[2015] NZSSAA 034

Reference No. SSA 160/14

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 February 2015

APPEARANCES

The appellant in person
Ms S Singh for the Chief Executive of the Ministry of Social Development

DECISION

Introduction

[1] The appellant appeals against a decision of the Chief Executive made on 27 February 2014 upheld by a Benefits Review Committee declining to include his son in the assessment of his entitlement to benefit.

[2] The Chief Executive declined to include the appellant's son in the assessment of his entitlement to benefit on the basis that the child was already included in his mother's benefit.

[3] The issues arising in this case have previously been considered by the Authority.[1] In that decision the Authority concluded that the child's mother had greater responsibility for the child and was therefore entitled to have the child included in her benefit. Moreover as the child's mother had been the principal caregiver of the child prior to the parents beginning to live apart, she would have been entitled to have the child included in the assessment of her entitlement to benefit if the Authority was unable to determine which parent had the greater responsibility for the child.

[4] The appellant says that as a result of a variation in the parenting agreement he now has greater responsibility for the child.

[1] [2012] NZSSA 4.

Background

[5] XXXX (XXXX) was born on 17 January 2010. His father (the appellant) and his mother (Ms XXXX) separated on 28 June 2010.

[6] The Authority's earlier decision was based on a Parenting Order made on 11 March 2011. That order was varied on 18 April 2013. Care of XXXX by each parent is now according to the following regime:

Week 1:

(a) XXXX shall have care of XXXX as follows:
  (i) Sunday 9.00 am to Tuesday 9.00 am.
  (ii) Wednesday 9.00 am to Thursday 9.00 am.

Week 2:

(b) XXXX shall have care of XXXX as follows:
  (i) Saturday 9.00 am to Tuesday 9.00 am.
  (ii) Wednesday 9.00 am to Thursday 9.00 am.

[7] Previously the Consent Order in force since March 2011 provided the following regime:

Week 1:

(a) XXXX shall have care of XXXX as follows:
  (i) Monday 9.30 am to Tuesday 9.30 am.
  (ii) Wednesday 9.30 am to Thursday 9.30 am.
  (iii) Friday from 9.30 am to Saturday 9.30 am.

Week 2:

(b) XXXX shall have care of XXXX as follows:
  (i) Monday 9.30 am to Tuesday 9.30 am.
  (ii) Wednesday 9.30 am to Thursday 9.30 am.
  (iii) Friday 9.30 am to Sunday 9.30 am.

[8] The change is fairly subtle but in effect it provides XXXX with a more settled routine in that there are longer periods between changeovers. The new routine also gives the appellant more weekend time with XXXX. Ms XXXX never has XXXX for a whole weekend. The Ministry calculate however that each parent is still responsible for XXXX for 168 hours over a fortnight.

[9] The variation order makes no reference to holidays. The appellant says the original order still applies. The arrangement for holidays is that during each school term holiday Ms XXXX has the care of XXXX for five days during the first week and the appellant is to have care of XXXX for five days in the second week. The original Parenting Order refers to university holidays but in practice since Ms XXXX ceased university study it has been treated as referring to school holidays. The appellant interprets the five day period as being the weekdays. Because of the days of the week each party has XXXX during term time, it seems that Ms XXXX loses two days of time she would normally have with XXXX in every holiday break.

[10] The appellant has mapped these arrangements out on calendars both for 2014 and 2015. These show the holiday arrangement occurring four times each year for two weeks in each period.

[11] The appellant says that at least in relation to 2015 he had care of XXXX for 186 days and Ms XXXX has care of XXXX for 179 days, a difference of seven days. In 2014 he cared for XXXX for 187 days and Ms XXXX cared for him for 177 days, a difference of 10 days in those two week holiday periods. The weekend time the appellant now has with XXXX under the new Parenting Order partly contributes to that situation. In effect the appellant now has XXXX for eight days, whereas Ms XXXX has him for only six days in a two week holiday period.

[12] Ms XXXX says that she was quite unaware that the variation arrangement she agreed to meant that XXXX spent more time in his father's care. She was surprised by the appellant's claim that as a result of the change in the parenting schedule XXXX spends more time in the appellant's care. She said it would never have been her intention to agree to such an arrangement.

[13] The appellant says that in addition to having XXXX in his actual care for slightly greater periods of time, he also has more actual time with XXXX because at various times when XXXX is in his mother's care she is in fact at work and XXXX is cared for by another caregiver. He says that this does not happen when XXXX is in his care. In addition he has XXXX for more weekend time than Ms XXXX. The appellant says that he has greater levels of hands-on day-to-day involvement with XXXX than his mother and has done so since he was eleven months old. He also spends more time participating in XXXX's education and taking him to various activities than Ms XXXX. He says that these matters demonstrate that he takes greater responsibility for XXXX.

