

Reference no: SSAA 085/2022

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an Appeal to the Social Security Appeal Authority 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

Hearing at Auckland on 13 March 2023

G Pearson (Chairperson)

R Palu (Deputy Chairperson)

M Dodd (Member)

T Tran (Member)

Appearances:

XXXX presenting her own appeal (supported by [XXXX's husband])

S Barrett, counsel, and N Jaura, appeals officer, for the Ministry of Social Development

DECISION

Introduction

- [1] XXXX's appeal concerns the decision by the Ministry of Social Development (the Ministry) to review and increase her Income Related Rent (IRR) from \$67 per week to \$168 per week on 22 September 2021. The decision was upheld by a Benefits Review Committee (BRC).

- [2] The review came about due to the inclusion of [XXXX's husband] to her household earlier in 2021 and his eligibility for New Zealand Superannuation (NZS) from September 2021. From the Ministry's perspective this amounted to a change in circumstances.

Background

- [3] XXXX receives New Zealand superannuation, a disability allowance and an Australian disability support pension (DSP). Prior to becoming eligible for NZS, XXXX received an invalid's benefit, which later became the supported living payment.
- [4] Since April 2012 XXXX has lived in a Kāinga Ora (formerly Housing New Zealand) house in Auckland.
- [5] The Ministry policy is to review income related rent at least once annually and at every change in circumstances. It is understood that due to a rent freeze during the COVID pandemic the Ministry did not undertake annual rent reviews in 2020.
- [6] Prior to the Ministry's review in September 2021, XXXX's rent had been reviewed in January 2019. The weekly rent set at that point was \$67. This was based on 25% of XXXX's supported living payment of \$269.15, which she received at the time. It is understood that [XXXX's husband] was not living with XXXX.
- [7] In January 2021 XXXX began receiving NZS. By this time [XXXX's husband] was living with XXXX and he was included in her NZS as a non-qualifying spouse. Each received a weekly rate of \$326.02. XXXX's DSP is deducted from her NZS. At this stage the Ministry had not re-started its annual rent reviews.
- [8] Until September 2021 [XXXX' husband] was not included in XXXX's income calculation.
- [9] In September 2021 when [XXXX's husband] qualified for NZS the Ministry carried out a rent review. At this point [XXXX's husband] and XXXX were entitled to NZS of \$336.11 each per week. According to the Ministry, XXXX received weekly net NZS payments of \$280.01, after a deduction of \$55.10 (net) for DSP.¹
- [10] As stated above, the Ministry's review of IRR increased XXXX's IRR from \$67 to \$168 per week. This is based on the Ministry's assessment of XXXX's total household income, which was assessed as \$672.22 and included XXXX's NZS, DSP and [XXXX's husband]'s NZS.

¹ This amount is based on an Australian pension entitlement of \$3,530.60 p.a. divided by 52 weeks. The gross weekly amount is \$67.89.

- [11] The Ministry advised Kāinga Ora of the revised IRR. Both the Ministry and Kāinga Ora sent XXXX a letter advising of the increased rent of \$168 per week, which was effective from 23 November 2021.

Issue

- [12] This appeal involves the issue of whether the Ministry was correct in calculating XXXX's IRR at the increased level.
- [13] XXXX has also referred to a range of other matters in her notice of appeal and supporting information. For various reasons outlined below neither of those matters fall within the scope of this appeal.

Legal provisions

- [14] The Ministry provides subsidised housing for clients in severe or serious housing need. This is based on eligibility criteria. The rent payable is based on total assessable household income. The Public and Community Housing Management Act 1992 (PCHM) applies to this social housing.

Calculating assessable income

- [15] Section 104 of the PCHM requires a social housing agency to calculate income related rent for a tenant.
- [16] The provisions for calculating IRR are contained in ss 107 to 113 of the PCHM.
- [17] Under s 116 the Ministry may, at any time, review any IRR.
- [18] Section 107 provides for two IRR assessments. The first is calculated by reference to household income, the second is calculated by reference to benefit levels. Under s 107(1) the applicable IRR is the higher of the two assessments. The calculation for each assessment as relevant to this appeal is prescribed as follows:²

107 Calculating income-related rents

...

- (2) A rent calculated by reference to household income is the sum of—
- (a) the prescribed proportion of the sum of the assessable incomes of the applicable persons concerned, up to the prescribed threshold (or the threshold prescribed for tenants of a category to which the tenant belongs); and
 - (b) the prescribed proportion of any amount by which that sum is greater than that threshold; and

...

