

[2019] NZSSAA 19

Reference No. SSAA 126/18

IN THE MATTER of the Social Security Act 2018

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

K Williams - Member

C Joe - Member

Hearing at AUCKLAND on 11 March 2019

Appearances

The appellant in person and Ivan Sowry, advocate
R Stainthorpe, counsel, and N Jaura for the Ministry of Social Development

DECISION

Background

- [1] XXXX (“the appellant”) was granted a Domestic Purposes Benefit in 1995. Apart from a brief period, she remained on that benefit until 15 June 2013 when it changed to Jobseeker Support due to welfare reforms. She was told that transition arrangements, referred to as grandparenting provisions, allowed beneficiaries who were receiving a main benefit and studying full time to transfer to Jobseeker Support. The grandparenting provision would expire in July 2015.
- [2] In 2012, the appellant had enrolled at Unitec for a three-year Bachelor of Social degree. When the grandparenting provision ended, she was on a three-month full-time placement, the last component of her degree course which she was due to complete in November 2015.

- [3] When the grandparenting provision expired, the Ministry granted the appellant Student Allowance. While the base rate of Student Allowance was the same as Jobseeker Support, the appellant was no longer entitled to the Temporary Additional Support or Accommodation Supplement which she qualified for while receiving Jobseeker Support. Her total benefit reduced from \$850 per fortnight to \$570 per fortnight; her rent was \$285 per week.
- [4] By this time, the appellant's daughter was 18 and studying. She received a Student Allowance in her own right and the appellant was not entitled to any assistance for a dependent child although her daughter was living with her.
- [5] The appellant sought a review of the decision not to continue Jobseeker Support until her course ended and then appealed.¹ In its decision (the 2016 decision) the Authority found that:
- (a) The appellant was a full-time student and not available for employment.
 - (b) She was a long-term beneficiary and the dramatic drop in her income placed her at risk of failing to complete the course and remaining on the benefit.
 - (c) When the appellant attended an appointment in June 2015 to discuss moving from Jobseeker Support to Student Allowance, the case manager failed to consider what the appellant might need to ensure she was able to complete the final semester of the course, which would significantly enhance her prospects of obtaining employment and becoming independent of the benefit system.
 - (d) It was open to the appellant to apply for assistance under the Employment and Work Readiness Assistance Programme (EWRAP). The Ministry staff made a serious omission in failing to advise the appellant of the possibility of assistance under EWRAP.
 - (e) The Chief Executive ought to have considered the appellant's eligibility for Emergency Benefit under s 61 of the Social Security Act 1964 (the Act) as, had the appellant been granted an Emergency Benefit at the single rate payable to a person in receipt

¹ [2016] NZSSA 86 (5 September 2016).

of Jobseeker Support, she would have remained eligible for the supplementary benefits which would have enabled her to make ends meet.

- (f) The appellant would have been assisted by suspension of debt recovery until she had completed her study.

[6] The Authority recommended the Ministry make an ex gratia payment to the appellant.

[7] The Authority's decision was issued on 5 September 2016. On 28 April 2017, a Service Centre Manager wrote to the appellant stating that she was responding to the Authority's recommendations to consider payments under EWRAP or payment of an Emergency Benefit. It is not clear what caused this delay. The manager said that the Ministry declined to pay EWRAP because this assistance is not available for courses at level 4 or above.

[8] The letter stated that the Ministry declined to pay an Emergency Benefit because:

Emergency Benefit is subject to a Ministerial direction to which the Ministry must have regard. The Ministerial direction significantly limits when full time students can be paid an Emergency Benefit. Furthermore an applicant for Emergency Benefit must be unable to earn sufficient livelihood for themselves. You had made a choice to complete your studies but it does not seem you are incapacitated from work. You were able to access the rate of Student Allowance and Accommodation Benefit paid to full time students without dependents. On that basis, the Ministry would not have granted you an Emergency Benefit for your tertiary study after 19 July 2015.

[9] The appellant was told that if she disagreed with these decisions she could seek a review. On 7 June 2017, her advocate wrote pointing out that this advice was contrary to the intent of the Authority's decision.

[10] Mr Stainthorpe responded to the advocate. He said that ex gratia payments are made out of good will or a sense of moral obligation and that a decision to make an ex gratia payment is not one which the Authority can make.

- [11] He said that the Ministry had considered its decision to decline payments under EWRAP and an Emergency Benefit and decided that it would not have paid this assistance when the appellant was receiving a Student Allowance. He stated that the appellant had review rights and the Ministry had deferred its decision on an ex gratia payment until those issues had been determined.
- [12] On 19 February 2018, the Ministry confirmed in a letter to Mr Sowry that it would treat the submissions of June and July 2017 as a request for review.
- [13] The Benefits Review Committee unanimously agreed to overturn the Ministry's decision not to grant EWRAP. It upheld the decision to decline to grant an Emergency Benefit. The Benefits Review Committee recommended that the Ministry invite the applicant to test for financial assistance for the period from July 2015 to November 2015 and noted that the applicant should have been interviewed in 2015 to investigate what she wanted to do while receiving assistance. The Committee concluded that, as there was no evidence that the applicant was offered any other form of financial assistance, the Ministry should consider providing assistance under the Special Needs Grant programme.
- [14] The appellant appealed the decision to decline to grant Emergency Benefit, assuming that the Ministry would implement the decision to grant assistance under EWRAP. However, at the telephone conference that the Authority convened in January 2019, Mr Sowry said that the appellant wanted to include this ground in the appeal as the Ministry had failed to implement the Benefits Review Committee finding on EWRAP.
- [15] However, as Ms Jaura indicated that the Ministry had decided to reimburse the appellant for any demonstrable costs incurred between 19 June 2015 and 19 July 2015, this ground of appeal was not pursued.
- [16] The sole issue for the Authority to determine is whether the appellant was entitled to an Emergency Benefit between 19 July 2015 and 29 November 2015.

