

[2017] NZSSAA 017

Reference No. SSA171/16

**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**

**Mr G Pearson** - Chairperson

**Mr C Joe** - Member

**Hearing** at Wellington on 4 April 2017

### **Appearances**

For Chief Executive of the Ministry of Social Development: Ms J Hume (agent)

For the Appellant: Mr N Ellis (agent)

## **DECISION**

### **Background**

- [1] Ms XXXX suffered from polio. As a result, she has a knee-ankle-foot orthosis, commonly known as an artificial leg. She depends on callipers to walk. Due to the attributes of her natural and artificial feet she requires a different size shoe on each foot. Unless custom made, to have one functional pair of shoes it is necessary to purchase two pairs. Non-matching sized shoes are no longer available in New Zealand. Accordingly, there is no dispute that for Ms XXXX to obtain a pair of shoes in New Zealand which she can use, she needs to purchase two pairs.
- [2] Proper footwear is critical for Ms XXXX's mobility. In the mid-1990s, the orthotic services provided by the State's health system made special

shoes for Ms XXXX. They did not work. The result was that on two occasions Ms XXXX fell and, as a result, suffered broken bones and the obvious health consequences. In the 20 years since Ms XXXX suffered those injuries, she has purchased shoes available at retail. She takes the shoes to the local Orthotic Centre (a service provided by the State's health system). The Orthotic Centre builds up the soles of these shoes in an appropriate way, and adds a non-skid sole. In the 20 years this has been happening, Ms XXXX has found the shoes satisfactory, and she has been safe without falling due to inappropriate shoes.

- [3] The shoes wear out quickly; the artificial foot cuts into the shoe that is used on that foot. For this reason, it is necessary for Ms XXXX to have a spare pair of shoes so that when she identifies one shoe has reached the stage of being a danger to her, she can then start using the spare pair, before she is at risk of falling.
- [4] Ms XXXX got to the point where she needed new shoes, the shoes she was wearing were close to wearing out and she had no spare shoes. It is of course important to recognise that for Ms XXX to get a spare pair of shoes takes time; she has to get the shoes, take them to the Orthotic Centre and have them put into a condition that is suitable for her to use them. Ms XXXX went to a shoe retailer and purchased enough shoes to provide one pair she could wear and one pair as a spare. The cost was \$734.86.
- [5] None of the preceding facts are contentious in any significant respect.

#### **What Ms XXXX wants**

- [6] Ms XXXX does not get enough money to pay for all of her essential needs and also pay for the shoes. She wishes to have assistance in the form of an Advance Payment of Benefit, or a Special Needs Grant, or a combination of those two types of assistance.

#### **The Ministry's position**

- [7] The Ministry provided Ms XXXX with an Advance Payment of Benefit. It did so to the extent of \$244.96. The Ministry's justification for this approach was that it considered that the hospital should have given Ms XXXX free shoes. Because Ms XXXX had not received free shoes from the hospital, Ms XXXX should bear the cost of the shoes; however,

the Ministry would meet some of the cost in the form of an Advance Payment of Benefit. In the Ministry's view, Ms XXXX did not have a "particular immediate need" beyond that.

## **Discussion**

### *The facts*

- [8] As noted, the general background facts are uncontentious. Ms XXXX was the only witness who gave evidence at the hearing. She has been obtaining shoes, and having them modified at the Orthotic Centre for more than 20 years. She made it very clear that she had to purchase shoes, provide them to the Orthotic Centre and the Orthotic Centre would modify them.
- [9] The Ministry's position is entirely dependent on the proposition that Ms XXXX is entitled to free shoes from the State health system and that she should be getting them. For reasons that the Ministry has not been able to explain, the Ministry seems to think that the State health service providers and Ms XXXX have for 20 years failed to achieve the delivery of free shoes and it is their problem, not the Ministry's problem. It is not clear whether the Ministry thinks that over the course of 20 years the staff at the Orthotic Centre failed to tell Ms XXXX she is entitled to free shoes, or that Ms XXXX has failed to ask for free shoes. However, the Ministry did not provide any evidence that Ms XXXX has an entitlement to free shoes from the hospital or Orthotic Centre. The Ministry's agent was unable to point to any law or policy documents saying that Ms XXXX was entitled to free shoes. The Ministry did not call a witness from the State health services to say that free shoes would be available. The Ministry produced no evidence that they had troubled themselves to make enquiries as to whether free shoes were available.
- [10] Instead the Ministry stated:
- In addition the Ministry understand that she could have sought assistance from the hospital but made the decision not to.
- [11] The Ministry had no evidence to support that statement; and appeared not to have reflected on how strange that would be for her not to seek free shoes from the hospital if they were available and pursue this appeal instead. When cross-examined Ms XXXX she made it clear she is a capable and intelligent woman who was grateful for the support she

