[2016] NZSSAA 091

Reference No. SSA 003/16

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of Invercargill 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

DECISION ON THE PAPERS

Introduction

[1] The appellant appeals against a decision of the Chief Executive, upheld by a Benefits Review Committee, to impose a sanction of a 50% reduction in the appellant's Jobseeker Support payment from 3 August 2015, due to the appellant failing to attend a work preparation meeting on 22 July 2015.

Background

[2] The appellant is aged XX years. He is in receipt of a single rate of Jobseeker Support. He has a medical deferment.

[3] The appellant suffers from "upper cervical nuchal pain".

[4] The appellant was granted Jobseeker Support from 25 August 2014. The letter advising him of the grant advised that because of his circumstances he did not have to look for work straightaway but he would be required to take part in activities to prepare for work "when you are able". He was advised:

> This means you'll need to:
>
> be available for and take reasonable steps to prepare for work.
> Work with us and take part in work preparation interviews.

The appellant was subsequently sent correspondence advising him of the need to be preparing for work.

[5] On 19 January 2015, the appellant was asked to attend a meeting on 29 January 2015 to discuss how he was preparing for work. The appellant contacted the Ministry and advised that he could not attend this meeting as he had not been given sufficient time to ensure that his legal rights were preserved by engaging a lawyer.

[6] On 8 April 2015, the appellant was sent a further letter advising him to attend a meeting with a case manager on 13 May 2015 to talk about what he had been doing to prepare for work.

[7] On 8 May 2015, the appellant wrote to the Ministry advising that he could not attend the meeting on 13 May 2015. He stated he was not going to place himself in a position where his rights could be jeopardised.

[8] On 22 June 2015, a further appointment was made for the appellant to attend a meeting at Work and Income on 22 July 2015 to discuss his work preparation activities.

[9] There were further communications with the appellant on 27 June 2015 and 20 July 2015 concerning his ongoing entitlement to Jobseeker Support and the associated obligations. In particular, on 20 July 2015, he was advised that his Jobseeker Support had been reviewed and based on his medical certificate it had been determined that he did not need to look for work but he did need to be preparing for work.

[10] The appellant did not attend the appointment on 22 July 2015.

[11] On 23 July 2015, notice was given to the appellant that his benefit would be reduced by 50% on 31 July 2015 because:

> On 22 July 2015 you didn't meet your work preparation obligations as you weren't available for or taking reasonable steps to prepare for work.

It was suggested to the appellant that he contact the Ministry to talk about what he needed to do to get his full benefit reinstated.

[12] The appellant wrote to the Ministry on 25 July 2015. A copy of that letter is not available but we understand the appellant outlined his reason for not being able to attend the meeting on 22 July 2015, namely, that his medical condition had made it impossible for him to attend an appointment that day.

[13] As a result, the appellant was advised in a letter dated 29 July that he should provide evidence of the medical event he referred to and that a further appointment had been made for 17 August 2015 so that the sanction on his benefit could be lifted.

[14] The Ministry further wrote to the appellant on 3 August 2015, advising that he had not met his obligations and that his Jobseeker Support was reduced by 50% from that date.

[15] The appellant sought a review of this decision.

[16] 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.

[17] In a letter to the Benefits Review Committee co-ordinator, the appellant advised that he had intended to attend the meeting on 22 July but had been unable to so because of his debilitating injuries. He noted that it was unreasonable for clients "under medical duress to be expected to attend appointments if they are unable to do so". He did not attend the Benefits Review Committee hearing.

[18] The appellant chose not to attend a hearing before this Authority. He elected to have the matter dealt with on the papers.

[19] In his written submissions to the Authority, the appellant says that his letter of 25 July provided a good and sufficient reason for being unable to attend the meeting on 22 July. He had expected the sanction to be lifted immediately. It is highly unsatisfactory that this letter has now been lost.

[20] The appellant refers to an extract from a medical report dated 18 August 2014 which states:

> At times the burning pain doesnt ease and he becomes 'incapacitated' this is associated with pain left maxilla region which if he can't relieve with cervical manipulation he has to go to bed lie down supine and he applies pressure to his forehead, the pain gradually calms down.

[21] The appellant says this describes what happened to him on the morning of 22 July. The medical events he experiences are unpredictable in frequency, severity and duration.

Legislation relevant to this appeal

[22] A person in receipt of Jobseeker Support has certain work test obligations pursuant to s 102A of the Social Security Act 1964 (the Act).

[23] In this case, the appellant's work test obligations were deferred pursuant to the provisions of s 88I. In this circumstance, the provisions of s 88J of the Act provide that ss 60P, 60Q and 60R of the Act apply to the appellant as though he were not a work-tested beneficiary.

[24] Section 60Q(2) provides that a person has a general obligation to take all steps that are reasonable and practicable to prepare for employment and to comply with any requirement under subsection (3). Section 60Q(3) provides that the Chief Executive may from time-to-time require a person to participate in certain activities. These activities include planning for employment, attending and participating in interviews with an officer of the department or other person, work assessment programmes or seminars etc. These provisions applied to the appellant.

[25] Section 60R places a responsibility on the Chief Executive to explain obligations to beneficiaries and the consequences of failure to comply with those obligations, including the sanctions that can be imposed.