Relevant law

- [17] Section 61 of the Act² provides that the Chief Executive may grant an Emergency Benefit in cases of hardship. The Chief Executive may grant an

² Social Security Act 2018, s 63 contains the equivalent provision.

Emergency Benefit instead of, or in substitution for, a Supported Living Payment, Sole Parent Support, or Jobseeker Support and may make the grant or continuance of Emergency Benefit subject to certain requirements. The Chief Executive's discretion is broad, subject only to such conditions as the Chief Executive thinks fit to impose on a person who is unable to earn a sufficient livelihood and does not qualify for a main benefit.

[18] Ministerial Directions on granting an Emergency Benefit on the grounds of hardship provide general criteria for such a grant to full-time students. The criteria relevant to this appellant include:

- (a) having cash assets of less than \$4,300;
- (b) having no other means of support;
- (c) either receiving a Student Allowance during the academic year, or being entitled to an allowance when the course commences;
- (d) whether the student has other sources of money for living costs;
- (e) the cause, nature and likely duration of the hardship;
- (f) the ability of the student to improve their financial situation; and
- (g) any other matters relevant in the particular case.

The case for the appellant

[19] Mr Sowry submitted that it was inconsistent with the principles expressed in s 1B of the Act for the Ministry to put the appellant in the position of potentially being forced to abandon her course of study which was likely to lead to permanent employment. The principles include the requirement for the Ministry to have regard to the fact that work in paid employment offers the best opportunity for people to achieve social and economic wellbeing, and the priority for people of working age to find and retain work.

[20] Mr Sowry also submitted that the Ministry failed to take into account any of the factors identified as relevant in the 2016 decision. He submitted that given the relatively short period of time that the appellant required assistance, the Ministry

should have exercised its discretion to grant an Emergency Benefit which entitled her to other supplementary assistance.

- [21] The appellant described the last six months of her course as an absolute struggle because of financial pressure. Although she knew that Jobseeker Support would end in July 2015, she was unable to manage the consequences of not being entitled to supplementary assistance. She could not take on paid employment if she wanted to continue her study, a decision borne out by the 2016 decision which recorded that the appellant's education provider confirmed that she was required to complete the practicum and it was not practical for her to undertake employment at that time.
- [22] The appellant's full-time placement was in Panmure and she lived in West Auckland. She had to travel by train each day to the placement. During the placement, the appellant and her youngest daughter moved to a boarding lodge and her elder daughter moved out of home in an effort to manage their finances. Her youngest daughter contributed her Student Allowance to their living costs. However, this meant that her daughter could not afford the travel costs for the work experience component of her own course.
- [23] The appellant said that she was offered \$80 per fortnight for food however, to access this funding, she had to travel into the city once a fortnight to sign for the grant. She said that sometimes this was just too difficult for her to manage with her work commitment. As she said, the Ministry had the option of providing a card and loading credit onto it but did not do so.
- [24] The appellant successfully completed her course in the anticipated time however, when her course finished, she had a one week stand down after her Student Allowance expired. She had no money for rent and was almost evicted from her rental accommodation. By the time she became eligible for Jobseeker Support at the end of November 2016 she owed rent arrears of \$616. The appellant asked for a Transition to Work Grant to assist with clothing and other work-related expenses. She was told that this application was declined because her application was late. She did not seek a review of this decision.
- [25] In March 2016, the appellant obtained permanent full-time employment using her qualifications. At the date of hearing, she had been three years in this position.

