

IN THE MATTER of the Social Security Act 2018.

AND

IN THE MATTER of an Appeal to the Social Security Appeal Authority by **XXXX** of Queenstown, against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee.

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

G Pearson (Chairperson)

J Ryall (Member)

Representation: **XXXX** presented her own case.

Ms A M Daly, lawyer, for the Chief Executive.

DECISION

Background

[1] XXXX was a single 39-year-old parent with two dependent children. She studied full-time at the Open Polytechnic and worked 30 hours per week. She was receiving a non-beneficiary accommodation supplement (the accommodation supplement) from the Ministry (administered by Ministry of Social Development's Work and Income (WINZ)) from October 2018 until 23 February 2020 while she was working 30 hours per week and studying part-time.

[1] On 16 March 2020, the Open Polytechnic advised Studylink that XXXX was enrolled to study full-time from 24 February 2020 to 14 February 2021. Studylink is part of the Ministry of Social Development, it is simply an administrative structure within the Ministry and obliged to consider and apply social security legislation as a whole in the same way as any other part of the Ministry of Social Development. For reasons we go on to identify the Open Polytechnic has no legal authority to decide what is a full-time course for the purpose of this Appeal. It is the Chief Executive of the Ministry of Social Development that has that power. References

to Studylink or WINZ have no significance beyond identifying a part of the Ministry of Social Development.

- [2] Studylink cancelled XXXX's accommodation supplement, it said it did so because she commenced full-time study. Studylink established an overpayment of \$225 from 24 February to 15 March 2020 for that month since she had started full-time study. The overpayment was disestablished after a Ministry review.
- [3] The issue we must decide is whether XXXX should have lost her accommodation supplement. The unfairness she identifies is:
 - [3.1] Her income qualifies her for an accommodation supplement,
 - [3.2] The Ministry of Social Development says her status as a student does not give her a substitute for the accommodation supplement; but it does disqualify her from the accommodation supplement.
- [4] She says it does not seem fair she should lose her accommodation supplement in these circumstances where she is not entitled to alternative non-recoverable support.

Preliminary Steps

- [5] The Authority heard this appeal in a telephone hearing. It became evident that to a significant extent it turned on questions of law. Neither the Ministry nor XXXX had fully considered the potential legal issues. Accordingly, the Authority set out what it identified as a potential view of the law for the Ministry and XXXX to give them a fair opportunity to be heard.
- [6] The Authority has close regard to the High Court's decision in *Chief Executive of the Ministry of Social Development v Genet*, provides some important analysis of the duties of the Ministry and this Authority, having regard to the integrity of the welfare regime and the vulnerabilities of many appellants.¹ Those factors are of the utmost importance when considering how the Authority's processes should be used to best secure access to justice. After setting out its potential view of the law, the Authority gave the parties the opportunity to respond.

¹ *Chief Executive of the Ministry of Social Development v Genet* [2016] NZHC 2541

The Statutory Provisions

The Social Security Act 2018 (the Act)

- [7] The purpose of the Act is to provide support to assist people to support themselves and their dependants and help people attain or retain employment.²
- [8] Additionally, a key principle in the Act is that when exercising statutory powers under the Act, regard must be given to the fact that paid employment offers the best opportunity for people to achieve economic well being and that it is a priority for people to retain work.³
- [9] Section 65 of the Act sets the default position and empowers the Ministry to grant discretionary accommodation supplement if the following criteria are met:
- [9.1] The person had accommodation costs.
- [9.2] The assets test is met (per s 423).⁴
- [9.3] The person is not excluded due to either a:
- [9.3.1] Social housing exclusion, or
- [9.3.2] Any other funding exclusion
- [10] There are exceptions or exclusions to the default position in s 65. Relevant to this case is the “other funding exclusion” in s 67. The only issue the parties identify concerns the three subparagraphs in s 67(b). Materially, a person is ineligible for an accommodation supplement if:
- [10.1] They are receiving a basic grant under the Student Allowances Regulations 1998 (the Regulations); or
- [10.2] Would be eligible for a basic grant under those regulations if they applied; or
- [10.3] Would be eligible for a basic grant under the regulations but for their level of income.⁵
- [11] Section 304 allows the Ministry to review a benefit to assess whether the beneficiary is still entitled to receive a benefit or receive it at a different rate. Section 306 allows the Ministry to suspend, cancel or vary

² Social Security Act 2018, s 3.

³ Section 4

⁴ Section 432 allows regulations to be made for factors affecting benefits.

