

[2017] NZSSAA 067

Reference No. SSA 018/17

IN THE MATTER of the Social Security Act 1964

AND

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

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

C Joe - Member

DECISION ON THE PAPERS

Background

- [1] XXXX (further referred to as the appellant) appeals the decision of the Chief Executive on 15 July 2016, upheld by a Benefit Review Committee, to stop payment of jobseeker support (with medical deferral) between 17 and 29 July 2016 when she took her grandson on a holiday to Australia. With the consent of the parties, this appeal has been determined on the basis of their written submissions and evidence.
- [2] At the time that she filed her appeal, the appellant's 12 year old grandson was in her care and she received the unsupported child's benefit on his behalf from 10 April 2015. The appellant received a sickness benefit from 18 March 2013. This benefit changed to jobseeker support (with medical deferral) from 15 July 2013, after changes to the Social Security Act 1964 (the Act).
- [3] On 6 July 2016 the appellant's doctor completed a medical certificate confirming that she was fit to work less than 15 hours a week in light work only. The doctor expected her to have the capacity to work regularly in suitable and open employment (15 hours a week or more) within the next two years.

- [4] After receiving this certificate, the Ministry wrote to the appellant stating that “based on your medical certificate and other information, we’ve determined you don’t need to look for work but you do need to be preparing for work”. The letter stated that the appellant needed to be available and take reasonable steps to prepare for work, including attending suitable courses, programmes and assessments, until 28 September 2016.
- [5] On 8 July 2016 the appellant submitted a letter written by a community social worker with the Family Achieving Balance Charitable Trust. This letter was written to support the appellant’s application to take her grandson to Australia, without her benefit being affected, for two weeks between 16 July and 30 July 2016.
- [6] The social worker confirmed that the Trust had paid the appellant’s and her grandson’s airfares, and had arranged accommodation. She said that she had been the appellant’s counsellor for five years, had known her grandson for four years and counselled him for 15 months. She stated that she “believe[d] this holiday would have great benefits for [the appellant] and (her grandson) and to help (her grandson) move forward and feel safe and secure”. The social worker described this holiday as therapeutic.
- [7] On 15 July 2016 the appellant was told by the WINZ case manager that she would not be paid jobseeker support while she was overseas. The unsupported child benefit and supplementary assistance payments would continue whilst she was overseas but not her main benefit. This decision was confirmed by letter on 18 July 2016.

Issue

- [8] The issue that the Authority needs to determine is whether the appellant was entitled to jobseeker support while absent from New Zealand between 17 and 30 July 2016.

Relevant law

Entitlement to jobseeker support

- [9] Section 88E of the Social Security Act 1964 (the Act) provides for a grant of jobseeker support on the ground of sickness, injury or disability. A medical certificate is required to support this application.
- [10] Section 88F of the Act sets out the obligations on recipients of jobseeker support. Section 88F(2) requires the Chief Executive to determine, after

granting jobseeker support on the grounds of sickness, injury or disability, whether the person has the capacity to seek and be available for part-time work. Part-time work is defined in s 3(1) of the Act as averaging *not less than* 15 hours per week over three months.

- [11] When jobseeker support is granted on medical grounds, and the person has the capacity for part-time work, s 88F(4) requires that person to comply with the work test when provided with a written notice.
- [12] Where a person is granted jobseeker support on the ground of sickness, injury, or disability and does not have the capacity for part-time work, s 88F(7) entitles them to a deferral of all their work test obligations.
- [13] Section 88I of the Act establishes the duty of the Chief Executive to defer work test obligations. Section 88I(6) requires the Chief Executive to grant a deferral to any person who has been found not to have the capacity for work under s 88F(7) of the Act.

Absence of beneficiary

- [14] Section 77 of the Act provides for the effect of an absence from New Zealand of a beneficiary entitled to jobseeker support. Section 77(1) establishes a presumption that the benefit is not payable while a beneficiary is absent from New Zealand unless one of the criteria in s 77(1)(a)-(d) is met; subsection (a) provides that a benefit may be payable under another provision of s 77. Section 77(2) provides that a benefit is payable to a beneficiary in respect of one or more absences less than four weeks in a year if three criteria are met:
- (a) the benefit is not one of the benefits referred to in s 77(2A);
 - (b) the benefit would be payable ordinarily but for the absence; and
 - (c) the Chief Executive is satisfied that the absences do not affect the beneficiary's eligibility for the benefit.
- [15] Pursuant to s 77(2A)(b) jobseeker support is one of the benefits subject to s 77(2). However s 77(3) gives the Chief Executive the discretion to pay a benefit to a beneficiary receiving a benefit of the kind in subsection 2A if the Chief Executive is satisfied that the benefit would be payable but for the absence and payment of the benefit complies with the applicable criteria in the regulations made under s 132 of the Act.

- [16] The relevant regulations are the Social Security (Effect of Absence of Beneficiary from New Zealand) Regulations 2013 (the Regulations). Pursuant to reg 3, a part-time work tested beneficiary has the meaning in s 3(1) of the Act, and a significant event, in relation to a beneficiary's family member, includes serious illness or injury or imminent death, events related to death, a wedding or civil union, birth of a child, or a Court case in which a family member is a party or witness.
- [17] Regulation 4 establishes the criteria for a discretionary payment of certain benefits in respect of absences of up to four weeks within a year. The relevant provision is reg 4(b) which provides that the absence does not prevent the beneficiary from meeting their obligations, specified in reg 6, which relate to attendance at employment-related training, undertaking employment or work-based learning.