- (3) A rent calculated by reference to benefit levels is the sum of—
- (a) the prescribed proportion of the rate (before reduction on account of income) of jobseeker support stated in clause 1(b) to (j) of Part 1 of Schedule 4 of the Social Security Act 2018 that would be appropriate if the tenant were a beneficiary;

...

² Sections 107(2)(c) and (3)(b), which add a portion of the tenant and their partner's family tax credit entitlement, are not applicable to [XXXX's husband] and XXXX.

[19] Pursuant to s 108 of the PCHM, assessable income is the estimate of the person's weekly income from all sources. Under s 108(a), weekly income is calculated on the basis of net income.

[20] Section 109 sets out certain amounts that are included in a person's weekly income for the purposes of s 108. This includes:

- (a) the appropriate weekly proportion of any periodical payment, whether capital or not, made to the persons on a regular basis for income related purposes and used by the person for income related purposes.³

[21] The term "income related purposes" has the meaning defined in Schedule 2 of the Social Security Act 2018.⁴ It means the purpose of:

- (a) Replacing lost or diminished income; or
- (b) Maintaining the person or a member of their family; or
- (c) Purchasing, for the person, or for a family member of the person's family, goods or services of a kind that are commonly paid for from income; or
- (d) Enabling the person to make payments that the person is liable to make and that are commonly made from income.

[22] Section 110 of the PCHM provides that:

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

- (1) For the purposes of section 108, a person's weekly income—
 - (a) includes any amount or payment (or, as the case requires, the appropriate weekly proportion of any amount or payment) of a prescribed description:
 - (b) does not include any amount or payment (or, as the case requires, the appropriate weekly proportion of any amount or payment) of a prescribed description.
- (2) Subsection (1)(a) does not limit section 108.
- (3) Subsection (1)(b) overrides sections 108 and 109(1).

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

113 Estimating weekly income

...

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

[24] Section 114 provides for regulations establishing a calculation mechanism.

³ Public and Community Housing Management Act 1992, s 109(1)(a).

⁴ Public and Community Housing Management Act 1992, s 2(1).

- [25] The Public and Community Housing Management (Prescribed Elements of Calculation Mechanism) Regulations 2018 (the Regulations) specify the prescribed elements of the calculation mechanism.
- [26] Under Regulation 5 the prescribed proportion of income (up to the threshold) is 25% for the purposes of s 107(2)(a).
- [27] For the purposes of ss 107(2)(a) and (b), Regulation 6 prescribes the threshold for a tenant with a spouse or partner as *“the rate stated in clause 1(c) of Schedule 1 of the New Zealand Superannuation and Retirement Income Act 2001, after deduction of standard tax and multiplied by 2.”*
- [28] As at September 2021 the NZS rate for a person with a spouse or partner after tax was \$336.11. Multiplied by two this is \$672.22 (the income threshold).
- [29] Under Regulation 10 the prescribed proportion of the benefit rate is 25% for the purposes of s 107(3)(a).
- [30] Under Regulation 13(a)(ii), NZS is to be included as weekly income for the purposes of s 110(1)(a).
- [31] Regulation 14 prescribes the amounts for payments of a prescribed description relevant to s 110(b) that are not to be treated as income. Relevant to this appeal, Regulation 14(b) provides:

14 Certain amounts or payments not to be income

...

(b) for a person with a disability (A), –

- (i) the value of any regular disability support services supplied to A:
- (ii) any direct payment of disability support made by or on behalf of the Crown to A, or a person on A's behalf, for the purposes of purchasing or obtaining disability support services for A;

- [32] Under Regulation 3(1) the “Crown” is the executive government of New Zealand.

Case for the appellant

- [33] XXXX considers that the Ministry was not entitled to carry out a review of her IRR when it did. She also submits that the Residential Tenancies Act 1986 does not allow a rent increase due to a change in circumstances.
- [34] Overall, XXXX contends that her income for the purposes of IRR has been incorrectly assessed. She considers that her NZS, DSP, and her disability allowance should not be included as income for the purposes of assessing her IRR. In XXXX's submission, her disability allowance and DSP, which is received as a result of a fall injury, are for medical needs and are not income.

