

[2018] NZSSAA 31

Reference No. SSAA 154/17

**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**

**S Pezaro** - Deputy Chair

**C Joe** - Member

**Hearing** at Whangarei on 23 May 2018

### **Appearances**

The appellant in person

Ms Ji, agent for the Chief Executive

## **DECISION**

### **Introduction**

- [1] There are two preliminary matters which we must address before we consider the grounds of appeal. The first issue is to clarify the scope of this appeal and the second is to consider the appellant's complaint about the Ministry filing documents outside the timetable.

### **Which decision is under appeal?**

- [2] XXXX ("the appellant") appeals the decision to decline to include his wife in his Job Seeker Support (JSS) payments from the date that she was granted a New Zealand residency visa, 21 February 2017.
- [3] The decision which the appellant asked the Benefit Review Committee (BRC) to review was the Ministry's decision on 19 October 2016 not to include his

wife in his JSS payments because she did not meet the residency criteria at that time. The appellant applied for a review of this decision out of time and his application to extend time was granted.

- [4] On 13 October 2017, the BRC upheld the Ministry's decision of 19 October 2016, but found that the appellant's wife met the criteria to be included as a partner in the appellant's JSS payments from the date that she was granted residency because she had been granted residency prior to the BRC hearing. The BRC recommended that the appellant provide further verification of the date on which the residence visa was issued.
- [5] However, the Ministry again declined to include the appellant's wife in his JSS payments as it considered that she had not complied with the Ministry's requirements for partner inclusion. The fact that the Ministry did not follow the recommendation of the BRC is of particular concern to the appellant. It is this decision which he now appeals; in his Notice of Appeal, he states that he wants the Authority to "include my wife in my benefit as to the recommendation".
- [6] In its Section 12K report, the Ministry submitted that the only issue for the Authority to determine in this appeal is whether the decision of 19 October 2016 to decline to include the appellant's wife in his JSS payments was correct at that time.
- [7] We accepted that this was the case when the pre-hearing telephone conference was convened. However, at the hearing we explained to the parties that, after further consideration which included the appellant's subsequent submissions, we did not consider that the scope of the appeal was as limited as the Ministry submits. We gave our reasons as follows and, on behalf of the Ministry, Ms Ji accepted our finding that the issue for determination is the appellant's wife's eligibility to be included in his JSS payments after the date on which she was granted a residence visa.

#### *Reasons*

- [8] Although the BRC concluded that the decision of 19 October 2016 was correct at the time that it was made, the BRC took into account that, by the time it conducted its review, the appellant's wife had been granted a residency visa. Therefore, the BRC varied the Ministry's decision to the extent that it found that the appellant's wife should be included in his JSS payments from the date that she was granted residency.

- [9] In *Margison v Chief Executive of the Department of Work and Income*, Justice Laurenson commented:<sup>1</sup>

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 those afresh and establish whether the appellant can provide the justification for doing so or not.

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

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.

...

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 ...

- [11] Accordingly, we are satisfied that the issue for us to determine is whether the appellant was entitled to have his wife included in his JSS payments from the date on which she was granted a residence visa.

### **Late filing of documents by the Ministry of Justice**

- [12] Ms Ji sought leave to file additional documents late on the day before the hearing. These documents are a letter from the appellant dated 20 December

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

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

<sup>3</sup> *Ibid* at [20] and [26].

2016 providing his new bank account number, the Ministry's file note recording this information, and ss 82, 82A and 83 of the Social Security Act 1964 (the Act).

- [13] The relevant provision of s 82 is s 82(7) which requires a current bank account number to be provided; s 82A requires a beneficiary to provide a tax file number and s 83 requires a benefit to be apportioned at the rate of 50 per cent to each partner (where the benefit is paid at the rate of a person who is married, in a civil union or de facto relationship).
- [14] The appellant objected to these documents being produced at the hearing because he said he had not had sufficient time to consider them and make a response. The sections of the Act produced by Ms Ji were particularly relevant to the appellant's submissions because he argued that there was no requirement for any part of the JSS to be paid to his wife, and, therefore, he said there was no need for the Ministry to have her bank account number.
- [15] It is unfortunate that Ms Ji offered no explanation or apology to the appellant for the Ministry's failure to either include the documents in the report or provide it at an earlier date. The appellant had filed his submissions over a month before the hearing and it is understandable that he was distressed by the Ministry's failure to comply with the hearing timetable.
- [16] However, as we explained to the appellant, we did not consider that the documents produced could reasonably be considered new information. The letter produced by the Ministry came from the appellant. The Authority must consider any relevant provisions of the Act, whether or not the parties refer to them in the hearing. Therefore, the extracts from the Act produced by the Ministry could not be considered new material.
- [17] For these reasons, while we were concerned that the Ministry did not comply with the timetable in producing all documents in support of its argument, we were satisfied that there was no prejudice caused to the appellant by allowing the Ministry to file these documents at the hearing. We therefore declined to adjourn the proceedings.

### **Background**

- [18] On 29 September 2016, the appellant applied for JSS with a medical deferral after his ACC payments stopped. When he applied for JSS he said his wife

was from China and her son was in his care. On 19 October 2016, he was granted JSS at the sole parent rate. His wife was not included in this benefit because she did not meet the residency criteria in s 74AA of the Act, which requires a person who is not a New Zealand citizen to hold a residence class visa and be ordinarily resident in New Zealand.