received from the State health services, but has never been given any reason to suppose it included free shoes in her circumstances. Ms XXXX lives a financially precarious life; she gets no more than just enough to live on, particularly given her significant health related needs. She does not enjoy the luxury of being able to choose not to take assistance which is available to her.

[12] The Ministry failed to make inquiries and understand the true position, despite hearing the evidence of Ms XXXX who certainly knew what she received. Regardless, the Ministry went on to say that Ms XXXX had provided no verification that the hospital could not provide her with appropriate footwear. The proposition is devoid of any rational justification; the Ministry advanced it notwithstanding:

- a. Ms XXXX's sworn and unassailable evidence that the hospital had provided custom-made footwear which resulted in two injury-causing accidents, and
- b. Her equally compelling evidence that over time, with the advice of medical specialists and a Clinical Orthotist, the required procedure was for her to purchase shoes at her cost, bring them to the Orthotic Centre, and the Orthotic Centre would modify them.

[13] The Ministry and this Authority have expended thousands of dollars dealing with this appeal. It reflects adversely on the Ministry that they should suggest that Ms XXXX with her compromised mobility, and other barriers to addressing her situation, is responsible for not accessing free footwear that was available to her. If the Ministry has a rational foundation to believe free footwear was available, it ought to have made reasonable and proper enquiries and demonstrated that was so. First, for Ms XXXX, and thereby saving the cost of this appeal. The Ministry should then have ensured that the health system delivers that service to other people in Ms XXXX's position throughout the country. If Ms XXXX has not been receiving her entitlement to footwear for 20 years, it implies a serious systemic failure in the delivery of care to the most needy persons. More realistically, given that the Ministry has provided no evidence that the footwear was available to Ms XXXX free, the Ministry has simply chosen

not to acquaint itself with the entitlements Ms XXXX has, and failed to deliver the support it is required to give her.

- [14] On any view, the State health system or the Ministry was required to provide Ms XXXX's shoes.

**Qualification for a Special Needs Grant**

- [15] The provision that applies to Ms XXXX's circumstances is Part 4 of the Special Needs Grants Programme ([www.workincome.govt.nz](http://www.workincome.govt.nz)) which covers emergency needs. Relevantly, clause 14 covers emergency grants. The material parts of the provision provide:

**14 Other emergency grants**

- 14.1 If the chief executive considers that special circumstances exist, the chief executive may make a recoverable or non-recoverable Grant towards the cost of any item or any service if the chief executive considers that without that item or service other than Emergency Housing, the Applicant, or the Applicant's spouse or partner or a dependent child, would suffer serious hardship.
- 14.1A The amount of a grant under clause 14.1 must not exceed \$500 unless clause 14.1B applies.
- 14.1B The chief executive may make a grant under clause 14.1 of more than the amount set out in clause 14.1A only if he or she considers exceptional circumstances exist.

- [16] The provision goes on to set out circumstances to be considered in relation to whether or not the grant will be recoverable:

- 14.3 In deciding whether a grant made under clause 14.1 will be recoverable or non-recoverable, the chief executive must have regard to the following matters-
- (a) the purpose of the Grant;
  - (b) the nature of the need;
  - (c) whether it would be equitable with other Applicants to require or not to require repayment; and
  - (d) the effect on the applicant of requiring or not requiring repayment of the Grant.

