

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

G Pearson (Chairperson)

R Palu (Deputy Chairperson)

J Ryall (Member)

Hearing: Wellington, 13 February 2023.

Decision: 01 March 2023

Representation: XXXX in person.

Mr P Engles and Ms G Borne for the Chief
Executive.

DECISION

Background

[1] XXXX's employer made him redundant when COVID-19 pandemic measures affected employment and employment opportunities. His concerns in this appeal relate to the "stand down" period between the end of his employment and receiving assistance under the social security regime. The issue turns on one point. XXXX was owed holiday pay, and the Ministry of Social Development (the Ministry) treated his employment as ended after the period covered by holiday pay.

Representatives: XXXX in person.

Ministry of Social Development for the Chief
Executive

- [2] XXXX appreciates the Ministry may be legally correct, but he wants the Authority to express its view on that matter, and to highlight the reasons for his concerns.

The issue before the Authority

- [3] The Authority is required to:
- [3.1] Identify XXXX's material circumstances;
 - [3.2] Determine whether the Ministry's approach was correct in law; and
 - [3.3] Decide the outcome of the appeal on that basis.

Discussion

The facts

- [4] XXXX and the Ministry agreed on what happened. XXXX's last day at work was 27 July 2021. The Ministry analysed the employment information XXXX provided, which showed that he received holiday pay of \$5,156.86 and it calculated that was payment for 15 working days. It deferred assistance until 18 August 2021, allowing for the 15 working days.
- [5] XXXX accepts the Ministry's calculations and the amount of holiday pay. We have seen the records XXXX provided, and we too agree with the calculation of the amount of holiday pay and the number of days work it represents.

The legal basis for the decision

- [6] The Ministry referred to several legislative provisions concerning the type of assistance that XXXX would receive, and his personal circumstances. However, the essential element that determines the outcome is the definition of phrases in Schedule 2 of the Social Security Act 2018. In particular:
- [6.1] "ceased" in relation to a person's employment. That term is defined in paragraph (b) of the definition as being the number of days of a person's normal daily wage or salary that is covered by a "specified termination payment".
 - [6.2] "specified termination payment" specifically refers to "holiday pay".

- [6.3] XXXX does not dispute that the \$5,156.86 is holiday pay, or that it equates to 15 normal daily wages. We agree and it is not necessary to further analyse the provisions.

XXXX's concerns

- [7] XXXX says:

- [7.1] The treatment of "holiday pay" is different from redundancy payments. Accordingly, it discriminates against workers receiving holiday pay which is essentially a universal entitlement for all permanent employment. It does not cover, he says, the more privileged workers receiving redundancy payments.
- [7.2] For him personally and others like him, it is unfair as he was penalised because he cautiously avoided taking leave during the uncertainty of a pandemic; and it was also difficult to usefully take leave at that time. In contrast, a person who took all their leave would receive immediate assistance after their employment ended.
- [7.3] The end of employment often causes immediate costs to adjust and deal with issues arising from the former employment, it was unfair to withhold assistance in those circumstances, and they applied to him.
- [7.4] Employees would have ongoing expenses for commitments entered when they thought their employment was assured, and they needed assistance to deal with that transition.
- [7.5] The issues faced at the premature termination of employment require flexibility and discretion, not an inflexible approach.
- [7.6] XXXX recognised that these concerns were related to legislative policy, and to a lesser degree the interpretation of the legislation.

The Ministry's approach at this hearing

- [8] XXXX acknowledges that the Ministry officials have treated him with respect and dignity, and simply taken the approach that they are obliged to apply the law.

Conclusion

[9] We are in the position where we are obliged to apply the law. In this case the law does not provide a discretion to take account of XXXX or other people's particular circumstances. We cannot interpret the law in a different way from the Ministry, the provisions relating to "holiday pay" are clear and they apply to this case. We are accordingly satisfied the decision is legally correct and that the law does not allow an alternative outcome.

[10] We recognise that a stand down period before providing assistance is a difficult issue. We also appreciate that allowing discretionary decisions in such matters has implications for administrative resources. Deciding where the thresholds are set for stand down periods is a matter that must lie with the persons responsible for formulating the legislation.

Decision

[11] The appeal is dismissed.

DATED at Wellington 1 March 2023

Grant Pearson
Chairperson

Rachel Palu
Deputy Chairperson

John Ryall
Member