

[2016] NZSSAA 053

Reference No. SSA 163/15

IN THE MATTER

of the Social Security Act 1964

AND

IN THE MATTER

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Ms M Wallace - Chairperson
Mr K Williams - Member

DECISION ON THE PAPERS

Introduction

[1] The appellant appeals against decisions of the Chief Executive upheld by a Benefits Review Committee to:

- (i) suspend Jobseeker Support from 31 October 2014 due to an alleged work obligation failure; and
- (ii) decline to pay a non-recoverable Special Needs Grant for food on 24 November 2014.

Background

[2] The appellant reapplied for and was granted Jobseeker Support from 17 March 2014.

[3] Ministry records indicate that on 4 June 2014, 17 July 2014, 27 August 2014 and 20 October 2014 he failed to attend appointments with Ministry staff to discuss his work search activities and related matters.

[4] Following his failure to attend the appointment on 27 August a letter was sent to the appellant advising him that his benefit would be reduced by 50% on 5 September 2014. He needed to get in touch with the Ministry by 5 September 2014. The appellant contacted the Ministry and advised that he did not attend the appointment on 27 August as he had not received a letter advising him of the appointment. As a result the appellant was advised that his benefit payment would not be reduced.

[5] This advice appears to have been overlooked when the appellant failed to attend the appointment on 20 October 2014. It was determined that his failure to attend this appointment was his second obligation failure and he was advised that his benefit would be stopped from 30 October unless he disputed or disagreed with the decision. The appellant was advised of this decision by letter dated 21 October 2014.

[6] On 31 October 2014, the appellant's benefit payments were suspended.

[7] A letter had been sent to the appellant on 20 October 2014 advising him of a further appointment on 24 November 2014.

[8] The appellant subsequently attended the interview on 24 November 2014. This was treated as being recompliance. However, the appellant's benefit was not in fact resumed immediately apparently as a result of some objection on the part of the appellant.

[9] The appellant sought a review of the decision to suspend his benefit. 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.

[10] In the course of preparing for the appeal, the Ministry conceded that it had overlooked the decision not to treat the failure to attend the appointment on 27 August as an obligation failure. A decision was made that the failure to attend the meeting on 20 October 2014 was therefore a first obligation failure. As a result, the appellant's benefit should have been reduced to 50% in the period 31 October 2014 to 24 November 2014, rather than suspended completely. However, the Ministry advise that the appellant had mentioned having had employment during the period his benefit was suspended. They have not been able to ascertain whether the appellant had income from employment during this period and have therefore not been able to reimburse him for any underpayment of benefit.

[11] The appellant's position is that the letter of 20 October 2014 advising him of a further appointment on 24 November, effectively overrides the letter of 21 October advising of the imposition of a sanction. He says that the letter of 20 October advising of the appointment on 24 November should be regarded as a contract and his benefit should not have been suspended. The Ministry say that the letter of 20 October should simply be seen as a willingness on the part of Work and Income to continue working with the appellant.

Legislation relevant to this appeal

[12] A person in receipt of Jobseeker Support in the appellant's position has certain obligations under the Social Security Act 1964 (the Act). In particular, he must comply with the work test.

[13] Provision for the work testing of beneficiaries is set out in ss 101-123D of the Act.

[14] The work test obligations provided in s 102(A)(1) include the requirement:

- (c) to attend and participate in an interview for an opportunity of suitable employment to which the beneficiary is referred to by the Chief Executive; and
- (d) when required by the Chief Executive to attend and participate in any interview with an officer of the department or other person on behalf of the Chief Executive; and
- (e) when required by the Chief Executive to undertake planning for employment; and
-
- (g) to report to the department on his or her compliance with his or her work test obligations as often and in the manner as the Chief Executive from time to time reasonably requires.

[15] Section 116(B)(1)(e) provides that when a person is a work tested beneficiary, and the Chief Executive considers that person has, without good and sufficient reason, failed to comply with any of the obligations set out in s 102(A), a sanction under s 117 must be imposed.

[16] Section 117 provides that the sanctions the Chief Executive must apply in respect of failures under s 116(B) are:

- (a) For a first failure, the person's benefit must be reduced by 50% until the person recomplies.
- (b) For a second failure (being a failure that occurs after the person has recomplied following a first failure), suspension of a person's benefit until the person recomplies.

.....

[17] Section 113 of the Act sets out the procedure for imposing sanctions. It provides in subsection (2) that a written notice must be given to the person before their benefit is reduced, suspended or cancelled.

[18] The notice must:

- (a) state the beneficiary has failed to comply with a specified obligation under the Act;
- (b) specify the nature of that non-compliance;
- (c) state, on the basis of the non-compliance the action being taken in regard to the person's benefit;
- (d) specify the date on which the action is to take effect and the nature and duration of any reduction or suspension;
- (e) state the person has five working days from giving of the notice to dispute the decision;
- (f) advise the person to contact the department if they want to dispute or discuss the decision; and
- (g) contain a clear statement of a person's right, under s 10A, to apply for a review of the decision and set out the procedure for applying for a review.

[19] Section 114 provides that the notice under s 113 is deemed to have been given to the person if it is delivered personally or by leaving it at the person's usual or last place of residence or the most recent address given by the person. If posting it in a letter, notice is deemed to be given when it is posted.

Decision

[20] We accept that at the relevant time, the appellant:

- (i) was a work tested beneficiary; and
- (ii) he failed to attend an appointment on 20 October to talk about his current work situation and to view his job search diary; and
- (iii) a notice was forwarded to him on 21 October giving him notice of the imposition of a sanction.