Decision

[14] It is Government policy that it should not pay twice for the same child when it comes to the provision of benefits. Section 70B of the Social Security Act 1964 reflects this policy and provides that where both parents of a dependent child are beneficiaries, only the parent with greater responsibility for the child is entitled to have the child taken into account in assessing that parent's entitlement to benefit and the rate of benefit payable. Section 70B(2) sets out how a determination as to which parent has greater responsibility for the child should be made in circumstances where each parent has responsibility for the care of the child for at least 40% of the time.

[15] The Authority must consider this issue at the time the Chief Executive's decision was made on 27 February 2014.

[16] Section 70B(2) of the Act requires that in the first instance, in determining who has greater responsibility for the care of the child, we must have regard primarily to the periods the child is in the care of each parent. As previously outlined the calendars produced by the appellant indicate that in 2014 he had XXXX with him 10 days longer than Ms XXXX and in 2015 seven days longer. In some months in the appellant's analysis he and Ms XXXX have XXXX for the same number of days each month, in some months the appellant has XXXX for more days and in other months Ms XXXX has XXXX for more days than the appellant. The differences arise primarily because of the school holiday arrangements previously outlined. The

holiday arrangement has been interpreted to mean that the five consecutive days should occur on weekdays. This is in fact not indicated in the Parenting Order. There is nothing in the order which would not permit Ms XXXX's five consecutive days to start on the first Saturday of the school holidays and for the appellant's five consecutive days to start on the second Saturday of the holidays.

[17] Given Ms XXXX's reaction to the finding that as a result of the way the holiday arrangement has worked she has less time than the appellant with XXXX, a question arises as to whether the holiday arrangements will work in the way described by the appellant in the future.

[18] In any event, taken over a year the differences in time spent with each parent are minimal. We have reservations as to whether the fact that Ms XXXX lost two days with XXXX in one week of a two week holiday period has any significant bearing on whether or not either party has greater responsibility for the care of XXXX but we note in any event that the arrangements regarding holidays in the original Parenting Order is capable of being implemented in such a way that she does not lose this time.

[19] The appellant submits that we should also take into account that when XXXX is in his mother's care at times she is working or studying and XXXX is looked after by others. The appellant says that this does not happen when XXXX is in his care, presumably because the appellant does not work or study on the days XXXX is in his care.

[20] A child attending kindergarten or school is not in the actual care of a parent when attending those institutions but the parent retains overall responsibility for the care of the child. Likewise if the parent places the child in the care of a caregiver or leaves the child at an extra-curricular activity, the parent remains responsible for the care of the child. We do not consider that any significance can be attached to the fact that Ms XXXX leaves XXXX in the care of a caregiver for periods. She clearly retains responsibility for XXXX during these periods and responsibility for decisions about his daily activity and financial expenses remain the same.

[21] A similar submission is made in relation to the fact that the appellant now has more weekend time with XXXX than Ms XXXX. There is nothing in s 70B which suggests a distinction should be made between weekend and weekday time.

[22] Section 70B(2)(a) requires us to have regard to how responsibility for decisions about how XXXX's daily activities are shared. The evidence is that each parent is responsible for XXXX's daily activities when he is in the care of that parent.

[23] We are then required to consider who was responsible for taking XXXX to and from pre-school and supervising his leisure activities. We understand that in February 2014 XXXX was attending kindergarten in Port Chalmers.

[24] There was some dispute between the appellant and Ms XXXX about this. As the parenting agreement involved the appellant returning XXXX to his mother's care in the morning, he would have liked to simply deliver XXXX directly to the kindergarten. That is what usually happens in parenting arrangements. Ms XXXX however insisted that the appellant return XXXX to her home so that she could then take him to kindergarten. This was perhaps a little unusual but it is not for us to make a judgement about her reasons for this. Whether the appellant took XXXX to

kindergarten once, twice or three times is of no great consequence. The reality was that both parents took XXXX to kindergarten when he was in their care. We note that the appellant made the point that he needed to travel significantly further than Ms XXXX to take XXXX to kindergarten but it is not clear how this translates into taking greater responsibility for XXXX's care.

[25] Both parents supervise XXXX's leisure activities when he is in their care. The appellant says that he has taken XXXX to swimming lessons and has taken XXXX on various trips away from home. Indeed he has taken XXXX to 25 museums. Ms XXXX on the other hand has a different approach to how XXXX's leisure time is spent. For her a particular focus is on spending time with her family and in less structured activity.

