

[2018] NZSSAA 62

Reference No. SSAA 55/18

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

S Pezaro - Deputy Chair

K Williams - Member

C Joe - Member

Hearing at AUCKLAND on 7 November 2018

Appearances

The appellant in person

For the Ministry of Social Development: T Braden and J Kirtlan, counsel, and N Jaura, appeals officer

DECISION

Background

[1] XXXX ("the appellant") appeals the decision of the Ministry of Social Development to establish and recover overpayments of benefit and supplementary assistance amounting to \$39,811.38 for the period 31 May 2012 to 7 May 2017. This decision was upheld by a Benefits Review Committee on 2 February 2018.

[2] After the appeal was filed and the appellant made further submissions, the Ministry revised its decision. It disestablished the overpayment for the period

31 May 2012 to 27 August 2013, reducing it to \$30,100.60 for the period 28 August 2013 to 7 May 2017.

- [3] At the hearing, the Ministry further reduced the overpayment to \$29,900.60 after conceding that two overpayments totalling \$200 for a Special Needs Grant were outside of the timeframe now relevant to this appeal.
- [4] During the relevant period, the appellant received jobseeker support (JS), accommodation supplement (AS) and temporary additional support (TAS). He owned a home in XXXX and the adjacent section, both purchased on 18 July 2011. He did not declare ownership of the section to the Ministry and the Ministry considers that it was a non-cash asset.
- [5] On 27 September 2012 the appellant opened a BNZ bank account in the name of his son, then three years old. The appellant was the sole signatory to the account. The opening balance in this account on 28 August 2013, the start of the relevant period, was \$22,611.72.
- [6] On 29 June 2015, when the balance in the son's account was \$207,926.37, a BNZ diary note on the son's account records:

I have spoken with [the appellant] who is the father of [his son] as we have been alerted to unusual activity on the account. [The son] is only six years old but there are a number of transaction/bill payments and a large deposit into the account. We have been asked by the financial crime management team to find out the source of the funds and the purpose.

When I spoke with [the appellant] on Friday ... he advised me that the large deposit came from a property settlement and the funds will be moved to a family trust for [the son] once it is set up.

[The appellant] has been using his son's account as he has this account as part of his total money group he felt that there was no issue for him to use it for his personal transaction, [the appellant] does have accounts with BNZ in his own name.

...

- [7] The Ministry began investigating the appellant's entitlement in December 2016. During this investigation, the Ministry decided that the appellant did not inform it about money in his bank account or the sale of property. On 12 May 2017 the Ministry wrote to the appellant advising him that it had established an overpayment. Since 26 June 2017 the appellant has not received any social assistance.

Relevant law

- [8] The Social Security Act 2018 (“the Act”) sets out the requirements for eligibility for jobseeker support which include income tests. Accommodation supplement and temporary additional support assistance is subject to cash asset tests.
- [9] Section 74(1)(d) of the Act provides that the Ministry may refuse a benefit, or terminate or reduce any benefit already granted, if the applicant had directly or indirectly deprived himself of any income or property which results in him qualifying for a benefit or an increased rate of benefit.
- [10] Section 80A of the Act imposes on every beneficiary an obligation to advise of a change of circumstances which affects their entitlement to a benefit or the rate of any benefit.

The case for the Ministry

- [11] At the start of the hearing, the appellant questioned the Ministry’s calculation of the revised overpayment and the basis for it. Therefore, with the agreement of the parties, we heard from the Ministry first followed by the appellant.
- [12] When it reviewed its decision, and limited the period in question, the Ministry focused on the balance in the appellant’s son’s bank account and the value of the section. The Ministry relied for its calculation of the appellant’s cash assets and income on the schedule and supporting documents that it produced with its further submissions.
- [13] The Ministry says that the appellant was not entitled to the assistance he received during the relevant time because the cash assets in his son’s account were over the allowable threshold of \$8,100 for AS and \$1,031.36 for TAS from October 2012 and that, due to excess income, he was overpaid the sum of \$5,591.50 for JS in the period from 1 February 2016 to 7 May 2017.
- [14] The balance on 7 May 2017, the end of the relevant period, was \$717,642.78. The Ministry has calculated the overpayment by taking into account the balance in this account at the time that the benefit payments were made to the appellant.
- [15] Ms Braden submitted that the appellant used his son’s account as his own. She argued that the \$10,000 initially deposited into this account came from

the appellant's own funds, and other funds came from sales on TradeMe and the sale of his properties. She said he regularly used this account for his own benefit, making cash withdrawals and paying his credit card, rates and power accounts.

- [16] The Ministry claimed that the section the appellant owned was a non-cash asset which should have been realised. When the appellant did sell the section, the proceeds of the sale were paid directly into his son's accounts by his lawyer. The appellant subsequently purchased another section, paying the deposit of \$53,500 from his son's account on 1 February 2017.

The case for the appellant

- [17] In his notice of appeal, the appellant said that when he applied for a sole parent benefit he completed the application form fully and truthfully.
- [18] He initially argued that the Ministry reached the decision under appeal by erroneously treating his mortgage as income and that it failed to understand the structure of his Total Money mortgage account. He referred to the decision of the High Court in *F v the Chief Executive of the Ministry of Social Development*¹ where the Court concluded that credit card spending and bank loans did not fall within the definition of income in s 3(1) of the Social Security Act 1964 (the Act) because they did not add to the appellant's resources and had to be repaid.
- [19] However, as the Ministry reviewed its decision and limited its focus to the period between 28 August 2013 and 7 May 2017, and the source of funds in the appellant's son's account and the section he owned, the Total Money mortgage is no longer relevant to this appeal. For the same reason, the loan of \$70,000 to the appellant from his parents in 2008 is no longer relevant as it is outside of the period in question.

