

[2015] NZSSAA 030

Reference No. SSA 001/15

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

Ms M Wallace - Chairperson
Mr K Williams - Member
Lady Tureiti Moxon - Member

HEARING at DUNEDIN on 15 April 2015

APPEARANCES

The appellant in person
Mr G Moore for Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant appeals against a decision of the Chief Executive upheld by a Benefits Review Committee declining to include his dependent children in the assessment of the rate of benefit paid to him.

[2] The issues which arise in this appeal are:

- (i) Whether the Chief Executive has applied the provisions of s 70B of the Act correctly.
- (ii) Whether the mother of the appellant's children should be required to pay some of the benefit payable to her to the appellant.

Background

[3] The appellant and his former partner (**XXXX**) are the parents of five children ranging in age from seven to 14 years.

[4] On 22 April 2013 the appellant and his partner separated. They agreed to share parenting of their children on the basis that the children would spend alternate weeks in the care of each parent. The children move from one parent's care to the other every Sunday night between 7.00 pm and 8.00 pm.

[5] At the time of their separation, applied for and was granted a Domestic Purposes Benefit – Sole Parent. The appellant was in full-time employment. In May 2014 he was made redundant from his job. He applied for a benefit to support himself. He was granted a benefit at the single rate on the basis that s 70B of the Social Security Act 1964 provides that only one parent can have the children taken into account in assessing the rate of benefit payable.

[6] The appellant sought a review of decision. The matter was reviewed internally and by a Benefits Review Committee. The Benefits Review Committee upheld the decision of the Chief Executive. The appellant then appealed to this Authority.

[7] The appellant's main reason for appealing is that he would like to agree to pay him part of the benefit she receives for the children.

Decision

[8] Section 70B of the Social Security Act 1964 provides that where both parents of dependent children are beneficiaries then only the parent with greater responsibility for the children is entitled to have the children taken into account in assessing that parent's entitlement to benefit and the rate of benefit payable. Section 70B(2) sets out the matters to which the Chief Executive is to have regard in determining which parent has greater responsibility for the children in circumstances where each parent has responsibility for the care of the child for at least 40% of the time.

[9] Section 70B(3) provides that if the Chief Executive is unable to decide which parent has greater responsibility for the children, then only the parent the Chief Executive decides is the principal caregiver of the children immediately before the parents began living apart should be entitled to have the children taken into account in assessing that parent's entitlement to a benefit and the rate of benefit payable.

[10] If the Chief Executive is unable to make a determination as to which parent has greater responsibility for the children under s 70B(2) or is unable to determine which parent was the principal caregiver of the children immediately before the parents began living apart, then and only then does s 70B(4) apply. Section 70B(4) provides that the parents are to agree between themselves as to which of them should be entitled to have the children taken into account in assessing benefit entitlement and until the parents reach agreement the children are not to be taken into account in assessing the benefit entitlement of either parent.

[11] In this case, the appellant requests that the Chief Executive invoke s 70B(4) and stop paying a benefit which includes the children to until such time as they reach agreement on the matter. The appellant says that it is unfair that his former partner should have the children included in her benefit simply because she applied for the benefit first. He wants to be involved in his children's lives as their father. The fact that the children are not included in his benefit makes this difficult for him.

[12] The appellant is mistaken about when the Chief Executive can apply s 70B(4). It can only be applied when the Chief Executive is unable to make a determination under s 70B(2) and (3). The same applies to this Authority. Before s 70B(4) can be invoked, the Authority must consider whether or not a determination can be made under s 70B(2) or s 70B(3). For that reason, in the first instance we have considered the application of s 70B to the appellant's situation.

[13] There is no dispute in this case that both the appellant and each had the children in their care for equal amounts of time when the appellant was granted a benefit in May 2014. We understand there has been a recent change in the arrangements relating to one daughter but we are considering the situation as it was at the time that the Chief Executive's decision was made to pay the appellant a single rate of benefit in May 2014.

[14] We are then required to consider the matters set out in s 70B(2) of the Act as follows:

- (a) *How the responsibility for decisions about the daily activities of the children are shared.*

We understand that responsibility for decisions about the daily activities of the children are made by each parent when the children are in that parent's care. All of the children are at school and they have a number of extra-curricular activities.

- (b) *Who is responsible for taking the children to and from school and supervising their leisure activities.*

Each parent is responsible for taking the children to school when they are in their care. Likewise, each parent supervises the children's leisure activities when they are in that parent's care. attends sports games at the weekends when the children are not in her care, but nothing turns on this.

- (c) *How decisions about the children's education and health care are made.*

Both the appellant and agree that the children are relatively healthy children and medical appointments are infrequent but we understand that each party would take the children to the doctor if required when they are in their care. The children are all attending school. There was no evidence to suggest one parent takes a greater role than the other when it comes to making decisions about the children's education.

- (d) *Who is responsible for the children's financial support and which expenses are paid by which parent.*

Currently, meets most of the costs of the children's extra-curricular activities, uniform, school fees and the like. Up until the time he applied for a benefit, the appellant supported the children when they were in his care and paid half of the costs relating to their school and extra-curricular activities. Once he stopped working and received only a single rate of benefit, he was unable to assist with these extra costs. Each parent provides for the children's basic living expenses such as housing, food and transport when they are in that person's case. We do not think anything turns on the current financial arrangements. If the appellant's financial contribution to the children currently is less than XXXX's that is because the children are included in XXXX's benefit and it does not seem appropriate to find that she takes greater financial responsibility for the children's support on that basis.