- [19] On 13 March 2017, the appellant notified the Ministry that his wife and her son had been granted resident visas. The Ministry explained that if his wife completed the partner inclusion form and provided bank account verification, she could be included in his JSS payments from the date that her residency was granted.
- [20] A Chinese speaking case worker called the appellant's wife and explained to her what was required. She stated that she wanted the money to be paid into her own bank account. On the same day, the appellant emailed the Ministry stating, "after careful thought please do not phone my wife".
- [21] The Ministry's file notes of 17 March 2017 record that the appellant's wife said that it was not her intention to be included in her husband's benefit and she preferred working to earn her own income. She stated she wanted the money paid into her own bank account.
- [22] On 4 April 2017, the Ministry file notes record that the appellant also stated that his wife did not want to complete the paperwork for partner inclusion because she did not want to go on a benefit.
- [23] The appellant filed his notice of appeal on 17 November 2017, following the BRC decision. At the date of the hearing, the appellant was on the single rate as he and his wife separated in January 2018.

#### **Relevant law**

- [24] In addition to the residency requirements in the Act, s 88B of the Act is relevant as it sets out the standard eligibility requirements for JSS. Partners of clients who are applying for JSS may have pre-benefit requirements.
- [25] Section 11E of the Act provides that unless the Chief Executive determines that the person (or partner) does not have the capacity to seek, undertake and be available for part time work, the person may be required to do any or all of the following:
- (a) Undertake one or more stated pre-benefit activities.

- (b) Attend and participate in an interview for an opportunity of suitable employment.
  - (c) Accept any offer of suitable employment.
- [26] Pre-benefit activities include attending seminars or related training, interviews, self-assessment and any other activity provided for in the relevant regulations.
- [27] Section 102 of the Act sets out the application of the work test and s 102A sets out the work test obligations.

### **The case for the appellant**

- [28] The appellant states that because the Ministry did not recognise that his wife was on a work visa and declined to include her in his benefit, he could not meet his rent payments. He says he lost his home of eight and a half years and declared himself insolvent in 2016. He says that as a result of his insolvency he had to change banks, hence the notification in December 2016 of his new bank account details. He believes the stress caused him and his wife to separate.
- [29] The appellant states that the Ministry had a copy of his wife's passport and birth certificate, his wife signed an obligation form, had a WINZ client number and was trying to find a job. The appellant states that his wife does not have a bank account in New Zealand and he was never asked for their joint bank account number. He says he provided his bank account details, and, together with all the information the Ministry had, this should have been sufficient for her to be included in his JSS payments. He also argued that if his wife is included in his JSS payments, there is no requirement for half of his benefit to be paid to her.
- [30] At the hearing, the appellant said that the fact that his wife had applied for a residence class visa should have been sufficient to meet the inclusion requirements. He also argued that the statutory declaration he swore on 6 April 2018 as to her circumstances should now be sufficient to grant the application for her to be included. In this declaration, the appellant states that his wife has no income, "as far as he knows" she does not have a bank account, she wants him to deal with WINZ, she does not want WINZ to call her, and she is living in Auckland trying to find work.
- [31] The appellant said he was authorised to represent his wife and the Ministry should accept that he has the authority to do so.

**The case for the Chief Executive**

- [32] Ms Ji said that the Ministry required an authority to represent signed by the appellant's wife before it would accept the appellant as her representative.
- [33] The Ministry's position is that the information it requires has not been provided, but when it receives this information, it will include the appellant's wife in his JSS payments from 21 February 2017 until the date of separation.
- [34] Ms Ji said the information required is detailed in the letter dated 16 January 2018 to the appellant. This letter states that the Ministry requires up to date information to assess the appellant's correct entitlement and asks the appellant to provide the following:
- (a) A completed partner inclusion form.
  - (b) A JSS obligations form completed and signed by his wife.
  - (c) Proof of his wife's bank account details such as a bank statement or deposit slip.
  - (d) A form or letter from Inland Revenue showing his wife's tax number.
  - (e) A Job Seeker profile either completed online or a paper version.
- [35] The letter stated that once this information was received, the appellant's wife would be booked to attend a job search seminar, either in Auckland where she was living or Whangarei, and that an interpreter could attend with her. At the hearing, Ms Ji accepted that a partner inclusion form had been provided in October 2016, but said that the Ministry requires an updated form.
- [36] The letter explained that the appellant's benefit was being paid at the higher Sole Parent rate payable to a person whose partner is not a permanent resident. As his wife now had residency, the Ministry stated that the appellant's JSS would now be paid at the half-married rate of \$189.67 and his supplements would be reassessed. His benefit would reduce to this rate from 5 February 2018, and, although an overpayment would be established, it would be written off.

**Discussion**

- [37] The requirements for inclusion of a spouse or partner in the JSS payments are strict. There is no discretion to waive the requirements, other than for a

refugee or person in need of protection. We do not accept the argument that the appellant made during the hearing that his wife's application for a residence class visa should have been accepted as meeting the residency requirements.

[38] It is unfortunate that the conclusion reached by the BRC gave the appellant the impression that all that was required for his wife to be included in his benefit was for the Ministry to see her residence class visa. The BRC appears to have reached this conclusion without regard to the other requirements of the Act.

[39] However, the appellant has been advised in clear terms what information is required for his application to be granted. The fact that he does not accept that his wife will be paid 50 per cent of the benefit if his application is granted, and that she must have her own bank account, are not factors that we can take into consideration; the requirements of the Act must be met.

[40] The inevitable conclusion is that the appellant has not met the requirements for inclusion of his wife in his JSS payments. Therefore, this appeal is dismissed.

**Order**

[41] The appeal is dismissed.

**Dated at Wellington** this 5th day of July 2018

**S Pezaro**  
Deputy Chair

**C Joe JP**  
Member