Legitimate expectation

[21] Two issues arise in this case. The first issue is that the appellant says on 20 October 2014, a letter was sent to him arranging a further appointment for 24 November 2014. This negates the letter of 21 October 2014 imposing the sanction.

[22] At the outset we note the payment of benefits is a result of a statutory entitlement enacted by Parliament. It is not a matter of contract. Nor is it an employment law situation.

[23] We have considered whether the letter of 20 October may have given rise to a legitimate expectation on the part of the appellant that no action resulting from his failure to attend the meeting on 20 October would be taken against him, and that he would be entitled to retain his full benefit until the appointment made for 24 November. There is no suggestion that an express representation to this effect was made to the appellant. Moreover, we do not consider that such an expectation would be reasonable. We do not consider that having issued an appointment to the appellant on 20 October, the Chief Executive was precluded from considering whether or not a sanction notice should be issued and proceeding to issue such a notice the following day.

[24] We note however that by any measure it was incompetent of the Ministry to make an appointment for 24 November when recompliance with work test obligations required the appellant to do something by 30 October. In the particular circumstances, we would expect that if a further appointment was to be made it should be made in the period before the sanction was due to be imposed, not three weeks later, when technically the person may no longer be on benefit.

Breach of statutory obligation

[25] The second issue is that the letter of 21 October 2014 does not correctly state the sanction that could be applied. This situation has arisen because it is now regarded as a first work test breach rather than a second. Section 113 sets out the matters to be included in the notice given. In this case, the notice sets out all of the required matters, including the sanction to be imposed. However, it incorrectly states that the sanction will be suspension of the appellant's benefit rather than reduction of his benefit by 50%.

[26] The Authority has previously found that strict compliance with s 113 is required.¹ The consequences of imposing a sanction are very serious. Matters to be considered in determining the impact of an error such as this will include:

- (i) the place of the provision in the scheme of the Act;
- (ii) the purpose of the provision viewed in isolation;
- (iii) the extent of the breach;
- (iv) the effect of holding that the action is unlawful because of non-compliance;
- (v) the effect of the statement of sanction on the appellant; and
- (vi) an overall assessment in the light of the above factors about whether the intention of the legislature in the enactment as a whole and the provision concerned, has been sufficiently met to excuse the breach.²

[27] The purpose of the requirement to serve a notice is to advise of the imposition of a sanction. The notice also gives the beneficiary time to remedy his breach and avoid imposition of the sanction. It is difficult to conclude that the misstatement of the sanction by advising of a greater sanction than the one to be imposed would have any impact on the appellant or his actions following receipt of the notice.

[28] The appellant was given notice that a sanction involving the suspension of his benefit was about to occur. The key requirements of s 113 were met. We are not satisfied that the appellant was adversely affected by the overstatement of the sanction. We are satisfied that on this occasion the requirements of s 113 were sufficiently met to excuse the failure to state the extent of the sanction correctly. Our conclusion would have been different had the notice advised of a lesser sanction than the one actually imposed.

[29] We are satisfied that when the appellant failed to re-comply with his work test obligations by 30 October, the Chief Executive was entitled to reduce the appellant's benefit by 50%. We note that the Chief Executive has not yet been able to settle the amount to be paid to the appellant. The remedy for this situation is in the hands of the appellant.

¹ See [2014] NZSSA 79.

² See G Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) Para 13.05..

Food grant

[30] On 24 November 2014, the appellant applied for financial assistance of \$50 to help with the cost of food.

[31] The welfare programme known as the Special Needs Grant Programme provides for assistance with food in certain circumstances.

[32] The Ministry point out that clause 5(b) of the Programme provides that in considering an application for a food grant, the Chief Executive may take into account the extent to which the applicant has caused or contributed to the immediate need or to the situation that has given rise to the immediate need. In addition, clause 9.11 provides that an applicant is not entitled to a grant if the benefit being paid to him or her is suspended or reduced under s 117 of the Act.

[33] On behalf of the Chief Executive it is submitted the appellant's benefit was suspended or reduced under s 117 of the Act because of his failure to comply with his work test obligations. On this basis, the Chief Executive declined the appellant's application. In addition, the application was declined because the appellant had caused the hardship he found himself in by not meeting his work obligations, which resulted in him not receiving his full benefit payment. It is also submitted that the appellant has not provided a good reason for his failure to attend the appointment on 20 October 2014.

[34] Now that the Ministry has conceded that the appellant complied by attending the appointment on 24 November, and that it acted incorrectly by completely suspending the appellant's benefit rather than simply reducing it to half, we do not think the Ministry can rely on s 117 for declining the grant. Moreover, as the appellant's benefit was incorrectly suspended completely rather than reduced to half, taking clause s 5(b) of the Direction into account requires some caution.

[35] The appellant may have been entitled to a food grant but we have insufficient information to determine this issue, particularly in light of the appellant's statement that he had undertaken some employment in the period concerned. We direct the Chief Executive give further consideration to the appellant's application for a food grant. The appellant will need to provide a copy of his bank statements for the months of October and November 2015 to enable a determination to be made, together with details of any wages earned.

[36] To the extent that the Ministry now acknowledge the correct sanction was 50% of the appellant's benefit not suspension and the impact of this incorrect decision on

his application for a food grant has not been properly considered, the appeal is allowed. In all other respects the appeal is dismissed.

[37] The Chief Executive is directed to reconsider the application for a food grant.

DATED at WELLINGTON this 16th day of June 2016

Ms M Wallace
Chairperson

Mr K Williams
Member

SSA163-15.doc(jeh)