⁵ Income limit for ‘any other sole parent’ is \$747.20 per Sch 5 pt. 2 of the Act.

the rate of a benefit. They are machinery provisions, and it is obvious in this case if XXXX's eligibility changes then the Ministry of Social Development has the power to make the necessary adjustments.

The Student Allowances Regulations 1998 (the Regulations)

- [12] Regulation 3(a) of the Regulations continues the “basic grant”, and reg 2 defines the “basic grant” as the grant continued under reg 3(a). The Regulations do not otherwise define a “basic grant”.
- [13] Subpart 2 of sch 2 of the Regulations provides that a single person is eligible for a basic grant of \$459.25, if they have one or more supported children but abated by the quantum of excess income over \$224.58 for the week. It follows, they are eligible to receive some level of basic grant up to an income of \$683.83, at that point it abates entirely.
- [14] Regulation 7 states every tertiary student is eligible for a basic grant if they are over 18 years old, whether living at home or away from home. There are various exclusions that do not apply in this case. Regulation 12 sets out exclusions the parties identify as material:
 - [14.1] The student must make an application under pt. 7 of the Regulations; and
 - [14.2] Be enrolled in “a full-time course” at a tertiary provider or be approved to study “in a part-time course”. Generally, approval for a part-time course is due to illness, or other circumstances that justify dispensation.

Discussion

Fundamental issues relating to the statutory provisions

- [15] The Ministry has approached the case on the basis that if XXXX is excluded from eligibility to a basic grant for any reason other than her income, then she is entitled to an accommodation supplement. Accordingly, when she was not enrolled in “a full-time course”, or approved part-time course, then she was eligible.
- [16] It follows that the Ministry's position is that the legislation demands a perverse outcome:
 - [16.1] XXXX's income level justifies an accommodation supplement; but
 - [16.2] She does not get the accommodation supplement because she is entitled to a basic grant; but her income reduces the basic grant to nil.

- [17] XXXX does not receive the basic grant; she has not applied for one but that does not affect eligibility in the relevant sense. If she could apply successfully no doubt she would.
- [18] The most favourable interpretation is that if XXXX is excluded for any reason in addition to her income, then she is entitled to retain the accommodation supplement. We understand that is the Ministry's approach and we agree it is consistent with the Act. It follows that the pivotal issue for us to determine is whether XXXX is excluded from being eligible for a basic grant for one or more reasons other than her income.

The approach we signalled to the Ministry and XXXX

- [19] We notified XXXX and the Ministry that we would take the following approach, subject to submissions they might provide.
- [20] As we have observed, the Act⁶ provides support to assist people in supporting themselves by gaining employment. It records that people being in paid employment offers the best opportunity for them to achieve this independence.
- [21] Training and gaining skills are also referred to in the principles. The Act should not impede people training and gaining skills, as far as the provisions in the Act permit that to happen. What XXXX did was to continue her part-time work, manage her responsibilities as a parent and take on some additional papers to complete her qualifications as quickly as possible. She reasonably objects to a legislative quirk if it deprives her of an accommodation supplement simply because she has successfully accelerated her course of study, while remaining in near full-time employment. If the legislation works in that way it is a perverse incentive that is inconsistent with the expressed purposes of the Act.
- [22] To the extent we can apply a purposive interpretation to the legislation to achieve the purposes of the Act we indicated we would do so. This approach to interpretation has statutory direction under s 5(1) of the Interpretation Act 1999, which states legislation's purpose is "ascertained from its text", and in the "light of its purpose". The purposive approach calls for a balance to be struck between the text and the purpose of the legislation. In appropriate cases attributing a means that is consistent with the purpose of a provision has a high value.⁷ Of course, where the words of a provision are sufficiently unclear

⁶ Section 4

⁷ *Holler v Osaki* [2014] NZHC 1977, [2014] 3 NZLR 791 at [32] citing JF Burrows "The cardinal rule of statutory interpretation in New Zealand" (1969) 3 NZULR 253.

or capable of more than one meaning, courts will adopt an interpretation that does not lead to injustice or absurdity.⁸ However, the effect is far more pervasive than that. This Authority must have regard to the total context of the words used and the purpose of the legislation in order to arrive at the meaning intended.⁹

- [23] In this case, the Act makes it clear that its purpose is to help people support themselves by providing financial assistance to assist reaching a level of independence.¹⁰ Taking a purposive interpretation, the Authority will interpret the provisions in a manner that achieves that objective, rather than a perverse outcome. In this case the Ministry of Social Development considers the legislation imposes negative financial consequences where a person takes additional study courses to quickly achieve a professional qualification; whereas a person in otherwise identical circumstances who does less study is not penalised.