The case for the Ministry

- [26] Mr Stainthorpe said that the Ministry relied on its submission to the Benefits Review Committee and its report and further submissions in response to the appeal. He said that the two requirements for Emergency Benefit are that there is no other benefit available and the applicant has insufficient livelihood.
- [27] He said that Student Allowance was the same amount as Jobseeker Support, although he accepted that there was no entitlement to Accommodation Supplement or Temporary Additional Support with Student Allowance. However, he said that it was the appellant's choice to study and, if she could not afford to do so, she should have stopped her course and taken paid work.
- [28] In its report, the Ministry said that the appellant had sufficient time to organise her finances before her Jobseeker Support expired, that she knew she would not qualify for Supplementary Assistance, and that her daughter was able to contribute her Student Allowance to the household income.
- [29] Mr Stainthorpe argued that the Ministry was required to consider the principle in s 1A(c) of the Act that, where appropriate, people use the resources available to them before seeking financial support. He submitted that the appellant's situation was no different from that of other students and therefore the Ministry was correct to decline to grant Emergency Benefit. Had it granted Emergency Benefit, the appellant would have obtained other benefits to which she was not entitled. He said that the Special Needs Grant for food of \$80 per fortnight was the only assistance available to her.
- [30] We asked Mr Stainthorpe to give an example of when the Ministry would exercise its discretion to grant an Emergency Benefit. He said that there were no particular criteria and he could not give any example of when it might be appropriate to grant an Emergency Benefit to a student.
- [31] Mr Sowry contended that the Ministry's inability to provide an example of when a full-time student may be eligible for an Emergency Benefit demonstrated that the Ministry applied the guidelines as rules rather than exercising its discretion. He submitted that s 1A(ca) required the Ministry to consider whether the appellant was entitled to assistance to enable her to remain in education, rather than receiving financial support under the Act.

Discussion

[32] In *D and the Chief Executive Officer of the Department of Work and Income New Zealand*³ the Court was satisfied that s 61(1) of the Act gives the Chief Executive a very wide discretion to consider criteria other than those set out in s 61(1) when deciding whether to grant an Emergency Benefit.

[33] The directions are a guideline only and cannot limit the wide discretion provided by the Act. However, in our view, a proper application of the guidelines indicates that the appellant was entitled to Emergency Benefit. The Ministry did not provide any evidential basis for its assertion that the appellant had sufficient means to live on, other than saying she could get a job.

[34] In the 2016 decision, the Authority did not make a finding on this appellant's entitlement to Emergency Benefit because this was not a decision under appeal. However, the Authority did set out the considerations relevant to granting the appellant an Emergency Benefit and stated that:

Although there were some items in the appellant's budget which could not be regarded as essential, even if those costs are disregarded the appellant was left with a significant deficit in her budget. Precisely how she was to eat and travel to her clinical placement is difficult to know. The appellant was clearly going to be in hardship once she was placed on a Student Allowance.

[35] The only reason for the Ministry's assertion that the appellant had the means to support herself appears to be that she had Student Allowance and should get paid work. We find Mr Stainthorpe's submission that this appellant, who had the end of her course and the prospect of permanent employment in sight, should abandon her study and take any other work she could get contrary to the principles and purposes of the Act, which the Ministry regularly articulates, of reducing dependence on social assistance. The decision to decline Emergency Benefit appears to have been driven by the Ministry's view that the appellant brought the situation upon herself by choosing to complete her course of study.

[36] The appellant accepted that it was her choice to study but said that as a long-term beneficiary she wanted to get off the benefit. Understandably, she felt that Mr Stainthorpe was "putting her down" for pursuing her goal and choosing to finish her study rather than taking a low paid job and abandoning her course.

³ *D and the Chief Executive Officer of the Department of Work and Income New Zealand* [2001] NZFLR 804.

Summary

[37] We are satisfied that it was appropriate to grant this appellant an Emergency Benefit between 20 July 2015 and 29 November 2015 to enable her to complete her qualifications. She was therefore entitled to Accommodation Allowance and Temporary Additional Support during this time. If the parties are unable to agree on the amount of these entitlements, they may seek a determination on this issue.

[38] In the 2016 decision, the Authority found that the appellant was eligible for EWRAP assistance. The second Benefits Review Committee reached the same conclusion in July 2018. It was not until January 2019 when this appeal was being timetabled for hearing that the Ministry decided to grant the appellant assistance under EWRAP.

[39] Although the second Benefits Review Committee upheld the decision not to grant an Emergency Benefit to the appellant, it commented on the lack of assistance given to her to understand what further assistance she might be entitled to and her options when the level of assistance changed.

[40] We express concern at the process of this appeal and the Ministry's failure to have regard to the 2016 decision and recommendations of the Authority and its delay in implementing the decision of the second Benefits Review Committee. For this reason, and because the Ministry has persisted with a course of action which we find is contrary to the principles of the Act, we refer this decision to the Chief Executive for consideration.

[41] We do not have the power to award compensation but consider if we were empowered to do so, the circumstances of this appeal and the previous appeal, and the delays by the Ministry, would justify such an award.

Order

[42] The appeal is allowed. The appellant is entitled to Emergency Benefit between 20 July 2015 and 29 November 2015.

[43] If the parties are unable to agree on the amount of Accommodation Allowance and Temporary Additional Support payable for this period, they may seek a determination on quantum.

Costs

[44] The Authority may award costs where an appeal is allowed in whole or in part. The Authority may award costs where a person is represented by an advocate and/or for the reasonable and demonstrable costs of an appellant pursuing an appeal on their own behalf.

[45] The Authority reserved costs in the 2016 decision and the Ministry expressed the view that those costs should be set after this appeal is decided.

[46] The appellant is to file submissions in support of costs with a schedule of costs incurred in this appeal and in the 2016 decision by 17 April 2019.

[47] Any response by the Ministry is to be filed by 2 May 2019.

Dated at Wellington this 1st day of April 2019

S Pezaro
Deputy Chair

K Williams
Member

Charles Joe JP
Member