was different from the evidence he gave at the first hearing, he said he could not remember what the loans were for. The appellant submits that the loans cannot be treated as assets.

[27] With his notice of appeal, the appellant produced documents which he identified as Exhibit 19A and 19B. 19A is a statement for the period 1 November 2019 to 30 November 2019 from a Sovereign Go floating account recording payments from the account to three different loan accounts.

[28] Exhibit 19B dated 19 December 2019 shows four accounts with Sovereign in the name of the appellant. In addition to the Sovereign Go floating account with a loan balance of \$,5856.24, there is a Sovereign Go Fixed 48 months account and two accounts for fixed terms of 36 months. These accounts have loan balances of \$175,471.67, \$114,997.82, and \$89,020.83, a total of \$379,490.32. This amount exceeds the original purchase price of the property and loans taken out by the appellant.

- [29] In support of his argument that he was always a tenant in the property, the appellant relies on a tenancy agreement signed on 26 January 2016 which records him as the tenant and his sister as trustee and landlord of the property. That agreement states that the rent is \$650 per week to be paid fortnightly in advance to a specified bank account number. The agreement states that no more than two tenants may reside in the property.
- [30] A subsequent agreement dated 5 February 2016 records the rent as \$480 per week with otherwise the same terms. The appellant states that the rental agreement was changed to record a lower rent because his probation officer did not accept that he could afford rent of \$650 per week. However, the appellant insisted that the earlier agreement with the higher rent applied.
- [31] The appellant accepted that although the tenancy agreement restricted occupancy to two people, he had more than that number in the house. The appellant said that he could not pay the rent by direct credit as he was living hand to mouth. He said he paid rent as and when he could.
- [32] In the appellant's written statement dated 20 August 2020 he states:
- (Boarder) and I were the only people living in the house from 19 January 2016 when I was released from prison (boarder) was paying \$300 per week board ... (boarder) moved out on 17 September 2017 and still owes my sister (as trustee) over \$3,000 for unpaid rent, while I was in prison, and he was the sole tenant.
- [33] The appellant produced two statements from his sister. One is an unsworn statement entitled The (name redacted) Family Trust (the Family Trust) signed by his sister and dated 23 January 2016. His sister stated that the letter is to confirm that the appellant is not a beneficiary or trustee of the Family Trust which owns the property and he does not receive any income or benefits from the Family Trust. She states that she is a trustee and the guarantor of the mortgage and as guarantor she has implemented a new tenancy agreement which requires the appellant to pay \$650 per week fortnightly in advance. She says she understands that he has a (named) boarder (Boarder 1) who will be paying him \$250 per week.
- [34] The second statement by the appellant's sister is Exhibit 20 to his submissions filed prior to the third hearing. This is an unsworn and undated statement entitled the Affidavit of (his sister). In this document she states that she makes the statement as the trustee for the Trust; she is the only legal owner of the property which purchased the property in 1998; the mortgage with Sovereign has always

been in the appellant's name "*which is just the way it was set up at the time of purchase. This was of course due to loan requirements of proof of income*"; as trustee I have a personal guarantee on the mortgage over the house.

The case for the Ministry

- [35] The Ministry said that the appellant applied for benefit assistance on 22 January 2016 and in support of his accommodation supplement application he provided a loan document in his name dated 2014, a letter from his sister advising the Ministry that he was paying \$650 per week to cover the mortgage and a tenancy agreement. He was granted Accommodation Supplement and Temporary Additional Support at the maximum rate. On 11 February 2016 he provided a change of accommodation costs form indicating that his weekly accommodation costs had reduced to \$480 per week as he had a boarder, his payments continued at the same rate.
- [36] On 6 April 2017 the appellant advised he had two boarders. The Ministry interviewed them and found they both believed they were paying rent with one paying \$300 per week and the other \$250. They both claimed Accommodation Supplement from the Ministry based on rent payments and not board. The Ministry eventually accepted the appellant's explanation of the situation and he continued to receive Accommodation Supplement and Temporary Additional Support at the maximum rate.
- [37] In November and December 2018 the Ministry received five different applications for bonds and rent or board from beneficiaries applying at different service centres for accommodation at the appellant's address. The Ministry paid the requested assistance and the payments were made to the appellant's personal account and the equivalent deducted in cash. At the same time, the Ministry says the appellant's home loan account shows another four people paying bond and board or rent to the appellant.
- [38] At that time, the appellant already had two boarders. The Ministry's policy is to allow a home owner to have two boarders without calculating the board payments as income. Any subsequent payments of board or rent are regarded as income by the Ministry. The Ministry says the appellant did not advise it of any new boarders or tenants in 2018 and the Ministry was not aware of the new applications until 14 December 2018. At that point it started an investigation into the appellant's circumstances to establish his income and assets and tenancy status at the property.