The central issue

- [24] We, accordingly, notified the Ministry and XXXX of what we considered the determinative point of law was. The simplified question in our view was whether there is any provision that excludes XXXX other than the income abatement of the basic grant. The only provision we could identify was the one the Ministry of Social Development and XXXX also identified. It follows the determinative point was reg 12(1)(c)(i) and specifically whether XXXX was “enrolled in a full-time course at a tertiary provider”.
- [25] The word “enrolled” is not defined. Its ordinary meaning is that a person has completed an application for a course of study and the institution providing the course has accepted the application. The dictionary definition is to “officially register as a member of an institution or a student of a course.”¹¹ We did not consider we should attribute any special significance to that word in the phrase in this context, it denotes no more than the threshold commitment to potential eligibility.
- [26] In our view the definitive issue was the meaning of the words “a full-time course”. In this case, we said it was clear, whether something is a “full-time course” is determined by the Chief Executive of the Ministry of Social Development under a statutory discretion. Regulation 2 of the

⁸ [Commissioner of Inland Revenue v Alcan New Zealand Ltd \[1994\] 3 NZLR 439 \(CA\) at \[446\]](#)

⁹ [Commissioner of Inland Revenue v Alcan New Zealand Ltd \[1994\] 3 NZLR 439 \(CA\) at \[440\]](#)

¹⁰ Sections 3 and 4

¹¹ “enrol” Def. 1 *Oxford English Dictionary Online*.
<https://www.lexico.com/definition/enrol> accessed 3 December 2020

Regulations provides: “**full-time course** means any recognised course of study approved by the chief executive as a full-time course forming part of a recognised programme”.

- [27] We said it appeared we needed to consider whether the approval is a generic approval. That is, whether this is a mechanism where anyone enrolled in certain subjects will be in a “full-time course” regardless of their circumstances. It appeared clear that is not the approach of the Chief Executive, he makes individual decisions for students, but generally exercises his discretion with an expectation that a student has committed to a certain course work-load before deciding the student is “full-time”.
- [28] The Ministry noted the Chief Executive had published that he exercises the discretion on an individual basis, as he states “for the course to be approved as full-time, the length of that course must meet certain [equivalent full-time student] value. ... We get this information directly from your education provider.”¹²
- [29] As the education provider has no statutory power to make the decision, it appears clear the Chief Executive gets information from the provider regarding the course work-load, and then makes the decision in respect of the individual student. However, we did not consider the discretion was confined to considering only the course work-load. If that were the case it would not be necessary to gather information for individual students. Furthermore, we do not consider that the Chief Executive is obliged to regard a student as engaged in a full-time course simply because they are enrolled in sufficient components of a course.
- [30] This Authority under s 401(3) of the Act in the course of considering XXXX’s appeal has all the functions and powers that the Ministry of Social Development had in respect of her entitlement. It follows we are required to consider whether XXXX was enrolled in a full-time course of study. Our indicative view, if we rely on the information we currently have before us was that we would have regard to the following and conclude XXXX is not engaged in full-time study:
- [30.1] XXXX is enrolled in enough components of a course to meet the minimum commitment to potentially regard her course as full-time;
- [30.2] However, she was not pursuing the course of study on a full-time basis. She is working outside the home for the equivalent of

approximately four days per week, she is close to full-time employment and has full parental responsibility for two dependent children;

[30.3] The principles in s 4 of the Act which says her work in “paid employment offers the best opportunity [for her] to achieve social and economic well-being”; and the references to development of employment focused skills;

[30.4] The purpose of the decision to approve XXXX's individual course as “full-time” affects her entitlement to assistance. She met the income test for accommodation supplement. She did not meet the income test for a basic grant as a student, or any other non-refundable assistance that equates to or substitutes in whole or part for the accommodation supplement.

[30.5] If we declined to approve XXXX's course as a full-time course, she would retain the non-beneficiary accommodation supplement to which she would be entitled if she pursued a less demanding course of study;

[30.6] She was pursuing the more demanding course only to gain qualifications that will benefit the community, and her and her family's circumstances;

[30.7] It would be a perverse outcome to approve the course as full-time when the effect would be:

[30.7.1] To deprive XXXX of assistance she is qualified for as a person working outside the home on a near full-time basis;

[30.7.2] When she does not get the benefits full-time students are entitled to, because she is not a full-time student, and instead a part-time student in paid employment for four days a week;

[30.7.3] The exercise of the discretion to approve the course as full-time would be inconsistent with the principles of the Act, that we are obliged to consider when exercising discretions under the Act.

