

[2017] NZSSAA 050

Reference No. SSA 180/16

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 17 April 2017

Appearances

The appellant in person

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

DECISION

Background

- [1] On its face, this appeal concerns whether the appellant should have received \$40 assistance with travel expenses on a basis which had to be repaid, or as a non-recoverable grant, and whether accommodation supplements should have been paid.
- [2] During the hearing, the answers to those questions became relatively obvious.
- [3] At least on the balance of probabilities, the appellant reasonably understood that she was travelling to a Ministry of Social Development (“the Ministry”) office at their request. She should have received \$40 on a non-recoverable basis for the particular purpose of this travel. The appellant was not entitled to an accommodation supplement because she was

homeless, so did not have any accommodation. Essentially, her problem was not having accommodation.

- [4] This case raised significant concerns for the Authority because the evidence indicated that the appellant had presented herself to the Ministry of Social Development seeking assistance at a point in her life where she was in considerable need. Her unchallenged evidence was that she had recently undergone an acrimonious marriage breakdown and had been forced to leave her home, cut off from access to money, had significant mental and physical health difficulties, and was living in her car. She said that despite presenting to the Ministry in those circumstances, she received little assistance, or direction as to what she might do to obtain help. This Authority is required to “step into the shoes” of the Chief Executive and his delegates to remake their decision, as at the point in time when an appellant sought assistance. For that reason, we consider it is necessary for the Authority to make some evaluation of the Chief Executive’s response to the appellant’s need.
- [5] We are conscious that we do not have a comprehensive factual basis to truly measure entitlement as at the point in time when the appellant engaged with the Ministry of Social Development. We have not sought to obtain such a foundation; the appellant’s evidence is that she had relationship property assets, accordingly, any assistance would have been short term and likely recoverable. The appellant has now successfully established more satisfactory circumstances for herself.

Discussion

Issues

- [6] On the face of it, this appeal concerned two issues:
- a) Whether \$40 should have been paid for a travel expense; and
 - b) Whether accommodation supplements should have been paid for the period from 8 March 2016 to 13 September 2016.
- [7] At the hearing it became clear that those points were not the real issue. The real concern was that the appellant engaged with the Ministry of Social Development seeking assistance and the Ministry did not adequately advise her. She had no home, was in poor health, living in her car, and had been placed into that position due to the vindictive behaviour of her husband.

[8] At the hearing, the Ministry failed to engage with the humanitarian circumstances, and seemed not to recognise any obligation to ensure that the appellant received what support she was entitled to have. The Ministry's response was essentially that:

- a) it had not identified an emergency situation entitling the appellant to support;
- b) the appellant was not entitled to an accommodation supplement because she had no accommodation; and
- c) it supported the response, or lack of response, of its staff to the appellant's endeavours to seek support.

[9] The Authority was concerned regarding that response, as the law is clear that the Ministry has a duty to provide the assistance citizens are entitled to receive, whether or not the person seeking assistance knows what assistance the Ministry is required to deliver to them.

[10] In *Margison v Chief Executive of the Department of Work and Income*¹ Justice Laurenson commented:

On an appeal to an Authority I am satisfied that once the Authority is faced with an appeal it is empowered by the inquisitorial nature of its function, its original power of decision and its full range of remedies, to seek out the issues raised by the appellant's case and determine these afresh and establish whether the appellant can provide the justification for doing so or not.

[11] The Supreme Court also considered the nature of proceedings before the Authority in *Arbuthnot v Chief Executive of the Department of Work and Income*². It was resolute in requiring the Authority to reach the correct view on the facts, rather than being constrained by the earlier processes:³

There is nothing in s 12M to prevent the Chief Executive from then asking the Authority to consider any matter which may support the decision which is under appeal. Indeed, the thrust of the section is quite the other way: that the Authority is to consider all relevant matters.

¹ *Margison v Chief Executive of the Department of Work and Income* HC Auckland AP.141-SW00, 6 August 2001 at [27].

² *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55.

³ At [20]–[26].

...

In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.

...

The duty of the Authority was to reach the legally correct conclusion on the question before it, applying the law to the facts as it found them upon the rehearing without concerning itself about the conclusion reached by the BRC ...

- [12] Accordingly, after the hearing, the Authority required the Ministry to consider what the appellant was entitled to when she asked for assistance, and not limit its response to the accommodation supplement and \$40 assistance for travel. The Authority noted that, as matters stood, it appeared that the Ministry's position did not have regard to all of the appellant's circumstances, or what support she should have received. The Authority wanted to know whether the Ministry considered that for the appellant to be living in a car was an emergency situation, which entitled her to support to change her circumstances.
- [13] The Authority requested that the Ministry clearly state what support it considered the Appellant was entitled to have, given its current knowledge of the circumstances after hearing the evidence at the hearing.

