

[2015] NZSSAA 096

Reference No. SSA 075/15

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

of an appeal by **XXXX** of
Christchurch against a decision
of a Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr R D Burnard - Chairperson
Mr K Williams - Member
Lady Tureiti Moxon - Member

HEARING at WELLINGTON on 12 November 2015

APPEARANCES

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

DECISION

Introduction

[1] Ms XXXX appeals against a Benefits Review Committee decision upholding the Ministry's decision not to pay Ms XXXX Supported Living Payment and Disability Allowance during the period 8 October 2014 to 5 November 2014 whilst Ms XXXX was overseas.

Background

[2] Ms XXXX is a widow in receipt of Supported Living payment and Disability Allowance at the rate of \$307.34 per week. She booked travel in July 2014 to visit a

sick relative in October 2014 but did not notify WINZ before her departure that she was leaving the country. The Ministry became aware of her absence by a data match and her benefit was suspended.

[3] On her return to New Zealand Ms XXXX visited the Work and Income office in Sydenham advising that she had returned to New Zealand and had been out of the country for 27 days. On 24 November the Ministry advised that her Supported Living Payment would not be backdated.

Case for the appellant

[4] Ms XXXX gave evidence before the Authority through an interpreter. She relied on two principal grounds. First she said that she had had to travel overseas because her cousin, who had been brought up as a sister in the family had pancreatic cancer and Ms XXXX was told that she had only three or four months to live. She had to first arrange for accommodation for her mother in Christchurch in a Mandarin-speaking establishment and this took some time. She then travelled overseas and saw her cousin and also obtained medical treatment herself. She considered that there were humanitarian reasons for her visit which entitled her to receive the benefit while she was overseas.

[5] The second issue she raised was that she had not received notification of a change in the requirements relating to overseas travel by beneficiaries. She said that she had not received a letter from the Ministry in June 2013 notifying of the changes as she at that time had been staying with relatives in Hamilton whilst her Christchurch home was being repaired following the earthquake. During her absence on that visit the letterbox had fallen over.

[6] Ms XXXX contended that she had understood that beneficiaries could be paid during overseas trips of not more than four weeks a year provided they advised the Ministry following their return to New Zealand and showed evidence of the journey.

Case for the Ministry

[7] In a comprehensive report under s 12K(4)(e) of the Social Security Act 1964 ("the Act") Ms Singh for the Chief Executive recorded the history of the Ministry's dealings with Ms XXXX in connection with overseas travel. She maintained that the appeal came down to the issue of the beneficiaries' duty to advise the Ministry of overseas travel under s 77(6) of the Act. She said that there was a positive obligation to notify the department of the forthcoming trip which Ms XXXX had not complied with.

[8] Ms Singh said that the Ministry had considered whether there were humanitarian grounds for exercising a discretion in Ms XXXX's favour but the travel did not meet the requirements of Regulation 8 of the Social Security (Effect of Absence of Beneficiary from New Zealand) Regulations 2013 because Ms XXXX had not been making an overseas visit which met the requirements of that provision having booked three months ahead of her travel.

[9] Ms Singh also submitted that the Ministry had complied with the obligation to explain the provisions of the overseas travel requirements when the legislation was changed in 2013 by notifying Ms XXXX in a letter of 10 June 2013 sent to her home address which included the statement "you need to tell us if you are travelling overseas. Let us know before you leave New Zealand no matter how long you plan to be away or why you are travelling".

The Authority's findings

[10] The legislation relating to the impact on a benefit of the beneficiary's absence from New Zealand was amended in 2013 when changes were made to s 77 of the Act. Of particular importance in respect of this appeal is the requirement in subs 6 that "a beneficiary who proposes to be absent from New Zealand has a duty imposed by this subsection to notify an officer of the department before that absence of the beneficiary's forthcoming absence from New Zealand. ..."

