

[2020] NZSSAA 6

Reference No. SSA 14/19

IN THE MATTER of the Social Security Act 2018

AND

IN THE MATTER of an appeal by **XXXX** of Wellington against a decision of the Chief Executive that has been confirmed or varied by a Benefits Review Committee.

BEFORE THE SOCIAL SECURITY APPEAL AUTHORITY

S Pezaro - Deputy Chair

C Joe - Member

Hearing at WELLINGTON on 11 March 2020

Appearances

The appellant in person

R Signal, agent for the Ministry of Social Development

DECISION

Background

[1] XXXX (“the appellant”) appeals the decision by the Ministry of Social Development (the Ministry) to stop his Job Seeker Support (“JSS”) payments on 16 May 2017. This decision was reviewed and upheld by a Benefits Review Committee on 20 November 2018.

[2] The appellant is a 57-year-old single man with no dependent children. He has been granted social assistance on 17 occasions since 11 May 1993.¹ These payments ceased for various reasons, mostly due to the appellant’s absence from New Zealand but also because, on one occasion, he gained employment,

¹ Exhibit 2 in the Ministry’s r 249 report at page 23.

three times because he did not return a renewal form, once because he refused a work offer, and once because he failed work test obligations.

- [3] On some occasions the appellant asked for a suspension of his benefit when left New Zealand. This occurred when he went to Germany from 14 to 21 December 2011 to visit his father who was ill; the following year because he intended to leave New Zealand for six months from 4 April 2012; in 2013 when he said he would leave New Zealand in April for a few months but did not know his expected return date; and in 2014 and 2015 when he was out of the country from April to October. In November 2015 when he returned to New Zealand and re-applied for JSS he was asked to provide verification of the reason for his travel but failed to do so.
- [4] At an appointment with a Case Manager on 10 February 2016 the Ministry recorded that the appellant stated that he did not want to engage with Work and Income to meet his work obligations and that he was leaving the country in two months' time for six months.
- [5] In a discussion with a case manager on 18 April 2016, after attending a Job Search workshop, the appellant advised that he had booked business class tickets to fly to Singapore and on to Germany. He was advised to declare his departure date online before leaving New Zealand. In May 2016, the appellant told the Ministry he would be leaving New Zealand for approximately three months. This travel was approved so that he could take care of his father because his father's regular carer was on holiday.
- [6] On 10 February 2017 the appellant advised the Ministry that he intended to leave New Zealand on 14 February because his father's health had deteriorated. On 27 February, after he returned, the appellant provided a copy of a statement signed by his father referring to his reason for travel.
- [7] On 8 May 2017 the appellant again said that he intended to leave New Zealand on 15 May 2017 to care for his father because his father's live-in carer was taking 6 weeks' leave. Before he left the appellant completed a personal details form with the circumstances of his impending absence and said that he would provide more information to verify the circumstances of his travel once he arrived in Germany. The appellant was told that his benefit payments would stop when he left New Zealand but the decision would be reviewed once he had

provided all the information required. The JSS payments were suspended from 16 May 2017.

- [8] On 24 August 2017 when the appellant applied for a review of this decision, he said that he had to undertake essential travel for 28 days from 15 May 2017 to 12 June 2017 to support his seriously ill father whose death appeared imminent and then attend court in Germany on 19 June 2017. He provided a statement signed by his father, boarding passes, and a letter dated 5 May 2017 from the Hess Regional Social Court.

Issues

- [9] The issue for the Authority to decide is whether the reasons for the appellant's absence from New Zealand in May 2017 met the requirements for a discretionary payment of benefit when the recipient is out of the country.

Relevant law

- [10] The Act in force at the time of the decision was the Social Security Act 1964 ("the Act"). Section 77(1) of the Act provides that a benefit is not payable while a beneficiary is absent from New Zealand unless other provisions apply.
- [11] Section 77(3) gives the Chief Executive discretion to pay a benefit to a beneficiary for one or more absences equal to or shorter than four weeks in any 52-week period provided that certain criteria are met; this provision is not relevant as the appellant was absent for more than four weeks.
- [12] Section 77(3AA) provides that if relevant qualifying circumstances apply, as defined in the regulations made under the Act, the Chief Executive may pay a benefit for one or more absences longer than four weeks in total in any 52-week period.
- [13] The Social Security (Effect of Absence of Beneficiary from New Zealand) Regulations 2013 ("the regulations") set out the criteria for exercising the discretion in s 77(3AA). The relevant clauses are:

3 Interpretation

- (2) In these regulations, a significant event, in relation to a beneficiary's family member, includes the following events:

- (a) serious illness or serious injury or imminent death:

5 Permitted reasons for absence

The permitted reasons for absence for the purposes of regulation 4(a) are 1 or more of the following:

- (a) to attend a job interview or follow up on a job prospect:
- (b) to attend a significant event relating to a family member that a person with the beneficiary's relationship to the family member would reasonably be expected to attend:
- (c) to attend a court case that the beneficiary is required to attend as a party or a witness:

7 Qualifying circumstances for discretionary payment of certain benefits in respect of absences of longer than 4 weeks in 52-week period

- (1) For the purposes of section 77(3AA) of the Act, relevant qualifying circumstances, in respect of an absence from New Zealand, are the circumstances in any of subclauses (2), (3), and (4).
- (2) The first circumstances are as follows:

1 or more absences totalling more than 4 weeks that are necessitated by 1 or more specified reasons

- (a) the absence from New Zealand must be solely for 1 or more reasons permitted by regulation 5; and
- (b) the chief executive must be satisfied that the length of the total absence is not longer than is necessitated by those reasons; and
- (c) if the absence is not the first in respect of which a benefit is or was payable under section 77 of the Act in any 52-week period, the chief executive must be satisfied—
 - (i) either that the beneficiary could not reasonably have foreseen an absence of longer than 4 weeks in a 52-week period or that the beneficiary could not reasonably have rearranged his or her affairs to avoid an absence of longer than 4 weeks in a 52-week period; and
 - (ii) that it would be unreasonable for the benefit not to be paid.

- (3) The second circumstances are as follows:

Return to New Zealand prevented by reasons outside beneficiary's control

- (a) the beneficiary's return to New Zealand from an absence in respect of which a benefit is paid under section 77 of the Act must be prevented by new circumstances that—
 - (i) were not reasonably foreseeable at the time when the beneficiary last left New Zealand; and
 - (ii) are outside of the beneficiary's control; and
- (b) the chief executive must be satisfied that the extension of the absence is not longer than is necessitated by the new circumstances.

- [14] Section 88F of the Act sets out the obligations on beneficiary receiving JSS. These include obligations to comply with work tests and be available for work.

The case for the appellant

- [15] In his Notice of Appeal, dated 22 February 2019, the appellant said that the reasons he left New Zealand on 15 May 2017 were his father's imminent death and to attend a court case which required him to appear in person. He submitted that because these factors are permitted reasons for an absence of more than 28 days under the Act and regulations, he is entitled to a discretionary payment of JSS.
- [16] In evidence the appellant accepted that when he notified the Ministry that he planned to leave New Zealand on 15 May 2017, the reason he gave for his departure was that he needed to care for his father in Germany while his father's carer took 6 weeks' holiday and that the carer took such a break each year. However, the appellant said that on 13 May, after he gave the Ministry this information, his father became seriously ill and his death appeared imminent.
- [17] In response to questions from the Authority, the appellant confirmed that he did not leave before 15 May even though he thought his father was dying on 13 May. He accepted that he could have changed his departure date easily because he had a fully flexible ticket that he bought each year in Germany for a return trip to New Zealand. He said he did not leave earlier because he always drove from Wellington to Auckland to get his flight to Germany and did not see any reason to change that practice.
- [18] The appellant also accepted that he raised his attendance in court only after looking at the regulations and seeing that the need to attend a court case was a reason permitting a discretionary payment of benefit during an absence. He said the court case was the result of proceedings he initiated in 2011 against a government department in Germany and was in its sixth year by 2017. The appellant declined to provide further details but accepted that when he left New Zealand it was not for the purpose of attending the court case. He said that he 'had to come up with a reason to justify the time overseas' and 'it probably was not so relevant now'. Given this concession, we are only required to consider whether his father's health was the sole reason for his departure and, if it was, whether it met the criteria for a discretionary payment of JSS.