- [35] XXXX and [XXXX's husband] said that the substantial increase from \$67 to \$168 was a shock. XXXX said the increase was inconsistent with prior increases which have largely been \$1 a year and at the most had increased by \$13.
- [36] XXXX also referred to the fact that her benefit is under the minimum wage and has not increased \$101 in proportion to the rent increase. According to XXXX, her benefit payments have actually decreased. XXXX also referred to the increased cost of living and difficulties meeting essential living costs.
- [37] XXXX believes that market rent has been forced on her. She also believes that the increase is not a valid rent increase as it was not made on her anniversary rent date, which is in April of every year.
- [38] XXXX considers that her rent has been increased to pay for work carried out to her home by the 'Healthy teams' who installed insulation, heat pumps and a new shower. This is work that should not be charged to her.
- [39] XXXX further considers that 25% is too high for rent on NZS tenants and submits that rent should be 5% or free.
- [40] XXXX has also raised concern about the notice period for rent increase.
- [41] XXXX also referred to a number of other matters. These included:
- (a) Rent arrears.
 - (b) The direct deduction of her DSP.
 - (c) The recovery of an advanced payment for dental work.
 - (d) The timing and underpayment of her first NZS payment in early 2021.
 - (e) The rate of her NZS and deduction of her DSP and the exchange rate applied to her DSP.
 - (f) The payment of tax on NZS or benefit payments.
 - (g) The Ministry's handling of its decision to create an overpayment due to cancellation of portable payment of XXXX's New Zealand Invalid's benefit and an associated debt in Australia with Centrelink in 2011.
 - (h) The Ministry's handling of two weeks rent arrears in 2012.
- [42] XXXX considers that the additional matters are further examples of mistakes and muck ups made by the Ministry over the years.

Case for the Ministry

- [43] The Ministry confirmed that XXXX's household income increased when she and [XXXX's husband] were granted NZS. Prior to this time XXXX's IRR was based on XXXX's sole income.
- [44] The Ministry submits that the formula for income related rent is prescriptive and it is obliged to apply it.
- [45] The Ministry submits that s 109(1)(a) of PCHMA permits it to include XXXX's overseas pension payment as income when determining assessable income under s 108. This is because the overseas payments are made on a regular basis for income related purposes and used for income related purposes.
- [46] The Ministry submits XXXX's DSP and net NZS constitute her assessable income to be used in estimating her weekly income for IRR purposes. The Ministry's calculation added XXXX's net weekly DSP of \$55.10 and net NZS of \$280.01, received at the time.
- [47] The Ministry's calculation of IRR was made with reference to XXXX's household income, as provided for in s 107(2). This included [XXXX's husband]'s net NZS of \$336.11 per week.
- [48] Consequently, the Ministry calculated XXXX's total household weekly income at \$672.22. 25% of this total produced an IRR rate of \$168.05, which was rounded down to \$168.
- [49] The Ministry's calculation with reference to the benefit level under s 107(3) included the couple rate of NZS of \$672.22 as at September 2021. 25% of this produced a similar rate of \$168.05.
- [50] As the rates were the same, XXXX's IRR was assessed at \$168 per week.
- [51] The Ministry submits that the assessment is correct.
- [52] The Ministry considers that the other matters raised by XXXX fall outside the matters to be considered in this appeal.

Reasons

- [53] Understandably, the substantial increase in IRR was a surprise to XXXX and [XXXX's husband] and has put pressure on their finances. However, for the reasons discussed below we accept that the Ministry was entitled to review XXXX's IRR when it did and that it has correctly calculated the rental increase.

Review

- [54] Section 16 of PCHM gives the Ministry a discretion to review IRR at any time. This enabled it to review XXXX's IRR when [XXXX's husband] was added to her household and XXXX's overall circumstances changed.

Assessable weekly income

- [55] We accept that the Ministry is required to include XXXX's NZS in assessing her weekly income. This is clear from Regulation 13(a)(ii) of the Regulations.
- [56] We also accept that XXXX's DSP is a regular payment made and used for income related purposes. As such it is part of her weekly income for the purposes of s 108 of the PCHM. The Ministry has included net DSP of \$55.10.
- [57] We agree with XXXX that her disability allowance is not to be included in the weekly income. Regulation 14 of the Regulations prescribes that payments to purchase disability support services are not income. However, that does not include DSP. In line with this the Ministry has not included XXXX's disability assistance in its income assessment.
- [58] The Ministry's report states that its assessment included weekly NZS paid to XXXX of \$280.01. This is based on net NZS of \$336.11 less net DSP of \$55.10. However, that calculation would result in net weekly NZS of \$281.01, not \$280.01. The Ministry's report to the BRC stated that XXXX's weekly NZS was both \$280.01 and \$281.01. Despite this, the Ministry has used the correct total net figure of \$336.11 when calculating XXXX's net weekly income. (That is net weekly NZS of \$336.11 less net DSP of \$55.10 deducted from XXXX's NZS. Net DSP of \$55.10 is then included by adding it back in.) The result is that the total net weekly income included for XXXX was correct.

