[2017] NZSSAA 053

Reference No. SSA 181/16

IN THE MATTER of the Social Security Act 1964

AND

IN THE MATTER of an appeal by **XXXX** of Auckland against a decision of a Benefits Review Committee

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

Mr G Pearson - Chairperson

Mr K Williams - Member

Mr C Joe - Member

Hearing at AUCKLAND on 13 September 2017

Appearances

Ms M Wang, agent for the appellant

For Chief Executive of the Ministry of Social Development: Ms A Katona

DECISION

Background

[1] The facts in this appeal are not contentious. The appellant is approximately 80 years of age. She was born in China and is now living with her adult daughter in a Housing New Zealand property in Auckland. She receives an emergency benefit at the job seeker support rate. Her daughter is currently receiving a supported living payment from the Ministry.

[2] The appellant first came to New Zealand on XX September 2002 on a business visa. During varying periods down to 10 January 2013, the appellant spent time in New Zealand. Some of the time she had a permit and for some of the time she was in New Zealand unlawfully without a valid

visa. During the period of time down to 10 January 2013, she only held temporary visas. On 10 January 2013, she lodged an appeal with the Immigration and Protection Tribunal and sought to obtain a residents visa on humanitarian grounds. The Immigration and Protection Tribunal allowed her appeal and issued a residence visa valid from 25 June 2014. The key element for granting the appellant's appeal and issuing a residence visa was stated in the Tribunal's decision as:

> The appellant and her daughter have lived together for most of their lives and their relationship is a particularly strong one. The daughter relies on the appellant for support and she is the only one who she can trust. As a person with long-term and serious mental health issues, the daughter will continue to rely on the appellant's presence if she is ever to manage her physical and mental health problems.

[3] On 30 October 2014, the appellant applied for New Zealand Superannuation. The Ministry declined her application because she did not meet the residence test under the relevant legislation. However, the case manager in the Ministry of Social Development who declined the application for New Zealand Superannuation did suggest that the appellant should test her eligibility for an emergency benefit.

[4] On 11 March 2016, the appellant was granted an emergency benefit from 3 March 2016 at the jobseeker support rate because she was in a position of hardship and she did not qualify for New Zealand Superannuation.

The Appellant's Position

[5] The appellant was represented by her daughter, who had a very sound grasp of the issues. The crux of the appellant's argument is that the jobseeker support benefit is not an appropriate basis to determine the rate at which the appellant's emergency benefit should be paid. She is too old for work, and has produced medical evidence to that effect. She referred to the High Court's decision in *Pillay v Chief Executive of the Ministry of Social Development*.[1] She said that in the *Pillay* case the appellant was granted an emergency benefit at the unemployment benefit rate when he was intending to look for a job; but, when he had a stroke and could not work he was then given a benefit at the invalid's rate. The analogy

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1 CIV 2003-485-2626 High Court, Wellington Registry, 15 June 2004, Ronald Young J.

advanced is that the appellant is unable to work due to her age, accordingly, the proper benefit she should receive is based on New Zealand Superannuation.

[6] The appellant supported her argument by referring to the Ministry of Social Development's Guide to Social Development Policy which discusses the granting of emergency benefit on the grounds of hardship if a person is 65 years of age and over. The appellant particularly referred to the following:

> When clients aged 65 years and over do not qualify for New Zealand Superannuation there are usually a range of reasons that they are unable to earn a sufficient living, such as disability, language or skill barriers as well as their age.
>
> **Determining the Analogous Benefit**
>
> Before granting emergency benefit for a client 65 years of age or over who is not residentially qualified for New Zealand Superannuation you need to determine the analogous benefit by looking at the reason the client is unable to earn sufficient living such as:
>
> - Disability.
> - Language.
> - Skill barriers.
> - Age.
>
> Generally if the client is unable to earn sufficient livelihood because:
>
> - They are unable to get a job the analogous benefit would be jobseeker support.
> - Of age alone then New Zealand Superannuation would be the analogous benefit.
> - The client is not available for or seeking full time employment they are not eligible for jobseeker support.

[7] The appellant's point is simply that she is unable to work because of age alone; it follows that she should receive support at the rate of New Zealand Superannuation.

The Ministry's Position

[8] The starting point in the Ministry's contentions is that plainly the appellant does not qualify for New Zealand Superannuation. That is because she does not meet the residential requirements, the reason that she is in New Zealand permanently is solely due to the humanitarian circumstances relating to the care of her daughter.

[9] The appellant does qualify for an emergency benefit. Section 61 of the Social Security Act 1964 (the Act) provides for the grant of an emergency benefit. The Ministry accepts that the appellant qualified for an emergency benefit, and was granted one.