[31] It appeared the Chief Executive had taken the approach that because XXXX was enrolled in sufficient courses she was engaged in full-time study, without further consideration. The fact she does meet the minimum requirement did not mean either the Chief Executive or this

Authority should consider she is in her circumstances in a full-time course of study.

The Chief Executive's response

[32] The Ministry of Social Development disagreed with the Authority's indicative view essentially on a jurisdictional basis. The essential points being:

[32.1] The Regulations are created under the authority of the Education and Training Act 2020.

[32.2] The Student Allowance Appeals Authority has jurisdiction to interpret the regulations.

[32.3] Even if this Authority and the Student Allowance Appeals Authority have jurisdiction, the Student Allowance Appeals Authority should determine the approach.

[32.4] The indicated approach of this Authority would mean no student could be certain their study was full-time or part-time and make planning impossible for thousands of students.

This Authority's conclusion

[33] We consider the Chief Executive's jurisdictional argument is flawed for these reasons:

[33.1] Legislation is interpreted by any judicial authority, or indeed any person or body applying it. It is the law of New Zealand.

[33.2] There is no doubt that the Student Allowance Appeals Authority has exclusive jurisdiction over student allowances.

[33.3] The Student Allowance Appeals Authority does not have any jurisdiction over accommodation supplement, payments, as they are the prerogative of this Authority.

[34] There is no inconsistency between what the Student Allowance Appeals Authority decides about student allowances, and the issues relating to XXXX. This case cannot and does not have anything to say about entitlement to student allowances, except in the context of an accommodation supplement. Significantly, this case concerns a discretionary decision. It would be unsurprising for that decision to take different factors into account when it affects entitlement to an accommodation supplement rather simple eligibility for a student allowance. This is not a situation where inconsistent interpretation of a statutory provision is in issue.

- [35] The provisions that are determinative are:
- [35.1] Section 67(b), in this case ineligibility for an accommodation supplement arises if XXXX would be eligible for a basic grant under the regulations but for her level of income.¹³
- [35.2] That turns on reg 12 which is expressed in the negative “no student is eligible ... unless”. There is no mandatory entitlement through meeting the criteria. One of the prohibitions is reg 12(c)(i) requiring enrolment in a “full-time course”.
- [35.3] The definition of “full-time course” is a recognised course of study “approved by the chief executive as a full-time course”.¹⁴
- [36] There is nothing in the regulations that deem a person entitled to an allowance without the Chief Executive’s discretionary decision. It is obvious that in the ordinary course there will be prescribed courses and it is unnecessary to apply individual decision-making. However, in a particular case if a person created a perverse outcome by some combination of courses that was not acceptable, the Chief Executive could choose to decline to approve that person’s course.
- [37] In this case the reality is that XXXX’s course was not, for her, full-time. That is the factual reality of her circumstances. The Chief Executive is not obliged to blindly consider she was in a full-time course simply because someone else in different circumstances would be in a full-time course studying for the same papers. That is the point of the legislation providing that entitlement turns on a discretion on the part of the Chief Executive.
- [38] The Chief Executive is charged with making decisions that take account of all the material legislation. In this case, the legislation concerns accommodation supplements and student allowances. Under s 401(3) of the Act, when hearing and determining an appeal, the Authority has all the duties, functions, and powers that the Ministry had in respect of the same matter. That includes all of the Chief Executive’s discretionary powers.
- [39] We can and must take account of XXXX’s circumstances, and the policy in the Act as well as the Regulations. We are satisfied for the factors that apply to XXXX, not other students generally, identified above in

¹³ Income limit for ‘any other sole parent’ is \$747.20 per Sch 5 pt. 2 of the Act.

¹⁴ Student Allowances Regulations 1998, reg 2 definition

paragraph [30] we determine XXXX's course of study is not approved as full-time, and accordingly she is ineligible under reg 12.

[40] Our decision has no relevance outside of the facts of XXXX's case; except in relation to other people seeking an accommodation supplement. We recognise there is a perverse outcome in respect of accommodation supplement entitlement without considering XXXX was not in full-time study. The Chief Executive has the power to consider his discretion in respect of whether to approve an individual's course of study.

[41] The Chief Executive may regard individual decision-making is onerous, however it appears that the intention of the legislation is to preserve the power to approve any particular person's course of study, or not. When the need arises for individual decision-making, then that discretion must be exercised consistently with the principles in the Act.

Decision

[42] The appeal is allowed, XXXX was entitled to an accommodation supplement. We reserve the right for the parties to request that we determine the quantum if it is not agreed.

DATED at Wellington 14 July 2021

Grant Pearson
Chairperson

John Ryall
Member