[26] We appreciate that the appellant has clearly thought about activities which will help to extend XXXX and aid his educational development, but these matters go primarily to the quality of care and not responsibility for care. In the case of a preschooler Ms XXXX's approach may well be equally valid and in fact complement the appellant's approach. We are unable to say that the appellant's more hands-on involvement in XXXX's leisure activities is evidence of his taking greater responsibility for XXXX.

[27] We are then required to consider how decisions about XXXX's education and health care are made. We understand that Ms XXXX made the decision to enrol XXXX at the kindergarten. We understand that both she and Mr XXXX visited the Port Chalmers school prior to him being enrolled and that Mr XXXX was primarily involved in actually enrolling XXXX at that school but in any event this did not occur until well after the Chief Executive made his decision in February 2014.

[28] In relation to health care we understand that both parents have taken XXXX to the doctor at various times, although XXXX is generally well he does have some issues with ear infections. We are not satisfied that it can be said either parent has taken greater responsibility than the other when it comes to medical care.

[29] The appellant says that he is solely responsible for XXXX's dental care. This is not entirely borne out by the records supplied which show Ms XXXX attending dental care appointments with XXXX in January and May 2014.

[30] Finally s 70B(2)(d) and (e) require us to have regard to the child's material support and which parent pays for which expenses of the child.

[31] Both parents pay for XXXX's needs when he is in their care. There was some evidence that Ms XXXX gave Mr Eddy $50 to assist him with XXXX's costs in relation to a holiday period, but it is not clear that that information was available to the Chief Executive when he made his decision in February 2014. The information about the payment of school fees is not relevant to this decision, although it transpires that both parents have paid school fees for XXXX. Both parents pay some child support.

[32] The appellant said that he had supplied musical instruments, a trike and books for XXXX that he could use at Ms XXXX's home. He has also paid for XXXX to visit various places away from the Dunedin area. This is relevant to XXXX's educational development. We were left in no doubt that the appellant is doing his best to be an involved and nurturing father.

[33] There is very little to separate the appellant and Ms XXXX in terms of the matters referred to in s 70B(2). The only real difference between the appellant and Ms XXXX is in the number of days actually spent with each parent over the school holiday period, although this difference is not sanctioned by the terms of the Parenting Order. Two days extra over a school holiday period four times a year is not the same as one parent having care of a child for more time on a weekly basis. We are not satisfied that the very small amount of extra time the appellant has had in the holidays in this case translates into taking greater responsibility for XXXX's care. We are not satisfied that either parent had greater responsibility for XXXX at the time the Chief Executive's decision was made in February 2014.

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

[35] As we are not able to decide which parent had greater responsibility for XXXX at the time of the decision in February 2014, we are required to consider who was his principal caregiver prior to the parents separating. The Authority has already decided that issue in its 2012 decision. It concluded that Ms XXXX was the principal caregiver of XXXX prior to separation and on that basis she was entitled to have him included in her benefit. There is no reason for us to revisit that issue. We consider that on the basis that Ms XXXX was XXXX's principal caregiver prior to separation she remains the person entitled to have XXXX included in her benefit.

[36] However that is not the end of the matter. 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.

[37] The possibility of the Chief Executive making a decision under this provision to pay part of Ms XXXX's benefit to the appellant was not canvassed at the hearing and does not appear to have been considered by the Chief Executive.

[38] Given that the school term parenting arrangement is that XXXX spends equal periods of time in the care of both parents, we consider the Chief Executive should give consideration to paying part of Ms XXXX's benefit to the appellant. Clearly for half of the time she does not have certain costs relating to XXXX such as food, transport and electricity. It seems unfair therefore that she should continue to receive the full benefit entitlement that includes XXXX for 52 weeks per annum.

[39] We direct the Chief Executive to make a determination in relation to whether or not he should pay part of Ms XXXX's benefit entitlement to the appellant, for the benefit of XXXX and the amount of such payment. We would expect both parties to provide detailed budgets to the Chief Executive to assist him in making this determination. If a decision is made to make a payment from Ms XXXX's benefit to the appellant, then both parties will be entitled to separate rights of review and appeal.

[40] In the meantime this appeal is adjourned. Leave is reserved to either party to return to the Authority for further directions.

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

DATED at WELLINGTON this 18 day of May 2015

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Ms M Wallace
Chairperson

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Mr K Williams
Member

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Lady Tureiti Moxon
Member