The case for the Ministry

- [19] The Ministry's position is that the appellant's circumstances did not meet the criteria for qualification for a discretionary payment of benefit under s 77(3AA) of the Act because reg 7 requires his absence to be solely for one or more of the reasons permitted in reg 5. Following the appellant's concession about the court case, the only potentially relevant circumstance is a significant event relating to a family member.
- [20] The Ministry did not accept that the reason for the appellant's absence in May 2017 was the imminent death of his father. Mr Signal said that the appellant's absence at this time of the year followed a pattern established over the previous nine years of going to Germany around April/May and returning in October, and the appellant had previously said he was going to care for his father. The reason given by the appellant when he notified the Ministry of this departure was that he needed to care for his father while the carer took leave and the Ministry says this does not constitute a significant event under the regulations.
- [21] The Ministry submitted that even if it is accepted that when the appellant left it was to care for his dying father, he is not entitled to payment of JSS during the absence, as reg 7(2)(b) requires the absence to be no longer than necessary. The letter the appellant produced from his father said that he recovered sufficiently in four weeks to know that he would live longer, due to his son's presence for those four weeks.

Discussion

- [22] We must decide whether the appellant was solely absent from New Zealand from 15 May 2017 because his father was dying and, if so, whether the criteria for payment of JSS in the appellant's absence were met. The minute issued on 17 April 2019, after a telephone conference, records that the Authority explained to the appellant that the issues in this appeal were clear and agreed by the parties; the decision would turn on the evidence.
- [23] In our view, the appellant did not produce credible evidence to support his claim that when he left New Zealand on 15 May 2017, his father's death was imminent. The appellant accepted that when he notified the Ministry of his intended absence, in writing and in person, the reason he gave was to relieve his father's carer.

[24] In fact, the appellant did not raise his father's rapid deterioration in health until 24 August 2017 when he applied for a review of the decision to stop his benefit. There is no indication that the appellant felt any sense of urgency when he left New Zealand. Although he had the ability to change his scheduled flight easily and get to Germany earlier to be with his father, he chose not to do so. This decision, and the fact that his father's health was first mentioned in the review application, tend to suggest that his father's illness was not as serious in May 2017 as the appellant subsequently claimed. The only medical evidence of his father's health is a letter dated 19 August 2019, two years after the relevant period, written by a Dr Dietrich which states:

This is to certify that my patient for over 20 years, (*name and date of birth redacted*) has been critically ill and that for medical and humane reasons, it was absolutely necessary for his only son, (*the appellant*), to be with his father at his bedside in Germany from 15 May 2017 to 30 September 2017.

[25] We asked the appellant why this medical certificate was not issued to his father, as the patient, and why it made no reference to the medical reasons for his father's illness. The appellant said that in Germany the privacy laws limit medical evidence. We do not accept this explanation in the absence of any documentary support; privacy law is intended to protect the privacy of an individual who may waive their right to privacy provided no other person is adversely affected.

[26] The medical certificate is inconsistent with the letter written by the appellant's father on 15 June 2017, which indicates that after four weeks he recovered to the point of being out of danger. The father stated in this letter: "Thanks to the emotional and physical support given to me by my son, during the four weeks following his arrival on 16 May 2017, my health has gradually recovered sufficiently, so that I can live a bit longer". His father's letter indicates that after four weeks he was out of danger; the appellant stayed away longer than his father's health required.

[27] Even if the evidence of his father's illness had been sufficiently compelling for us to be satisfied that it was a significant event that was a permitted reason for absence under reg 5(b), the appellant failed to demonstrate that this was the sole reason for his departure, as required by reg 7(2)(a,) or that he was away no longer than necessitated by the illness, as required by reg 7(2)(b).

[28] For these reasons, we find that the appellant did not meet the requirements for payment of benefit when he left New Zealand on 15 May 2017.

Observation

[29] As indicated, aspects of the evidence the appellant produced raised concerns regarding frankness. He has been receiving an income tested benefit, and produced boarding passes showing he travelled internationally first class on one trip, and business class on another. That in itself raises a concern that the appellant may not have been entitled to a benefit at all. While we have an inquisitorial function, for this appeal to address the issue before us it was sufficient to make the findings we have without inquiring into other aspects of the appellant's entitlement. The scope of this decision is limited to him not being entitled to receive Jobseeker Support payments when out of New Zealand, it should not be read as concluding he was entitled to the benefit during the relevant period had been in New Zealand.

Order

[30] The appeal is dismissed.

Dated at Wellington this 28th day of April 2020

S Pezaro
Deputy Chair

C Joe
Member