The son's bank account

- [20] In evidence, the appellant said that he opened the bank account in his son's name as a "family account". He denied that he had control over it although he agreed he was the sole signatory. The appellant said that he moved funds into this account because he was involved in relationship property proceedings and wanted to "create funds for [his son]". He said that he did

¹ *F v the Chief Executive of the Ministry of Social Development* [2018] NZHC 1607; [2018] 3 NZLR 260.

not have a will and the bank account was his way of ensuring that his son was provided for.

- [21] He initially denied that there was any evidence of TradeMe transactions through this account. He then said the TradeMe deposits were from selling his son's personal belongings. When questioned as to whether his son owned the gym equipment sold through TradeMe, the appellant said that his friends and family put proceeds from their TradeMe sales into this account to support his son. In response to Ms Braden's questions about the multiple sales of gym equipment, the appellant said he sold the gym equipment to pay for his car which had broken down.
- [22] We then asked the appellant why he told the MSD investigator that he sold the gym equipment to pay for medical bills. The appellant said that when he was interviewed in April 2017 he could not recall what had happened several years ago. He said he felt defensive with the investigator; although he could not remember then, he could remember now.
- [23] In response to questions about the cash withdrawals, credit card payments, and payment of rates and power from his son's account, the appellant agreed that he and his mother had made cash withdrawals. He said that his mother had full access to this account, including internet banking. He said he "effectively let her have power of attorney".
- [24] At the hearing, the appellant produced three documents which he had not filed in accordance with the timetable. The appellant said one schedule showed transactions through the account for the relevant period and another showed his regular expenses such as rates and insurance. He said these schedules explained the balance in his son's account at a particular time. The third document was a screen shot from TradeMe which the appellant said was the listing for his car.

The appellant's section

- [25] The appellant argues that, although the house he owned in XXXX was on two titles, the section was part of the house. He said he purchased the house and section as one and there would have been significant costs in preparing the section for a separate sale as it had a pool on it. He said that he was advised to sell the property as one lot. However, in evidence he confirmed that he sold the section separately from the house.

- [26] In response to the Ministry's reliance on the decision of the High Court in *Chhima v WINZ*,² the appellant argues that, as the Chhima's property was commercial property used as a market garden, it can be distinguished from his section. He says the section he owned in XXXX was never registered as a business and could only be used residentially and, because in *Chhima* the Court did not require the appellants to sell their residential home, he was entitled to use the section adjoining his house as part of his home.

Discussion

- [27] We found the appellant's evidence about the transactions through his son's bank account implausible and inconsistent. We do not accept that he opened this account to protect funds intended for his son because, as he acknowledged, he regularly withdrew money from this account as personal funds to cover his living expenses. His explanation that certain withdrawals and deposits were by other family members who could access the account is inconsistent with the appellant's stated intention to establish a fund for his son.
- [28] There is a conflict between the appellant's initial statement that the numerous TradeMe sales through this account involved personal items his son no longer wanted and the nature of the items sold which included adult clothing, household items, and the gym equipment. The appellant's attempts to explain sales which were clearly not of his son's unwanted toys were implausible, as was his claim that he had a better recall at the hearing of his reason for selling gym equipment than he did a year earlier when he was interviewed by the Ministry investigator.
- [29] The appellant failed to provide any of the source documents necessary to verify the figures in the schedules that he produced at the hearing to show his financial commitments. If the appellant had any legitimate expenses to declare he should have done so when he applied for assistance. We therefore prefer the Ministry's calculation of the appellant's income and assets during the relevant period as they are based on the balance in his son's account.
- [30] There was nothing on the screen shot of the TradeMe listing to confirm that this listing was the appellant's, however, even if there was, the fact that he sold his car would not affect the outcome of this appeal.

² *Chhima v WINZ* [2006] NZFLR 690.

- [31] We are satisfied that the appellant used his son's account to deprive himself of income for the purpose of qualifying for benefits and assistance from the Ministry of Social Development. Had he declared this income as he was obliged to do, he would not have qualified for the assistance he received during the relevant period.
- [32] Similarly, the appellant's evidence in relation to the XXXX section was not consistent with the facts. He said that he considered the section was part of the home he owned next door as it could not easily be sold separately and he was advised not to do so.
- [33] However, it was on a separate title and we are not satisfied that there was any reasonable basis for the appellant to consider it was part of his home or to think that he could not deal separately with the section. When the appellant did sell the section, he sold it separately from the house.
- [34] For these reasons, we do not accept that the appellant did not know that he had to declare he owned this section when he completed forms applying for assistance. These forms clearly stated that he must declare any land he owned.
- [35] Therefore, we find that the section the appellant owned was an asset that he was obliged to realise before applying for assistance. By failing to declare that he owned this section, and failing to declare the proceeds of its sale, the appellant misled the Ministry about the level of his income and assets.

Conclusion

- [36] As a result of failing to declare he owned a section and depriving himself of income, the appellant received benefits to which he was not entitled. We accept the Ministry's calculations of the extent to which he was overpaid and find that the Ministry is obliged to recover the sum of \$29,900.60 from the appellant.

Orders

- [37] The appeal is dismissed.
- [38] Costs are reserved. The Ministry may apply for costs within 10 working days. If the Ministry applies for costs, the appellant is to file any response within 10 working days from the date of the Ministry's application. The costs application

will then be decided on the basis of the written submissions. We do not intend to indicate what the outcome of any application would be.

Dated at Wellington this 6th day of December 2018

S Pezaro
Deputy Chair

K Williams
Member

C Joe
Member