[15] On the basis of the information available we are not satisfied that either parent had greater responsibility for the children at the time the Chief Executive's decision in relation to the appellant's benefit was made in 2014.

[16] Section 70B(3) of the Act then requires us to consider which parent was the children's principal caregiver prior to the parents beginning to live apart. The term "principal caregiver" is defined in s 3 of the Act. It means the person who has primary responsibility for the day-to-day care of the children. In the period immediately prior to separation the appellant was in employment. He was doing forestry work on small blocks. He said every day was different. This meant at times he was available to deliver the children to school or pick them up and generally be involved in their care.

[17] When questioned about who cared for the children prior to school, delivered them to school, collected them from school, organised their clothing and prepared their meals, the appellant said that these tasks were mostly carried out by but sometimes by himself. He was the breadwinner for the household and provided for the family's financial support. In addition, at the end of the day would go to yoga several days a week as soon as he got home, leaving him to supervise the children's evening routine.

[18] said that prior to separation she was the person responsible for getting the children up, dressed and ready for school in the morning. She transported them to school in the mornings, helped out at school, and after school collected them and took them to their various after-school activities. In the evening she would typically organise dinner and the children's evening routine. She was also responsible for the shopping, the laundry, organising the children's clothes and the household chores. She prepared most meals. She agreed that two or three times a week she went to yoga and would leave the house when the appellant arrived home. He then cared for the children during these periods.

[19] We were left in no doubt that was the person who cared for the children on a day-to-day basis and was their principal caregiver prior to separation. She is therefore the person who is entitled to have the children included in her benefit at the present time. The operation of s 70B means that the Chief Executive has no alternative but to exclude the children from assessment of the appellant's entitlement to benefit.

[20] We appreciate that this results in difficulty for the appellant. He receives a total of \$275.13 per week in benefit payments. In addition to this he receives a share of the Family Support Tax Credit.

[21] By comparison, receives a total of \$407.98 plus a share of the Family Support Tax Credit. She also has casual employment. XXXX's benefit entitlement includes Accommodation Supplement of \$107 based on rental costs of \$250 per week. By comparison the appellant receives \$65 a week in respect of Accommodation Supplement, although his accommodation costs, which relate to mortgage repayments, rates and insurance, are higher than XXXX's.

[22] The difference in the basic benefit (excluding Accommodation Supplement) between the appellant and is \$90.85.

[23] The appellant would like to share the additional benefit she receives with him. is not prepared to do that. She says that she is meeting as much as she can of the children's expenses such as school-related costs and extra-curricular activity costs. The appellant suggests that it may be best for the children to give up their extra-

curricular activities, given that his financial circumstances mean that it is difficult for him to pay the basics such as food while they are in his care.

[24] We have some sympathy for the appellant's situation. The children are included in XXXX's benefit payments even in the weeks they are not in her care. She does not, for example, have the cost associated with feeding them that week and no doubt her power and transport costs will be lower. In fact, the majority of state assistance relating to children is delivered by way of the Family Tax Credit rather than benefit. Her basic benefit delivers only \$90.85 extra each week for the care of five children. She says she can only just make ends meet. On the other hand, it is difficult to see how the appellant can manage on the level of income he receives.

[25] The Government has made a policy decision that it is not prepared to pay twice for the same children by way of benefit. The benefit can only be included in the benefit payments related to one parent. Arguably, if she meets the costs relating to school and school uniform, health care, haircuts and extra-curricular activities, this will consume a significant amount of the additional payment made to her.

[26] We note that Child Support is being deducted from XXXX's benefit payments which also reduces the funds available to her and therefore her ability to pay some of her benefit to the appellant in the weeks the children are not living with her.

[27] Section 82(3)(b)(ii) of the Social Security Act 1964 provides that where there is good cause, the Chief Executive has a discretion to direct that part of any instalment of a benefit be paid without the consent of the beneficiary to or for the benefit of the spouse or partner, or any dependent child or children of the beneficiary. The possibility of the Chief Executive making a decision under this provision to pay part of XXXX's benefit to the appellant in the weeks that he has the care of the children was not canvassed at the hearing and does not appear to have been considered by the Chief Executive. We consider it should be, given that she does not have the children in her care for any longer than the appellant. Accordingly, we direct the Chief Executive to consider this issue. Any such consideration will need to take into account that she pays Child Support. Any calculation of the additional amount that she receives in respect of the children should be reduced by this amount. We also consider that the Accommodation Supplement should not be taken into account as her accommodation costs do not change when the children are not in her care, unlike, for example, food costs. We would expect both parties to provide detailed budgets to the Chief Executive to assist in making such a determination.

[28] The appeal is adjourned for two months to enable the Chief Executive to make a determination in relation to whether or not he should pay part of XXXX's benefit entitlement to the appellant for the benefit of the children in the weeks that he is responsible for their care, and the amount of such payment. The Chief Executive is to report to the Authority by 1 July 2015 on the outcome. If a decision is made to make a payment from XXXX's benefit to the appellant, both parties will of course be entitled to separate rights of review and appeal.

[29] The appeal is adjourned. Leave is reserved to either party to return to the Authority for further directions.

[30] We direct that a copy of this decision be provided to XXXX.

DATED at WELLINGTON this 4 day of May 2015

Ms M Wallace
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member