[26] Sections 116B(1)(c) and 117 provide that if a person fails to attend an interview with an officer of the department without good and sufficient reason then a sanction must be imposed.

[27] Section 117(1)(a)(i) provides in the case of a first failure the beneficiary's benefit must be reduced by 50%.

[28] Section 113 provides the procedure for imposing a sanction. This includes giving a notice to the beneficiary specifying the nature of the non compliance and other matters.

Decision

[29] There is no dispute in this case that the appellant was in receipt of Jobseeker Support, but that because of his medical condition he had a medical deferment and was not required to job search or to be available for or look for employment. He was, however, required to participate in activities which included planning for employment, attending and participating in interviews, work assessment programmes, seminars, work experience, employment-related training and the like.

[30] The Ministry has enumerated a number of occasions where the appellant was advised of his obligations. The submissions made by the appellant did not suggest that he was unaware of his obligations. We accept that the appellant was aware of his obligations.

[31] The appellant failed to attend two meetings prior to his non-attendance at the meeting on 22 July 2015. There is no indication in the s 12K report about whether the Chief Executive considered whether the appellant's failure to attend these meetings was for a good and sufficient reason.

[32] There is no dispute that the appellant was given notice of the meeting on 22 July by letter sent on 22 June 2015, and that he failed to attend.

[33] Before a sanction notice could be issued, however, the Chief Executive needed to be satisfied that the appellant did not have a good and sufficient reason for his failure to attend the interview.

[34] In this case, the decision to impose a sanction was made on 23 July. No explanation has been offered about why the Chief Executive considered the appellant did not have a good and sufficient reason for failing to attend the meeting. Making a decision about whether the appellant had a good and sufficient reason for failure to attend is critical. In fact, if the Chief Executive was to make a decision to impose a sanction based on the statutory criteria, he should have given the appellant an opportunity to provide an explanation for his non-attendance, then on the basis of that

explanation, make a decision on the information provided (or not provided). This ought to have occurred before the sanction notice was issued.

[35] Furthermore, the sanctions notice must accurately specify the nature of the non-compliance.

[36] The notice given to the appellant states that he has failed in his obligations as he was not available to take reasonable steps to prepare for work. The reason the Ministry have put to the Authority for imposition of the sanction was that the appellant had failed to attend the required interview. In the appellant's circumstances, the notice should have stated that the failure of the appellant to comply with his obligation was his failure to attend an interview 'without good and sufficient reason'.

[37] In effect, in this case there has been a breach of the Chief Executive's statutory duty to impose sanction only where the necessary decisions and specified procedures have taken place. 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 light of the above factors, about whether the intention of the legislature, the enactment as a whole and the provisions concerned have been sufficiently met to excuse the breach.[1]

[38] In effect, two errors have occurred in the process in this case. First, the Chief Executive has failed to consider whether the appellant had a good and sufficient reason for failing to attend the interview before issuing the sanction notice. Second,

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[1] G Taylor *Judicial Review: A New Zealand Perspective* (3rd edition, Lexus Nexus, Wellington 2014) at [13.05]

the notice itself did not correctly specify the breach because the correct decision making process was not followed in the first place.

[39] The appellant did write to the Ministry on 25 July explaining his reasons for failing to attend the interview. It appears that the decision maker was prepared to consider the possibility that a medical event had prevented his attendance but this could not cure the error in issuing the sanction notice prior to an appropriate decision being made in the first instance.

[40] Moreover, while the Ministry wrote to the appellant on 29 July 2015 acknowledging his letter of the 25th, asking him to provide evidence of the medical event he had mentioned and advising him of an appointment on 17 August to lift the sanction, the decision maker proceeded to reduce the appellant's benefit to 50% on Monday 3 August when it is perfectly apparent that the appellant would not have had time to provide any additional material. Indeed, the letter of 29 July 2015 could be read as meaning that the decision maker would consider whether there was a good reason for the appellant failing to attend the meeting and lift the sanction on 17 August. This letter appears to be in the Ministry's tradition of writing confusing and inconsistent letters to its clients. In any event, the legislation requires the decision maker to consider whether there was a good and sufficient reason for failing to attend a meeting before the sanction notice is issued, not afterwards.

[41] The Authority has previously found that strict compliance with s 113 is required.[2] The consequences of imposing a sanction are very serious. The reduction of what is in any event, a benefit paid at an extremely modest rate by 50% is a very serious matter. We consider the errors of process in this case to be a significant breach of the rules laid down by Parliament to ensure that injustices do not occur.

[42] As the Chief Executive has not followed the process required to impose a sanction in this case, the imposition of the sanction was invalid. The appellant's benefit should be restored to the full rate. The Chief Executive is to reimburse the appellant's benefit from 3 August 2015. We note that the appellant's benefit was cancelled from 21 September 2015; we are unaware of the reason for this or whether this was linked to the sanction procedure.

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[2] [2014] NZSSA 79

[43] We note in passing that we have not made any final decision in relation to whether or not the appellant had good and sufficient reason for failing to attend his interview.

[44] Leave is reserved for either party to return to the Authority for further directions in the event that directions are required in relation to the period in respect of which the appellant's benefit should be reinstated to the full amount.

[45] The appeal is allowed.

DATED at WELLINGTON this 21st day of October 2016

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Ms M Wallace
Chairperson

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Mr K Williams
Member

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Lady Tureiti Moxon
Member