Household income

- [59] We also accept that an IRR assessment with reference to household income is applicable in XXXX's circumstances. An assessment of IRR with reference to household income, which includes [XXXX's husband]'s NZS income of \$336.11, would be higher or equivalent to an assessment with reference to the benefit level, for a couple without children, as provided for in section 107(3).
- [60] The outcome is that XXXX's household income is \$672.22 (being \$336.11 x 2). The Ministry assessed XXXX's household income correctly at \$672.22.

Proportion of income to be charged as IRR

- [61] Section 107(2)(a) and Regulation 5 set the proportion of assessable household income that must be charged as IRR, at 25% up to the threshold of \$672.22, and 50% on income above that threshold. As XXXX's household income is at the threshold, 25% of her assessable household income is payable as IRR. This is \$168.05. The Ministry rounded this down to \$168.
- [62] We appreciate that XXXX's views on what the proportion should be are likely to be informed by the reality of her modest income. However, the proportion set is prescriptive and we have no power to change it.
- [63] Although XXXX's personal income has not increased in similar proportion to her IRR, the primary reason for the increase was the inclusion of [XXXX's husband]'s income. [XXXX's husband]'s NZS income has increased the household income by double. The IRR reflects that increase.

Market rent

- [64] Implicit in XXXX's position is a view that her rent has increased to market levels. Section 74(2) of the PCHM prohibits income related rent from exceeding the market rent for a property. XXXX's information confirms that the market rent for her home as at 10 April 2020 was \$330 and two years later in April 2022 the market rent was \$356. XXXX's IRR increase is clearly significantly less than the market rate.

Notice period

- [65] XXXX's information refers to her concern that Kāinga Ora gave notice of her rent increase outside the requirements in the Residential Tenancies Act 1986. This appeal concerns the decision made by the Ministry and not Kāinga Ora. However, s 74(5) of PCHM clearly provides that various provisions of the Residential Tenancies Act 1986 concerning rent increases, including notification of an increase, do not apply to an increase in rent due to a change in circumstances.
- [66] We now turn to the other matters raised by XXXX.

Rent arrears

- [67] We understand that as the Ministry's IRR assessment and decision to increase rent was under review, XXXX understood that she was not required to increase her rent payments until the matter had been determined. Consequently, she continued to make rent payments from her bank account at the rate of \$67 per week.
- [68] Sometime after the IRR was increased, Kāinga Ora contacted XXXX and informed her that she had rent arrears of \$1,000. Later in June 2022 Kāinga Ora informed her that she had rent arrears of \$2,000. XXXX said this came as a shock to her.

- [69] XXXX said that the Ministry began deducting the increased rent from her NZS plus an additional \$20 per week for “rent and damages” that was deducted from her benefit without her knowledge. XXXX also said that she did not cause any damage.
- [70] XXXX further considers that the Ministry does not pay her rent on time and has deliberately created arrears. XXXX has referenced the fact that the Ministry is deducting rent from her NZS which is paid fortnightly, whereas rent paid to Kāinga Ora is paid weekly. XXXX also considers that the Ministry cannot deduct her rent from her benefit because it includes a disability allowance.
- [71] Information provided by XXXX and the Ministry confirm that from 29 April 2022 the Ministry began deducting rent at the rate of \$168 per week from XXXX’s NZS together with payments of \$10 per week for “HNZ Arrears-Damages Payments”.
- [72] The Ministry has stated that it commenced rent reductions after a discussion with XXXX on 22 April 2022 during which she agreed to the deduction and informed the Ministry that she would cancel her rent automatic payment. At the time it was understood that due to the dispute raised by XXXX concerning the increase, any overpayment would be refunded.
- [73] The Ministry also submit that it is entitled to deduct XXXX’s rent from her benefit and direct it to Kāinga Ora, under s 339 of the Social Security Act 2018 and clause 5(1) of the Ministerial Directions for Redirection of Benefit Payment, where there is “good cause” to do so. It says that it made the deduction so XXXX did not get into further arrears.
- [74] The Ministry confirmed that the weekly deduction of \$10 relates only to rental arrears, which are a “debt due to the Crown” under s 74(3) of the PCHM. It submits that it is recovering this debt in accordance with s 128 of the PCHM.
- [75] Accumulated rent arrears or the direct deduction of rental payments were not included in XXXX’s request for review of the Ministry’s decision to increase her rent, or the BRC decision of 24 August 2022 that is appealed by XXXX in this appeal. The matter is not directly within the scope of this appeal. However, the overall outcome in this appeal has determined that the decision to increase XXXX’s rent was correct. XXXX was therefore required to pay rent at a higher rate from 23 November 2021. Section 128 enables the Ministry to recover the rental arrears debt under the Social Security Act 2018 and the Social Security Act Regulations 2018. It is understood that XXXX’s rental arrears debt balance with Kāinga Ora as at 24 March 2023 was \$837.⁵