- [17] Ms XXXX is a vulnerable person. She was brought to New Zealand at the election of the New Zealand Government, as part of its obligations under the United Nations quota refugee programme. New Zealand invited her to this country with full knowledge of her complex medical needs and is obliged to meet her fundamental entitlement to human dignity. Those circumstances do not make Ms XXXX's situation different from others in the same position, however, the context usefully reminds us of the humanitarian standards New Zealand sets for itself. In the context of New Zealand society, it is reprehensible that a person would be allowed to lose their mobility through want of a pair of shoes, or be exposed, for the third time, to the risk of suffering a fall and the consequent serious injuries, due to the lack of suitable shoes. Ms XXXX twice experienced such falls due to unsuitable footwear. Since that time, medical experts have supported Ms XXXX, and established what is required to keep her safe.
- [18] Ms XXXX gave evidence regarding her needs, particularly for ongoing medical and other support, which is obvious and compelling given the primary effects of polio, and now the additional complications of post-polio syndrome. There was no suggestion in the evidence, as far as we can ascertain, that Ms XXXX had any money spare to meet the cost of the shoes. She said she had only been able to acquire them because she had borrowed money from friends.
- [19] Accordingly, we are satisfied that whether the State health system or the Ministry should have funded the shoes, neither did so. For Ms XXXX, the shoes are a critical item for her mobility, health and safety. In our view, if Ms XXXX did not have a pair of shoes, and a spare pair that she could use, she would suffer serious hardship.
- [20] In this case, the serious hardship was the result of a failure of two State agencies to resolve between them which of them is obliged to provide this essential need for Ms XXXX. In our view, the failure of two government agencies to resolve this situation is plainly an exceptional circumstance, indeed it is a situation that should never occur.
- [21] In our view, the grant must be made to the full value of the shoes, and be non-recoverable. The purpose of the grant is to meet a basic human need. The nature of the need goes to fundamental issues of human

dignity and the essentials of life. It would be grossly inequitable for any person in this situation to be required to repay the grant. Ms XXXX depends on State support, and that cannot change significantly due to her lifelong health issues. New Zealand accepted the obligation to care for Ms XXXX; and the Ministry has an obligation to do so under established Social Welfare programmes.

### **Decision**

- [22] We direct that a non-recoverable Special Needs Grant of \$734.86 will be paid to Ms XXXX.
- [23] We refer the appellant, and her agent Mr XXXX to the decision of the High Court *Chief Executive of Ministry of Social Development v Genet* [2016] NZHC 2541. That decision discusses the appropriate principles relating to awards of costs. Paragraph [33] of that decision explains why this Authority requires a calculation of costs before making an award.
- [24] Ms XXXX, personally, or through her agent Mr XXXX may submit a written claim for costs. They should itemise the costs. The Ministry will have an opportunity to respond to the claim.
- [25] This is a case where the Ministry should meet the costs of the Authority pursuant to section 120A of the Act.
- [26] The Authority considers that this is potentially a case where the Ministry should pay costs, as the view may be open that:
- (i) The Chief Executive ought not to have pursued the position advanced in this appeal.
  - (ii) The central element in this appeal was that the Chief Executive considered that Ms XXXX was entitled to support from a different agency of the State. Instead of responding by resolving the issue with the other agency, the Chief Executive placed the obligation to resolve the issue on a vulnerable person who have been doing her best to access services for 20 years.
  - (iii) The Chief Executive expended a disproportionate amount of money pursuing this appeal; whereas carrying out his statutory

function of determining entitlement on an informed basis would have been far less costly.

[27] The Chief Executive is requested to address those issues when responding to the issues relating to costs.

**Timetable**

[28] Ms XXXX, with Mr Ellis's assistance, may submit a schedule and supporting submissions relating to costs within 10 working days of this decision issuing.

[29] The Ministry may provide submissions relating to the question of whether the Tribunal should recover from the Ministry some or all of its costs relating to the hearing and determination of the appeal, within 10 working days of this decision issuing.

[30] The Ministry will have five further working days after receiving any schedule and submissions relating to Ms XXXX's claim for costs to provide a reply.

**Dated at Wellington** this 20<sup>th</sup> day of April 2017

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**G Pearson**  
Chairperson

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**C Joe JP**  
Member