[11] Ms XXXX did not notify the department of her forthcoming absence from New Zealand for reasons which will be discussed later in this decision. In presenting her appeal Ms XXXX relied primarily on the contention that her trip overseas had been for humanitarian reasons to visit her gravely ill cousin. The Chief Executive has a discretion to authorise a beneficiary's entitlement to be paid their benefit whilst overseas in subsection 8 which reads:

Despite subsections (6) and (7), the chief executive may, in his or her discretion, authorise the beneficiary's entitlement under subsection (2), (3), (3AA), (3A), or (4) to commence on or after the beneficiary's departure if the chief executive is satisfied that—

- (a) both the beneficiary's absence from New Zealand, and the beneficiary's failure to notify an officer of the department, before that absence, of the beneficiary's forthcoming absence from New Zealand, are justified for 1, or more good and sufficient humanitarian reasons (as the term humanitarian reasons is defined for the purposes of this paragraph by regulations made under section 132); and
- (b) the beneficiary after departing from New Zealand notified an officer of the department of the beneficiary's current absence from New Zealand as soon as was reasonably practicable in the circumstances.

[12] “Humanitarian reasons” are defined in Regulation 8 of Social Security (Effect of Absence of Beneficiary from New Zealand) Regulations 2013 which reads:

In section 77(8)(a) of the Act, humanitarian reasons means any of the following:

- (a) a need or desire to provide aid or assistance to a family member immediately following a natural disaster or adverse event:
- (b) a need or desire to be with a family member who is facing sudden imminent death or who has suddenly been taken seriously ill or seriously injured:
- (c) a need or desire to attend the sudden funeral (however called) of a family member.

[13] Of the three circumstances in the Regulation only (b) would apply to Ms XXXX’s case namely the “need or desire to be with a family member who is facing sudden imminent death or who has suddenly been taken seriously ill or seriously injured”.

[14] Whilst the Authority accepts that Ms XXXX’s cousin was seriously ill the Authority is not persuaded that this was a situation in which Ms XXXX visited her cousin because she was facing sudden imminent death or had been suddenly taken seriously ill. Ms XXXX told us that she had been notified by her uncle in July 2014 of her cousin’s illness but the circumstances in which she decided to make the bookings and travel overseas involved a delay of some three months, whereas in the Authority’s opinion the Regulation requires a relatively hasty decision to make an overseas trip within days rather than months to enable the discretion to be exercised.

[15] The second issue raised by this appeal has caused the Authority more concern. In paragraph 6.29 of the Section 12K Report Ms Singh stated that the obligation on a beneficiary to advise the Ministry of intended travel overseas had not changed in 2013. She recorded “the only change is that a beneficiary is unlikely to get paid a benefit if they did not advise the Ministry of their travel prior to leaving New Zealand”. We do not agree. Prior to the 2013 changes we understood from Ms Singh that the Ministry considered there was a duty to inform the department of travel overseas by reason of s 80A of the Act which provides:

80A Duty to advise change of circumstances affecting entitlement to benefit

- (1) Every beneficiary shall forthwith advise an officer of the department of any change in circumstances which affects the right of the beneficiary to receive the benefit received by him or which affects the rate of any such benefit.

[16] By the original s 77(1) & (2) a beneficiary was entitled to be paid certain benefits “in respect of the first four weeks of any absence from New Zealand if the Chief Executive is satisfied that the absence does not affect the beneficiary’s eligibility for the benefit”. Ms XXXX was paid her benefit on previous occasions in respect of periods when she was absent from New Zealand despite not having notified the Ministry in advance of her plans. This is shown from departmental entries in Exhibit 11 of the Section 12K Report. At 16 June 2005 there is a note that she was absent from 4 to 10 June 2005 without her benefit apparently being affected. She did advise of overseas travel on 18 May 2007 and was told to bring her passport into the Ministry on her return. A later overseas trip on 18 June 2010 appears to have been brought to the Ministry’s attention by a data match but without her benefit being affected. On 8 November 2011 a note appears to record Ms XXXX contacting the Ministry on returning to New Zealand and providing her boarding pass, which led to her receiving the benefit for four weeks but not for a period of 10 days in excess of that time.

[17] On examining this history the Authority does not discern a pattern of notification from Ministry officers to Ms XXXX that she was required up until 2013 to notify her overseas trips in advance. She strongly maintained that she understood the rule was to bring her passport and boarding pass into the Ministry on her return from overseas, which she appears to have done following her contact with the Ministry in 2010.