[10] The only issue to be determined is the correct rate of the emergency benefit. The material provision relating to that is s 61(2) which provides:

> **61 Chief executive may grant emergency benefit in cases of hardship**
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> …
>
> (2) The rate of the emergency benefit shall, in each case, be in the discretion of the chief executive, but, except in any case where the beneficiary is receiving medical or other treatment, shall not exceed the rate to which the beneficiary would be entitled if he were qualified to receive such other benefit as in the opinion of the chief executive is analogous to the emergency benefit.

[11] The Ministry's position is that the analogous benefit in this particular case is not New Zealand Superannuation. Given that the appellant has not qualified for New Zealand Superannuation, the rate of benefit is appropriately set at the rate allowable for a person who does not qualify. The jobseeker support rate of benefit is regarded as a hardship rate, that is to say that it provides sufficient support, but no more. In contrast, the New Zealand Superannuation rate is set as a proportion of the average weekly wage in New Zealand. In short, the reason for the appellant being in New Zealand is a humanitarian one; it provided her with an opportunity to support her daughter. Her daughter also has the support of a benefit and social housing.

[12] The Ministry emphasises that there is no question of expecting the appellant to work; the relevance of the jobseeker support benefit is simply that it sets a minimum level of support.

[13] The Ministry agrees that the High Court's decision in *Pillay* is relevant. The Ministry refers to this Authority's decision in *Pillay* which said:

> We think that the fact that New Zealand Superannuation is not income tested other than in the situation where a spouse who does not qualify in their own right is included in an eligible recipient's benefit, is a clear indication that New Zealand Superannuation is intended at least in part as a reward for a contribution to New Zealand as demonstrated by the provisions of section 79 of the Social Security Act 1964 which provide that where a person employed outside New Zealand pays income tax on their earnings in New Zealand they are deemed to have been resident in New Zealand during the period of such employment outside New Zealand.

[14] The Ministry also referred to a further passage in the case that said:

> The purpose of section 61 is to provide an emergency benefit for those in need. Because of the wide definition of "benefit" in the Act the analogous benefit potentially does include New Zealand Superannuation. In deciding what the analogous or similar benefit referred to in section 61(2) is, reference must be had to **the applicant's circumstances and the reasons why they were able to satisfy the Chief Executive they were entitled to an emergency benefit.**
>
> [Emphasis added].

[15] The Ministry said that the High Court recognised in the *Pillay* case that there may be a situation where age is the essential reason for the inability to earn sufficient income; however, those circumstances would be rare.

[16] The Ministry noted that the appellant has five children, three of whom live in China and two of whom live in New Zealand, including the appellant's daughter. The appellant was only able to avoid deportation and receive residency in New Zealand due to the serious health condition of her daughter and their close relationship.

[17] The Ministry says that it would be unfair to pay someone the highest benefit rate, New Zealand Superannuation, which has a long residential qualification as its distinguishing character. The appellant, at least partly, contributed to her own hardship by not complying with New Zealand's

immigration law. To grant the emergency benefit at the New Zealand Superannuation rate would unfairly discriminate against other elderly residents who are staying in New Zealand lawfully but do not qualify for New Zealand Superannuation and receive a lower rate of benefit.

[18] The Ministry contends that paying the emergency benefit to the appellant at the New Zealand Superannuation rate would effectively thwart the purpose of the residential requirement for a universal retirement income.

[19] The appellant's situation is significantly alleviated by the support provided to her daughter, she is provided with social housing because her daughter has social housing and other support from the State.

Discussion

[20] Many people in New Zealand over 65 years of age do not qualify for New Zealand Superannuation because they do not meet the residency requirements. Many of those people are not able to work due to their age. The Ministry's contention that if the simple fact that the appellant's age means she cannot work and that means she is entitled to a benefit at the rate of New Zealand Superannuation, the residential requirement would be largely undermined. Of course, hardship is necessary to qualify for an emergency benefit.

[21] Indeed, the Ministry says it would lead to the paradox that if a person was unable to work solely due to age if they became unwell, their rate of benefit could reduce because then the analogous benefit would be based on their inability to work due to illness.

[22] We recognise that while the appellant's presence in New Zealand is on the basis of compelling humanitarian circumstances, in terms of qualifying for New Zealand Superannuation, the appellant has not made the contribution to New Zealand that is intended to be implied by the residential qualification. In making that observation, we recognise that it is not necessary to find that an appellant has been a taxpayer in New Zealand, simply that residence in New Zealand infers contribution.