The case for the appellant

- [18] The appellant states in her notice of appeal that her grandson could not have a holiday in New Zealand because there were no appropriate people for them to stay with who would give her grandson a positive experience. She said that her grandson had not seen his father for over five years or his mother for over two years. He refused to see his mother due to the severity of abuse he suffered and has no contact with extended family on his mother's side, other than his two older sisters. The appellant said that if she had not stepped in to care for her grandson, she may have been required to attend his funeral.
- [19] The appellant referred to media statements made by Paula Bennett, then Minister of Social Development, and the Ministry of Social Development's Deputy Chief Executive, Debbie Power, in 2014. These statements indicated that the government would allow beneficiaries who did not have work obligations to travel overseas for up to 28 days on compassionate or health grounds, without their benefits being affected. The appellant questioned the distinction between a holiday out of New Zealand and a holiday in New Zealand, which has no impact on a benefit. She also highlighted the anomaly between suspension of jobseeker support and payment of accommodation benefit or temporary additional support in the same circumstances.
- [20] The appellant raised the question of whether jobseeker support was the correct benefit for her. She referred to s 20H of the Act which provides that sole parent support expires when the youngest dependent child turns 14 and is replaced with jobseeker support. Her grandson was born in August 2004 and therefore, at the relevant time, was younger than 14.

The case for the Chief Executive

- [21] The Ministry submits that the appellant was not entitled to payment of jobseeker support whilst absent from New Zealand because she did not come within the criteria for continuing payment during an absence in the Regulations. The Ministry says that the holiday was not a 'significant event' as described in reg 3 and was not therapeutic because it was not recommended by a doctor.
- [22] The Ministry contends that reg 6 required the appellant to meet her work test obligations in accordance with reg 4(b). At paragraph 6.13 of the s 12K report the Ministry states that she was not granted medical deferral because the doctor certified that she could undertake light work up to 15 hours. However, at paragraph 2.2 of the report records that the appellant receives jobseeker support with medical deferral.

Discussion

Did the appellant have the capacity to work part time?

- [23] The Ministry has not offered any explanation for its conclusion (at paragraph 6.13 of the report) that the doctor had certified that the appellant could work *up to* 15 hours per week. This interpretation is plainly wrong as the medical certificate states that she could work *fewer than* 15 hours per week. Fewer than 15 hours a week means *less than*, not *up to*, and clearly falls within the definition of part-time work in the Act.
- [24] Therefore, at the relevant time, the appellant was unable to work part-time and was entitled under s 88F(7) to a deferral of all her work test obligations. In accordance with s 77(3) we have the discretion to pay jobseeker support if the relevant criteria in the Regulations are met. Regulation 4(b) provides that jobseeker support can be paid for up to four weeks if we are satisfied that the absence does not prevent the appellant from meeting her obligations. As we have found that she had no work test obligations, we conclude that it is appropriate to exercise the discretion to continue payment of jobseeker support for the relevant period.
- [25] It is possible that the Ministry has misinterpreted s 88F(7) by concluding that, in order to have *no capacity for part-time work*, a beneficiary must be completely unable to work. If this is the case, the Ministry has failed to apply the correct definition of part-time work in the Act.

The nature of the holiday

- [26] As we have concluded that this is an appropriate case in which to exercise the discretion under Regulation 4(b), we are not required to consider whether the reason for the absence falls within one of the permitted reasons for an absence provided in Regulation 5 which applies only to Regulation 4(a).

The correct benefit

- [27] As the appellant did not raise the question of whether she was on the correct benefit in her application to the Benefit Review Committee for review, the Authority does not have jurisdiction to consider this issue in the context of this appeal.
- [27] However we observe that there seems to be some uncertainty in this area. To be eligible for sole parent support, the applicant must be a person to whom Sections 20A or 20B of the Act apply. Section 20A applies to parents and is not relevant; Section 20B allows the Chief Executive to regard a dependent child as being the child of the applicant in certain circumstances.
- [28] Section 20B(c) is the only section that is possibly relevant; it provides the Chief Executive with the discretion to pay sole parent support where the child's parents are unwilling to support the child because of circumstances the Chief Executive considers exceptional. We can find no authority for what is considered exceptional for the purposes of s 20B(c). Although the WINZ website indicates that a person in the appellant's situation may be eligible for sole parent support, the criteria are unclear.
- [29] We recommend that the Ministry assess the appellant's circumstances at the time that her grandson was placed in her care and consider whether she was entitled to sole parent support at that time and, if so, whether it would have been more beneficial for her than jobseeker support.

Orders

- [30] The appeal in relation to the payment of jobseeker support for the period 17 to 29 July 2016 is upheld.
- [31] The Ministry is to immediately pay the appellant the full entitlement of the jobseeker support benefit for this period. If the parties are unable to agree on the amount payable, either party may apply to the Authority for a ruling on this issue.

[32] The appellant is entitled to the costs of bringing this appeal. However as there was no hearing and she was not represented it appears unlikely that she has incurred any costs which she can claim. If she has a claim for costs, the claim is to be filed by 15 December 2017 together with copies of any documents that show how the costs claimed are calculated.

Dated at Wellington this 27th day of November 2017

S Pezaro
Deputy chair

C Joe JP
Member