[18] It was certainly the position prior to the changes in the legislation that a beneficiary was required by s 80 to advise a “change of circumstances affecting entitlement to a benefit” but a person continuing to live at the same address but making periodic trips to other parts of New Zealand for short terms, or to an overseas country for a few days, could not in the Authority’s view be considered to be changing their circumstances if they continued to live at the same address without altering their financial or other living circumstances.

[19] But the amendments to s 77 in 2013 imposed a duty to notify the department of absence from New Zealand and disentitlement to be paid a benefit where such notification had not been given. It was plainly believed that this change should be explained to beneficiaries and a new s 77A was inserted which reads:

77A Effect of absence of beneficiary from New Zealand: department must explain provisions

The chief executive must take reasonable and appropriate steps to make every person who is, or appears to the chief executive to be likely to be, affected by a provision of section 77 aware of—

- (a) the existence, and substance, of the provision; and
- (b) the consequences or possible consequences of the operation of the provision.

[20] The Ministry in Ms XXXX's case produced a copy of a letter of 10 June 2013 to her address setting out the change and making it plain that there was a requirement to inform the Ministry if she was travelling overseas before (and that word was highlighted) she left New Zealand.

[21] We agree with Ms Singh that with thousands of beneficiaries to be notified it was reasonable for the Ministry to simply send the letter to Ms XXXX recorded address and the copy of the letter appears to have been correctly addressed and to have clearly explained the new provisions.

[22] However we are satisfied from Ms XXXX's evidence that she did not receive the letter. At the relevant period she was not living at home whilst earthquake repairs were being carried out. She impressed us as an honest person who was anxious to comply with what she described as government rules, but she was adamant that she did not receive the letter. Section 86J of the Act reads:

86J Notices

- (1) Every notice given to any person under this Act may be given by delivering it to that person—
 - (a) in the case of a natural person (other than an officer or employee in the service of the Crown in his or her official capacity)—
 - (i) personally; or
 - (ii) by leaving it at that person's usual or last known place of residence or business or at the address specified by that person in any application or other document received from that person; or
 - (iii) by posting it in a letter addressed to that person at that place of residence or business or at that address:
 - (b) in the case of any other person, including an officer or employee in the service of the Crown in his or her official capacity,—
 - (i) where applicable, personally; or
 - (ii) by leaving it at that person's place of business; or
 - (iii) by posting it in a letter addressed to that person at that place of business.
- (2) If any such notice is sent to any person by post, then, in the absence of evidence to the contrary, the notice shall be deemed to have been received by that person on the fourth day after the day on which it is posted, and, in proving the delivery, it shall be sufficient to prove the letter was properly addressed and posted.

[23] It will be noted that by subs 2 a notice sent to a person by post is deemed to have been received by that person on the fourth day after the day on which it was posted. This provision however is “in the absence of evidence to the contrary”. We accept the evidence of Ms XXXX that she did not receive the letter and it could not be said therefore that she received notice of the change to the legislation.

[24] The Authority is left with the position that whilst we are satisfied Ms XXXX did not receive the letter of 10 June 2013, nevertheless the Ministry has complied with the obligation to explain the provisions of the new legislation by “taking reasonable and appropriate steps” to make beneficiaries aware of the provisions. In these circumstances it seems to us as a matter of law that the duty imposed to notify the department in advance continues to apply to Ms XXXX's position and prevent her being entitled to be paid the benefit whilst she was overseas (s 77(6) of the Act). If there were an overriding discretion vested in the Chief Executive to pay the benefit, notwithstanding a lack of compliance with subs 6, the Authority would rule that the discretion should be exercised, but the only discretion which appears to be given by the section is contained at subs 8 and we have already held that this cannot be applied in Ms XXXX's situation. We consider that there is an element of unfairness in the outcome of this appeal but we are bound to apply the legislation and uphold the Ministry's position.

Conclusion

[25] For the reasons given above the appeal is dismissed.

DATED at WELLINGTON this 8th day of December 2015

Mr R D Burnard
Chairperson

Mr K Williams
Member

Lady Tureiti Moxon
Member