[23] We must apply the principles in *Pillay*. The circumstances were somewhat analogous. In that case, the appellants were a married couple who came

to New Zealand having been granted a residence visa on family reunification grounds. They were granted an emergency benefit and the key question was whether the correct rate was for an invalid's benefit or the New Zealand Superannuation rate, when determining what the analogous benefit was under s 61 of the Act.

[24] The Court noted that it is important to keep in mind that an emergency benefit is payable because of hardship. The Court then went on to consider the application of s 61(2).

[25] It is important to bear in mind the provisions of s 61(2) before considering what the Court said:

[25.1] The first part of s 61(2) states that the rate shall be in each case in the discretion of the Chief Executive.

[25.2] The second part is that despite giving the Chief Executive that discretion, it shall **not exceed** the rate to which the beneficiary would be entitled if they qualified to receive an analogous benefit.

[26] The Court went on to say:

> In deciding what the analogous or similar benefit referred to in s 61(2) is, reference must be had to the applicant's circumstances and the reasons why they are able to satisfy the Chief Executive they were entitled to an emergency benefit. Section 61(1)(a) gives examples of reasons for hardship, including age, physical disability, domestic circumstances, etc. An analysis of why an applicant is unable to earn sufficient livelihood will reveal the appropriate analogous benefit for each individual.

[27] The Court then went on to observe that the proposition of "age" is a more difficult situation. In that situation the Court observed:

> There may be situations where age (whether youth or old age) is the essential reason for the inability to earn sufficient to live on and thus the basis on which the emergency benefit is granted. Assessment of eligibility and therefore analogous benefit must be based on the actual circumstances of an individual. Self-evidently many persons well over the age of eligibility for New Zealand Superannuation are fit and capable of working. If they suffer hardship and need the support of an emergency benefit the analogous benefit cannot be New Zealand Superannuation. Analysis of why they are eligible

> for the emergency benefit will expose the analogous benefit that applies to them.
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> While "benefit" continues to be defined widely for the purpose of s 61, New Zealand Superannuation will be the analogous benefit where age by itself is the reason for the hardship. Obviously these circumstances will be rare.

[28] When considering these issues, neither the appellant nor the Ministry focused on the two limbs of s 61(2). The first decision is what rate the emergency benefit should be. The analogous benefit is only relevant to the second limb; the Chief Executive is not permitted to allow an emergency benefit at a rate that **exceeds** the analogous benefit. The Chief Executive may have good reason to set the rate below the analogous benefit.

[29] In our view, the second limb is not the deciding factor in the present case. In our view, the jobseeker support rate, whether or not it is the analogous benefit, is the correct rate at which emergency benefit should be paid to the appellant.

[30] As the Court noted in the *Pillay* case, we should have regard to the reasons for the hardship. In the present case, the reason is "domestic circumstances", as provided in s 61(1)(a). The only reason the appellant is in New Zealand is because she has been granted humanitarian relief to live in New Zealand indefinitely to care for her daughter. She has the benefit of significant support from the State in the form of social housing, and the State support provided for her daughter. In these circumstances, we are satisfied that the jobseeker rate of benefit is fair and appropriate.

[31] If the appellant were a person under 65 years of age, she would have support only at the jobseeker support rate. Given that the appellant does not have a residential qualification for New Zealand Superannuation, we can see no reason why she should receive more support than would be the case if she was younger. She is seeking to be preferred over other persons who do not qualify for New Zealand Superannuation due to lack of residential qualification. To the extent that jobseeker support is a hardship rate of benefit, which is what other people in New Zealand requiring support receive, it is a fair and appropriate rate for the appellant to receive.

[32] Given our view as to the correct rate, it is not necessary for us to decide which analogous benefit provides the cap to the potential rate of the benefit. We would incline to the view that given that the appellant is 80 years of age, that alone is the reason why she cannot work. However, we note that in *Pillay* the High Court observed that New Zealand Superannuation is the analogous benefit where age "by itself is the reason for the hardship". That is not true in this case because the reason for the appellant's hardship is her domestic circumstances, namely having relocated from China to support her daughter in New Zealand. Apart from that situation, the appellant would have remained in China and relied on the support network she had there. Accordingly, viewed in that way, age is not the sole reason for hardship in this case. Accordingly, the analogous benefit providing the cap could be a supported living payment or other form of benefit. However, we are satisfied that the proper rate is the jobseeker support rate which has been paid to the appellant.

Decision

[33] We are satisfied that the payment of an emergency benefit at the jobseeker support rate is the correct rate of benefit to be paid to the appellant and accordingly dismiss the appeal.

Dated at **Wellington** this 4th day of October 2017

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G Pearson
Chairperson

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K Williams
Member

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C Joe JP
Member