⁵ Further Submissions under Regulation 249(1)(e) of the Social Security Regulations 2018 to the Social Security Appeal Authority, Ministry of Social Development, 24 March 2023.

The direct deduction of DSP and the recovery for an advanced payment for dental work

- [76] The direct deduction of XXXX's DSP from her benefit was the subject of a proposed appeal to the Authority in *Re SSA106/15*.⁶ That decision concerned an appeal by XXXX against a BRC decision upholding a decision by the Ministry of 28 May 2013 to deduct XXXX's DSP from her benefit. The decision concerned the direct deduction of overseas benefits or pensions from entitlement to New Zealand benefits or pensions. As the appeal had been filed out of time the Authority considered whether to allow the late filing of the appeal. The Authority declined to do so. In doing so it noted that the proposed appeal concerning direct deduction of XXXX's Australian DSP lacked merit. The Authority's decision was not appealed further.
- [77] An advanced payment of \$820 for dental work provided to XXXX in 2017 was also the subject of an appeal to this Authority in 2019. In its decision *Re SSA085/18* the Authority dismissed the appeal and found that the advanced payment was recoverable at a rate of \$5 per week.⁷ This decision was not the subject of any further appeal and has been determined.
- [78] Legal principles relating to *res judicata* and issue estoppel prevent parties before this Authority challenging determinations already made. Neither matter can be the subject of a further appeal.

The timing and underpayment of XXXX's first NZS payment in early 2021, the married rate of XXXX's NZS and the exchange rate applied to her DSP

- [79] These matters concern the payment by the Ministry of XXXX's first NZS payment in early February 2021, which was two weeks after her 65th birthday, the married rate of NZS paid to XXXX and the exchange rate applied to her DSP.
- [80] All matters were the subject of a determination by a BRC on 25 February 2022. They are also the subject of a notice of appeal filed by XXXX on 14 June 2022. As the appeal was filed out of time, the matters will be the subject of a separate decision by the Authority on whether the appeal can be accepted out of time.

Payment of tax on NZS or benefit payments, overpayment in 2011, and rent arrears in 2012

- [81] XXXX has reiterated an earlier view that tax should not be deducted from her NZS or benefit payments. She considers that NZS is a scheme that she has contributed to throughout her working life and should not be taxed.

⁶ *Re SSA106/15* [2016] NZSSAA 3.

⁷ *Re SSA085/18* [2019] SSAA 16.

- [82] Section 395 of the Social Security Act 2018 provides a right of appeal to the Authority only against decisions made under ss 397, 398 and 399 that have been confirmed or varied by a Benefits Review Committee or made by the Chief Executive personally.
- [83] The Authority confirms that as the deduction of tax from XXXX's NZS is not a decision made by the Ministry under ss 397, 398 or 399 or is a decision confirmed or varied by BRC or made by the Chief Executive, is not a matter which can be the subject of an appeal to the Authority
- [84] Decisions made by the Ministry in 2011 and 2012 are historic matters. They are not matters that are the subject of the BRC decision which XXXX appeals and are not relevant to this appeal.

Decision

- [85] For the reasons given above the appeal is dismissed.

DATED at Wellington 31 August 2023

G. Pearson
Chairperson

R. Palu
Deputy Chair

M. Dodd
Member

T. Tran
Member