Determination of the first two issues

- [14] We have already identified the matters in issue, and the limits to our consideration of them.
- [15] It is not necessary to consider the two issues initially identified as the grounds for the appeal in any depth:
- a) We allow the appeal to the extent of the \$40 and conclude that it was non-recoverable. We accept that the appellant understood, on reasonable grounds, that she was travelling to a remote Ministry of Social Development office at the Ministry's request, for a particular purpose that the Ministry funds. Furthermore, she had an accident on her way there (a drunk driver ran into her car when she was sleeping in it). The payment should have been non-recoverable. The Ministry accepted that it would have paid for the particular purpose. Regardless, the accident added to the cost of travel, and the trip was for a purpose that the Ministry treated as necessary. The circumstances met the conditions for a special needs grant for an emergency.

- b) The absence of accommodation costs means there is no entitlement to an accommodation supplement. There is a threshold of \$66 per week in costs before any supplement can be paid. Accordingly, given the Ministry paid accommodation supplement when the appellant had accommodation, that decision is necessarily correct.

[16] We now consider the appellant's circumstances and what should have been made available to her.

The facts

- [17] The appellant gave evidence regarding her circumstances. Some of those circumstances relate to the behaviour of her husband; we are mindful that he did not give evidence. Our findings are simply the findings based on the appellant's, essentially unchallenged, evidence.
- [18] The appellant is a woman in her late 50s. She had owned her own home since she was a relatively young person. She and her husband have two adult children. The marriage had some difficulties; they became acute in February 2016. It was at that point when the appellant's husband behaved in a way that made it impossible for her to continue to live in the house. She was cut off from electronic communications within the house, lost access to funds and bank accounts, and was treated in an abusive manner. These events occurred while the appellant was suffering a major depressive disorder, and recovering from the death of a sibling.
- [19] The appellant left the family home essentially with no more than personal belongings and her car. The appellant embarked on a process of seeking assistance from the Ministry of Social Development, and also sought to engage a lawyer to assist her with her relationship property claim. The appellant faced two difficulties relating to obtaining accommodation; one was a lack of money and the other was that she had the family dog with her. Those difficulties were not resolved in a timely way, by, or for, the appellant. For the period the Ministry has refused to pay accommodation supplement, the appellant was living in her car. The Ministry did pay an accommodation supplement for periods during which the appellant did have accommodation (mainly in a camping ground – though some of the time she slept in her car at the camping ground).

[20] The appellant's evidence was that Ministry staff were unhelpful, antagonistic, added to her distress and failed to provide the support she required to cease being homeless.

The Ministry's Response

[21] When requested by the Authority, the Ministry reviewed its treatment of the appellant. The Ministry's position is that the appellant first engaged with them on 1 March 2016. They say that there is no indication in their records that their staff realised the appellant was living in her car at that point in time. The Ministry's position is that had it been aware of her homelessness, then its response would have been as follows:

- a) An emergency appointment would have been made for the appellant so she could see a case manager the same day.
- b) The appellant's emergency housing needs would have been assessed, if she was unable to find accommodation herself she would have been referred to a women's refuge or similar facility located nearby that could provide emergency accommodation.
- c) If necessary, the Ministry would have referred the appellant to a social agency such as the Salvation Army.
- d) The appellant could also have been assisted with money to secure accommodation such as a bond or rent in advance in the form of a recoverable or non-recoverable special needs grant.

[22] The second point of contact the Ministry was aware of was on 10 March 2016. The appellant attended with a social worker from the Salvation Army. At this point, the appellant had some temporary accommodation at a holiday park. The Ministry considered that there were some significant difficulties in obtaining housing due to the appellant having a dog.

[23] The Ministry also recognised that an assessment could have been made for social housing.

[24] The Ministry has also drawn attention to an amendment to the Special Needs Grant Programme from 1 July 2016, which makes specific provision for persons in need of emergency housing, and gives a discretion to disregard a person's cash assets or income in exceptional circumstances.

The Appellant's Reply

- [25] The appellant largely rejects the Ministry's response to her allegations. She characterises the Ministry's treatment of her as "defensive", having an "aggressive attitude", and not "paying attention to anything I was saying". Generally, the appellant paints a picture of lack of interest and concern on the part of Ministry staff.

The Chief Executive's duty

- [26] The Chief Executive's response demonstrates that there were significant steps that his staff could have taken to assist the appellant. We do appreciate the circumstances were not simple. The appellant was very attached to her dog, and that was important to her given her fragile mental health. Finding accommodation which allows dogs adds to the difficulties.
- [27] Regardless, we found the appellant to be an intelligent and reasonable person who had the ability to communicate her needs, and circumstances. It is very difficult to accept that any person engaging with the appellant in a constructive manner would have failed to elicit the extent of the difficulties she faced, including the reality that she was homeless. It appears that there is little room for doubt that rather than gaining the appellant's confidence, the initial engagement with the Ministry was unsatisfactory. The Ministry has limited information regarding the contact. Some of the key points the appellant makes are:
- a) She had to wait some time to make an appointment.
 - b) She told the person she dealt with that she was homeless, and was told by the official that it was not the Ministry's job to find her a home.
 - c) She was told that as she was not living with her husband so she would not now get any of his superannuation. That led to a heated discussion, and the Ministry was inflexible and would not arrange a meeting to discuss the issues for 10 days.
- [28] The appellant attended the second meeting with a Salvation Army social worker, and while she did not achieve any satisfactory solution, the social worker said in a letter that "it is my belief that [Ministry staff] acted appropriately at the interview and tried to assist with what they could for [the appellant]". The Ministry official who attended that meeting also wrote a letter which said she did not appreciate the appellant was homeless and

sleeping in her car. The appellant's perception was quite different. From the appellant's point of view:

- a) she had some days booked at the camping ground in a cabin, but it was temporary as the accommodation was booked out at times.
- b) Women's refuge and another emergency accommodation facility had said they could not assist.
- c) she found the Ministry staff callous, focused on cancelling the New Zealand Superannuation payments and delaying any other form of relief until a medical certificate was available.
- d) she collapsed in grief and broke down.

[29] The Ministry did observe that the Salvation Army social worker said "the appellant's anxiety level at the time was high and she may not have understood or misunderstood what was said to her."

[30] Section 11D(3) – (4) of the Social Security Act 1964 ("the Act") allow applications for any benefit as a gateway to the grant of a benefit of a different kind. The obligation to "get it right" when a person presents seeking assistance carries through each level including the disposition of appeals before this Authority.

[31] The law is very clear regarding the Chief Executive's duties, and staff at all levels within the Ministry must understand that law to perform their duties. The nature of the Chief Executive's duties is concisely summarised by Dunningham J in *Crequer v Chief Executive of the Ministry of Social Development* [2016] NZHC 943, at [48]:

The role of the Chief Executive in performing his functions and powers under the Act has been considered in previous decisions. They have emphasised that, under s 12, it is for the Chief Executive and those acting with his authority, to determine what benefits should be granted to a claimant. In doing that, there is a requirement for the Chief Executive, or his delegate, to ensure that the correct benefit or benefits are paid and in making that determination, to be "pro-active in seeing to welfare, and not defensive or bureaucratic".

[32] In *Chief Executive of the Ministry of Social Development v Scoble* [2001] NZAR 1011 (HC) the Court acknowledged that the Act "does not specifically place a duty on the Chief Executive to invite application where no enquiry for assistance has been made." However, when a person does

seek assistance, then the Chief Executive is to consider what forms of assistance the person is or may be eligible to receive⁴.

- [33] These duties were reiterated in *Koroua v Chief Executive of the Ministry of Social Development* [2013] NZHC 3418 (HC). The Court observed, at [16]:

In general as McGhechan J put it in [*Hall v Director-General of Social Welfare* [1997] NZFLR 902 (HC) at 912], the Ministry should be “proactive in seeing to welfare, and not defensive or bureaucratic”.

- [34] The Court in the *Koroua* case also referred to *Taylor v Chief Executive of the Department of Work and Income* [2005] NZAR 371 (HC), and noted that it was a question of fact whether an approach for assistance amounted to an application. The Court in *Taylor* stated, at [15], that:

Those who are in need are not to be deprived of the benefits to which the law entitles them, by an overly prescriptive and bureaucratic approach, and the Department should be proactive in ascertaining needs. But that must be viewed in the light of the statutory scheme, which involves persons who are in need being required to make their needs, in a broad sense, known to the Department by way of a claim... In light of that, there must in my view be a sufficiently clear identification of the need to enable the Department to give consideration to that need, and the way in which it can best be met, before a claim or an application can be said to have been made.

- [35] Against that background, for the reasons discussed, we have not attempted to resolve the differences between the account of the appellant and the Ministry’s perspective. Doing so would not result in orders that change present circumstances for the appellant. However, regardless of the issues of perspective, it is clear that the Ministry’s officials either failed to understand the appellant’s circumstances, or they failed to respond to those circumstances. The reality is that a very unwell and vulnerable woman continued to live in her car.

- [36] In making that observation we emphasise this was not a case where the appellant was refusing assistance. We fully appreciate that in some instances persons in great need do not seek, or actively refuse, assistance. In such cases, there are some other protections, but they are not generally the Ministry’s responsibility.

⁴ Paragraph [9] to [11].

- [37] In our view, on any perspective, the Ministry failed to engage in an effective manner with the appellant when she presented to the Ministry and sought assistance. There was relief available, and it was not delivered to her.

Recommendation

- [38] We request that the Chief Executive ensure that staff are trained to recognise their duties. In particular, to consider the “full range of remedies” and “to seek out the issues raised by [each applicant’s] case”. The present case is a concerning example of the Chief Executive’s delegates failing to perform those duties. They appeared not to recognise the failure to understand the appellant’s situation and deliver the support she should have had was an issue; down to the point when this Authority heard appeal.

Decision

- [39] The appeal is allowed; the \$40 special needs grant is not recoverable. In other respects, we dismiss the appeal.
- [40] We endorse the concerns the appellant sought to highlight by bringing the appeal.

Dated at Wellington this 4th day of September 2017

G Pearson
Chairperson

C Joe JP
Member