- [39] In submissions filed 5 August 2020 the Ministry showed its analysis of the appellant's main home loan account and a second personal bank account. The Ministry contends that this analysis shows that the appellant's accommodation costs were not \$480 per week as he claimed.
- [40] At the hearing Ms Kanji said that the Ministry had been unable to establish the appellant's accommodation costs as it did not have verifiable costs. She said that the appellant's outgoings from his bank account did not reflect what he says are rent payments and accommodation costs and it is not possible to determine what amount he has paid as rent.
- [41] The Ministry says the appellant's status in relation to the Trust and interest in the property is unclear. The Ministry does not have the full mortgage documents or the Trust deed. It is not clear about the purpose of refinancing the loans. Further, the Ministry says that the appellant pays water charges and rates which are more indicative of an owner than a tenant. The Ministry also says the appellant has not provided any accounts to show the cost of services provided to his boarders so it is unable to assess his level of income from the boarders.
- [42] The Ministry produced a series of emails and records of telephone calls between the appellant and ASB Bank from 2013 to 2020. The emails and records show communication between the appellant and the bank about mortgage arrears and payments, and requests for deferral of payment.
- [43] The Ministry's position is that it will reconsider the appellant's entitlement to Accommodation Supplement and Temporary Additional Support once he provides full information of his accommodation costs and the documents the Ministry requested in relation to the Trust.

Discussion

- [44] We are not satisfied that the appellant has provided sufficient information for his accommodation costs to be assessed as at 15 July 2019; or that the information he has provided is accurate or complete. Although he claims he is a tenant in the property, we do not accept the evidence he has produced confirms this status. If there was a Trust deed in the form he claims, we infer he would have produced that document, and not produced the incomplete and inconsistent document he presented to the Authority. Furthermore, if there was a Trust deed of the kind claimed, it would be usual for a lawyer and a bank to have a copy of it. There has

been no explanation that that could allow us to reasonably accept his claim the only copy of a trust deed was destroyed by a leaking pipe.

- [45] The appellant's evidence has been mobile and inconsistent. We inevitably find it is probable that the land transfer records reflect the true ownership of the property. We cannot reach any reliable conclusions regarding the extent of the Appellant's assets or income, as his evidence is based on arrangements that were probably never made. He has failed to provide adequate and plausible information regarding his assets and income. The Ministry put him on clear notice that the information he has produced was not satisfactory; and this Authority gave him extensive opportunities to produce information. Unfortunately, we can only conclude he has used those opportunities to provide further and inconsistent information which is not plausible or reliable.
- [46] While some irregularities in payments may be accepted if the landlord is a family member, in this case the appellant claims that the Trust is the landlord and his sister as trustee performs the obligations of the landlord. As trustee she would have obligations to maintain clear financial records for the Trust. We do not accept the appellant's oral evidence that the cash withdrawals from his bank account were applied to rent; if he paid rent in cash his sister as trustee was required by the Residential Tenancies Act 1986 and her obligations as trustee to maintain an accurate record of those payments.
- [47] The fact that the number of people living at the property with the appellant exceeded the number permitted by the tenancy agreement, he did not pay rent in the manner required by the agreement, the two agreements differ as to the rent payable, and that the appellant has not provided the information required to establish the value of the property he settled in the Trust when it purchased the property all tend to suggest that the tenancy agreements between the appellant and the Trust were not genuine agreements at the date that his entitlements were cancelled.
- [48] Although the appellant denies any ownership interest, we have also considered whether he was entitled to Accommodation Supplement and Temporary Additional Support as owner of the property. He said that the Trust was established to protect his business assets but did not provide evidence of the value of those assets or show what property he settled in the Trust. The sale and purchase agreement for the property in 1998, the trust deed produced by the appellant, and loan agreements and trustee certificates, and the tenancy

agreements all refer to the Trust, not the Family Trust, as owner, guarantor of the loans, and landlord of the property. The appellant's sister's statements she says were made on behalf of the two trusts are contradictory.

[49] The appellant has at least four home loans in his own name secured against the property for a total sum in excess of the value of the purchase price of the property.

[50] In these circumstances, the best we can conclude is that the appellant potentially either divested himself of assets if and when the Trust was established and the property was purchased and/or continues to have an interest in either the property in which he lives or some other property which is financed by some or all of the loans in his name. However, that is no more than speculation.

[51] The result is that we find that, on the evidence before us, the appellant was not a tenant in the property as at 15 July 2019. On the information we have, it is probable he had a financial interest in the property at that time. In the absence of further reliable proof, we must regard the certificate of title as recording his interest, and his borrowing which he has secured against it. We are not able to satisfy ourselves that he has any lesser interest, or the quantum of any lesser interest.

[52] We are satisfied the appellant has not given evidence of his true interests and the relationships of others relating to the house. It follows we are not able to conclude the Ministry's quantification of the appellant's accommodation costs at that time were probably wrong. It follows we cannot conclude the appellant was entitled to any assistance he did not receive.

[53] Accordingly, the appeal does not succeed.

Order

[54] The appeal is dismissed.

Dated at Wellington this 26th day of March 2021

S Pezaro
Deputy Chair

J Ryall
Member